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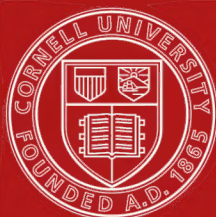
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BRICKWOOD'S
SACKETT
ON
INSTRUCTIONS
TO JURIES

CONTAINING A TREATISE ON

JURY TRIALS AND APPEALS

WITH

FORMS OF APPROVED INSTRUCTIONS AND CHARGES
ANNOTATED

ALSO ERRONEOUS INSTRUCTIONS WITH COMMENT OF
THE COURT IN CONDEMNING THEM

THREE VOLUMES

VOL. II

THIRD EDITION

BY

ALBERT W. BRICKWOOD, LL. B.

OF THE CHICAGO BAR

CHICAGO

CALLAGHAN & COMPANY

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VOLUME II

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CHAPTER LXII.

NEGLIGENCE—IN GENERAL.

See Erroneous Instructions, same chapter head, Vol. III.

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§ 1336. Negligence Defined. (a) "Negligence," as that term is used in this charge means the failure to exercise ordinary care.¹

(b) Negligence is a failure to exercise that degree of care and

1—Rapid T. Ry. Co. v. Miller, (761); Southern K. Ry. Co. v. Sage — Tex. Civ. App. —, 85 S. W. 439; — Tex. Civ. App. —, 80 S. W. 1038 Gorman's Adm'r v. Louisville Ry. (1039); Nesbit v. Crosby, 74 Conn. Co., 24 Ky. L. 1938, 72 S. W. 760 554, 51 Atl. 550 (552).

diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances.²

(c) Negligence consists in doing something, which a person of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances.³

(d) Negligence is the failure to do what a prudent person would ordinarily have done under the circumstances of the situation, or doing what such person, under the existing circumstances, would not have done. The duty is indicated and measured by the exigencies of the occasion.⁴

(e) Negligence is failure in the matter of care under the circumstances. Every man is bound to be careful that others take no harm by his conduct or his actions. The measure of his duty is the circumstances of the case. What may be absolutely necessary under some circumstances to protect others from harm may not be necessary under other circumstances. Negligence, as I have said, is the lack of care under the circumstances. It is the doing of something which,

2—"It is said that this does not cover acts of commission as well as acts of omission, and that in this respect it is faulty and misleading. But we think that it covers both. Failure to exercise care and diligence that an ordinarily prudent person would involve either or both." *German Ins. Co. v. C. & N. W. Ry. Co.*, 128 Iowa 386, 104 N. W., 361 (363).

3—*Galloway v. Chicago, R. I. & P. Ry. Co.*, 87 Iowa 458, 54 N. W. 447 (450).

"Appellant cites *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; and contends that this instruction makes the negligence of the plaintiff to depend on the question whether a person of ordinary prudence would have done the same thing. As said in the case cited, 'the formula used is that frequently adopted in attempting to define "negligence." It is there said: "Whether the plaintiff was negligent or not depended upon the particular facts admitted or satisfactorily proved in the case." This instruction does not ignore the facts, but makes them the very groundwork of the inquiry. True, 'the most prudent men are not always exempt from carelessness, and, when actually negligent, the law charges the same consequences to their negligent conduct as to similar conduct in others.' But there is no better standard by which to measure the acts of men, as to negligence, than to ask what

persons or ordinary prudence and care would have done under the same circumstances; and such is the rule of this instruction."

4—*Houston & T. C. R. Co. v. Milam*, — Tex. Civ. App. —, 58 S. W. 735 (736).

"We believe the usual definition of negligence, as often approved by the courts of this state, would be less subject to criticism. It is the failure to do what a person of ordinary prudence would do under the circumstances, or doing what a person of ordinary prudence would not do under the circumstances. The care required is ordinary care; that is, such care as a person of ordinary prudence would exercise under the circumstances. The failure to exercise such care is negligence. *Austin N. W. R. Co. v. Beatty*, 73 Tex. 596, 11 S. W. 858; *City of Austin v. Ritz*, 72 Tex. 402, 9 S. W. 884; *St. L. A. & T. R. Co. v. Finley*, 79 Tex. 88, 15 S. W. 266; *Houston & T. C. R. Co. v. Smith*, 77 Tex. 181, 13 S. W. 972; *Gulf, C. & S. F. R. Co. v. Hodges*, 76 Tex. 92, 31 S. W. 64; *Houston & T. R. Co. v. Oram*, 49 Tex. 341. The case last cited above is authority for the charge given in this case, as is the case of *McDonald v. R. Co.*, 86 Tex. 11, 22 S. W. 939. See also *Martin v. R. Co.*, 87 Tex. 119, 26 S. W. 1052; *Texas & P. R. Co. v. Gorman*, 2 Tex. Civ. App. 146, 21 S. W. 158; and *Houston & G. N. R. R. Co. v. Randall*, 50 Tex. 254."

under the circumstances and in view of his duty to endeavor to protect other people from harm by reason of his conduct, a reasonable and prudent man of ordinary common sense, would not do. It is the failure to do something which a man of good judgment and sound common sense would do, in view of the circumstances, out of a desire to perform his duty to protect other people from harm by reason of his actions.⁵

(f) The court instructs the jury that negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct and affairs, would do, or doing something which a reasonable man would not do under all the circumstances surrounding and characterizing the particular case. And the jury in this case, taking this as the definition of negligence, is to find from the facts and circumstances surrounding the transaction in question whether or not the defendant company has committed negligence; and if they so find, and further find that plaintiff was injured thereby, then the verdict should be for plaintiff.⁶

5—Foote v. American P. Co., 201 Pa. St. 510, 51 Atl. 364.

6—Kennedy v. So. Ry. Co., 59 S. C. 535, 38 S. E. 169 (170).

In Bodie v. Charleston & W. C. Ry. Co., 61 S. C. 468, 39 S. E. 715, 716, the following charge was given:

"Negligence simply means want of due care. That is a very short definition. If you weigh each word, you will find that that contains the whole doctrine,—want of due care; not simply want of care but want of due care. From its very nature, negligence may consist in the doing something which should not have been done. Negligence may also consist in leaving undone that which ought to have been done. It may, therefore, be a fault of omission as well as a fault of commission. (It is impossible for the court to furnish a jury with a hard and fast measure of care, the presence of which, or the exercise of which, would drive away the idea of negligence, the absence of which would mean the presence of negligence. There is no such hard and fast rule which can be applied by a jury like a foot rule or a bushel measure; but there is a general principle which underlies the doctrine of negligence, and shows sufficiently clearly the measure of care proper in each particular case, and it is this: The greater the probability of danger in the

particular circumstances, the greater is the required degree of care, because the measure of care naturally varies in the different circumstances. For example a man cutting wood with an ax must exercise a proper amount of precaution to guard against other people that may be near him; but a man who is blasting rock with dynamite, since there is much greater danger in handling that explosive than in holding an ax, is required to exercise a much greater degree of care. Due care in handling an ax in cutting wood would not be sufficient measure of care in handling dynamite and blasting rock. But this shows you that the jury in each particular case has to establish from the testimony in the case exactly the measure of care which should have been exercised under the circumstances, and it is just that amount of care which would or should have been exercised by a man of ordinary intelligence and prudence. Your common sense and intelligence will guide you, in deciding by the testimony), in the case what amount of care should have been exercised by the railway company in the circumstances detailed in the testimony, and also will show you what amount of care should have been exercised by ———, the plaintiff, under the circumstances detailed, when you are considering the subject of contribu-

(g) Negligence, as used in the instructions, means, when applied to plaintiff, a failure to exercise ordinary care to protect himself from injury; and "ordinary care" means such care as an ordinarily prudent man would exercise to protect himself from injury under the same or similar circumstances.⁷

(h) Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances. There is no precise definition of ordinary care, [but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. This rule applies alike to both parties to this action, and may be used in determining whether either was negligent.

(i) It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the accident in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff, on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk; and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city.⁸

tory negligence; and I repeat it is just that degree of care which a man of ordinary intelligence, common sense and prudence should have exercised under the same or similar circumstances; not absolute care, not the utmost care to guard against a possible danger, but only reasonable care, due care, that amount of precaution proper to guard against the probable danger."

On appeal, the court said:

"The exception is to that portion of the charge above which is within the brackets, and the specific errors assigned are: (1) That the jury were instructed that in some cases a higher degree of care than due care is necessary to exempt from liability; and (2) the charge left to the jury the legal question, what degree of care was necessary in this case. We do not think the charge is amenable to either objection. The learned circuit judge, by his language and illustration, merely meant to show the jury that 'negligence' is a relative term when applied to different cases or

sets of circumstances, and that the care or caution required in one case may be greater or less than the care or caution required in another; but the jury were plainly instructed that in any particular case or set of circumstances the law enjoined the duty of observing the care due under such circumstances, and the court did not instruct the jury that in any case the law required a higher degree of care than due care."

7—*L. & N. R. Co. v. Hiltner*, 22 Ky. Law 1141, 60 S. W. 2 (4); *Gulf, C. & S. F. Ry. Co. v. Hays*, — Tex. Civ. App. —, 89 S. W. 29 (32).
8—*Hill v. City of Glenwood*, 124 Iowa 479, 100 N. W. 522 (524).

"It is too well established to require argument or citation of authority that the care which the city is bound to exercise in the maintenance of its streets is ordinary and reasonable care, the care which ordinarily marks the conduct of a person of average prudence and foresight. So, too, it is equally well settled that the care which a person using the

§ 1337. **Ordinary Care Defined—Reasonable Care.** (a) The court instructs the jury, that ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.⁹

(b) The court instructs the jury that ordinary care, as mentioned in these instructions, is the degree of care which an ordinarily prudent person situated as the defendant was, as shown by the evidence, before and at the time of the injury, would usually exercise for his own safety.¹⁰

(c) Ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care.¹¹

street is bound to exercise on his own part to discover danger and avoid accident and injury is of precisely the same character, the ordinary and reasonable care of a person of average prudence and forethought. The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those, possessing perfect health, strength and vision. The law casts upon one no greater burden of care than upon the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case. As said by us in *Graham v. Oxford*, 105 Iowa 708, 75 N. W. 474:

"There is no fixed rule for determining what is ordinary care applicable to all cases, but each case must be determined according to its own facts." In the case before us the plaintiff's blindness is simply one of the facts which the jury must give consideration in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity. In other words, the measures which a traveller upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care—the care which men of ordinary prudence and experience

may reasonably be expected to exercise under like circumstances. See cases cited in 21 A. & E. Enc. Law (2d Ed.) 465, note 1. In the case at bar the plaintiff was rightfully upon the street, and if he was injured by reason of the negligence of the city, and without contributory negligence on his part, he was entitled to a verdict. In determining whether he did exercise due care it was proper for the jury, as we have already indicated, to consider his blindness, and in view of that condition, and all the surrounding facts and circumstances, find whether he exercised ordinary care and prudence. If he did, he was not guilty of contributory negligence. This view of the law seems to be fairly embodied in the instructions to which exception is taken."

9—*So. K. Ry. Co. v. Sage*, — Tex. Civ. App. —, 80 S. W. 1038 (1039); *Copeland v. Wabash R. Co.* 175 Mo. 650, 75 S. W. 106 (108); *Rapid T. Co. v. Miller*, — Tex. Civ. App. —, 85 S. W. 439; *Cronin v. Delavan*, 50 Wis. 375, 7 N. W. 249.

10—*C. C. Ry. Co. v. O'Donnell*, 208 Ill. 267 (273), 70 N. E. 294 and 477.

"The instruction required due care before and at the time of the injury, and, we think, was broad enough, and did not assume as is contended, that the deceased was in the exercise of due care at any time."

11—*Gorman Adm'r. v. Louisville Ry. Co.*, 24 Ky. L. 1938, 72 S. W. 760 (761); *Louisville & N. Ry. Co. v. Lucas*, 30 Ky. L. 359, 98 S. W. 308, where a somewhat similar instruction was approved.

The court, in the first case, said: "It might be impossible to lay

(d) Reasonable care means that degree of care which an ordinarily prudent and careful person of the same age would exercise under similar circumstances and surroundings.¹²

§ 1338. **Elements Necessary for a Recovery.** (a) The jury are instructed that the plaintiff cannot recover in this case against the defendant company unless they find that she had a preponderance of the evidence supporting the propositions:

First. That the plaintiff was not at the time of the accident guilty of any failure to exercise ordinary care for her own safety, which approximately contributed to her injury.

Second. That the defendant company was guilty of negligence in the manner charged in the declaration.

Third. That such negligence was the proximate direct cause of the plaintiff's injuries in question, if any.

And if you find from the evidence that the plaintiff has failed to sustain these propositions, as stated, or that she has failed to sustain any one of them she cannot recover against said defendant company, and you should find the defendant not guilty.¹³

down a general rule that would aptly and minutely define the care to be exercised under every conceivable state of case. Nor would it be wise to attempt it. What would amount to ordinary care in a sparsely settled, unfrequented part of a city might be gross negligence in a much used downtown thoroughfare. And what would be ordinary care toward an adult under similar circumstances, might be criminal negligence toward an infant of very tender years. Ordinarily careful and prudent persons regulate their conduct by the difference in circumstances surrounding the act. This is generally known and recognized of all people. That is what makes it ordinary care. So, when the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinarily careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the street his full legal duty was stated."

12—*Economy L. & P. Co. v. Hiller*, 113 Ill. App. 105, aff'd 203 Ill. 518, 68 N. E. 72.

"The objection to this instruction is that it omits to tell the jury that in determining the degree of care which the appellee

was required to use, the jury should consider not only the age but also the experience and discretion of appellee. In *Weick v. Lander*, 75 Ill. 93, our Supreme Court say: 'It was proper for the jury in passing on the degree of care required of the plaintiff to take into consideration his age and experience.' And in *Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, the instruction on this point was that the intestate (a child ten years old) should exercise such degree of care 'as from his age and intelligence, under the circumstances in evidence, was required.' The court sustain the instruction and while criticising its phraseology say: 'The circumstances are always to be taken into consideration in such cases and if intestate exercised such care as under the circumstances might be expected from one of his age and intelligence, it was sufficient.' And again in *I. C. R. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. 575, our Supreme Court Review and approve the foregoing authorities and say: 'These decisions are in harmony with the decisions of other states on the same subject and but recognize the rule laid down by approved text writers on negligence;' citing *Shearman & Redfield on Negligence*, sec. 49; *Wharton on Negligence*, sec. 309."

13—*W. C. St. R. R. Co. v. Pet-*

(b) The jury are instructed that, in order to entitle the plaintiff to recover in this case from the defendant, two things must concur, and appear from a preponderance of the evidence: first, that such defendant was guilty of negligence which contributed to the injury complained of; and secondly, that the plaintiff exercised reasonable and ordinary care for her own safety. And if the plaintiff fails to establish both of these essentials by a preponderance of the evidence, she cannot recover. The burden of proving negligence rests with the party alleging it, and where a party charges negligence on the part of any other as a cause of action, she must prove his negligence by a preponderance of the evidence.¹⁴

(c) The jury are instructed that this is a suit brought to recover damages which it is alleged were caused the plaintiff by and through the negligence of the defendant company as set forth in plaintiff's declaration, or in some one or more of the counts thereof.

(d) In order to a recovery of any damages in the case, it is required that you should believe, from a fair and impartial consideration of all the evidence in the case, that the preponderance or greater weight of the evidence establishes first the fact that plaintiff suffered an injury as stated in his declaration, and the extent thereof; second, that he himself was at the time and place of said injury exercising reasonable and ordinary care and caution for his own safety; and third, that the injury was the direct and proximate result of the negligence of the defendant company at said time and place as same is set out in the declaration, or in some one or more of the counts thereof.¹⁵

§ 1339. Mere Accident Not Actionable. The court instructs the jury that, if you believe, from the evidence, that the injury to the plaintiff was the result of a mere accident, and neither the defendant nor the plaintiff were the cause thereof, you should find the defendant not guilty.¹⁶

§ 1340. Actionable Injury Must Be the Result of Negligence. The jury are further instructed that if the evidence in this case fails to

ters, 95 Ill. App. 479 (481), aff'd 196 Ill. 298, 63 N. E. 662.

14—N. C. St. R. R. Co. v. Boyd, 156 Ill. 416 (418), 40 N. E. 955, aff'd 57 Ill. App. 535.

"In these instructions, the rule in regard to the burden of proof is fully laid down."

15—Penn. Co. v. Reidy, 99 Ill. App. 477 (478), aff'd 198 Ill. 9, 64 N. E. 698.

"This instruction is criticised as being misleading because it assumes the defendant was negligent. We think the criticism not good. The instruction as we read it makes no such assumption. It is also said that the instruction is objectionable because it limits

the exercise of care on the plaintiff's part to the 'time' of the injury, and cases are cited which seem to support the contention. A careful reading of these cases, however, as we think, shows the contrary. In L. S. & M. S. Ry. Co. v. Hessions, 150 Ill. 546-555, 37 N. E. 905, this objection to a similar instruction was held to be untenable. To a like effect: L. S. & M. S. Ry. Co. v. Johnson, 135 Ill. 641-53, 26 N. E. 510; McNulta v. Lockridge, 137 Ill. 270-87, 27 N. E. 452, 31 Am. St. Rep. 362; C. & A. R. R. Co. v. Fisher, 141 Ill. 614-25, 31 N. E. 406."

16—Webster Mfg. Co. v. Nisbett, 87 Ill. App. 551 (553).

disclose what was the cause of the explosion of the boiler of the locomotive, which explosion caused the death of A. B., and if from a careful consideration of all the evidence in this case the cause of such explosion is unknown, and if the plaintiff fails to prove, by a preponderance of the evidence, that the defendant was negligent as is charged in the plaintiff's declaration, then the plaintiff cannot recover in this case, and you should find the issues for the defendant.¹⁷

§ 1341. Injury the Result of Negligence and Accident. The court instructs the jury, as a matter of law that if a person receives an injury as the combined result of an accident and of negligence on the part of another, and the accident would not have occurred but for such negligence, and the danger could not have been foreseen or avoided by the exercise of reasonable care and prudence, on the part of the person injured, then the person guilty of the negligence will be liable for the injury received.¹⁸

§ 1342. The Negligence Charged Must Be the Proximate Cause.

(a) The court instructs the jury, that the rule of law is, that every person must be held liable for all of those consequences which flow naturally and directly from this act, or which might have been foreseen and reasonably expected as the result of his conduct, but not for those consequences which do not flow naturally and directly from his acts, or which he could not have foreseen or reasonably have anticipated as the result of his conduct.¹⁹

(b) If you believe, from the evidence, that the defendant was guilty of the negligence or carelessness charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded as the approximate cause of the injury.

(c) You are instructed, that although you may believe, from the evidence, that the injury complained of was occasioned by the acts of the defendant, still, if you further believe, from the evidence, that such injury was not the natural result of the acts of the defendant and could not have been foreseen or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable.

(d) You are instructed, that an act is not to be deemed the proximate cause of an injury, unless the injury was such a consequence of the act as, under the surrounding circumstances of the case, might

17—I. C. R. R. Co. v. Prickett, 210 Ill. 140 (148), 71 N. E. 435.

18—Aurora v. Pulfer, 56 Ill. 270; Norton v. Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. 167, aff'g 54 Ill. App. 545.

19—Cooley on Torts (3d Ed.) 125; Wharton on Neg., § 74-78; 2

Parsons on Cont., 456; Rigby v. Hewitt, 5 Exch. 240; Fent v. T. P. & W. Rd. Co., 59 Ill. 349; Brashberg v. Mil. etc., Rd. Co., 50 Wis. 231, 6 N. W. 821; Texas & P. Ry. Co. v. Short, — Tex. Civ. App. —, 58 S. W. 56 (57).

and ought to have been foreseen or anticipated by an ordinarily reasonable and prudent man, as reasonably likely to flow from the act.²⁰

(e) When we speak of the proximate cause of an injury, we mean not only the natural cause of an injury, but also such a case as ought under the attending circumstances, to be reasonably expected, by a person of ordinary intelligence and prudence, to produce injury to another. Or, in other words, ought an injury to another, in the light of the attending circumstances, to have reasonably been foreseen as a natural result of the act or omission complained of?²¹

§ 1343. **Question of Negligence One of Fact for the Jury.** (a) The court instructs the jury that the questions involved herein, as alleged in the plaintiff's declaration, of negligence on the part of the defendant, if any, and the exercise of reasonable care on the part of the plaintiff, if any, are what are known as questions of fact, which is the duty and province of the jury to determine under the law and the evidence in the case.²²

(b) Whether there was or was not negligence, or want of due care, on the part of either the defendant or plaintiff, or both, is to be determined by you, in consideration of all the facts, the situation and surroundings at the time of the accident, tested by your judgment as practical men. The court cannot lay down any legal rules by which to resolve the question.²³

(c) The court instructs the jury that if, immediately after the injury plaintiff said that nobody but himself was to blame, or words to that effect, this does not of itself make it so; but the jury should consider all the facts and circumstances of the case, and those surrounding plaintiff at the time he said what he did say, and from all the facts and circumstances of the case in evidence the jury must de-

20—Hoag v. L. S. & M. S. Rd. Co., 85 Penn. St. 293; L. N. A. & C. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572 (585).

21—Olwell v. Skobis, 126 Wis. 308, 105 N. W. 783.

22—C. & J. Elec. Ry. Co. v. Patton, 219 Ill. 216, 76 N. E. 381.

"It is contended that this instruction is defective, in that it attempts to summarize the facts necessary for the plaintiff to prove in order to entitle her to recover but does not require her to prove she was injured. The instruction, in the opinion of the court, does not assume to point out the elements of proof necessary to a recovery and direct a verdict, but merely informs the jury that two of the elements in the case, those of due care and negligence, are questions of fact for their determination under the

law and the evidence, and is within the rule stated in W. C. St. R. R. Co. v. Schultz, 217 Ill. 322, 75 N. E. 495, where at page 325 it was said: 'In framing instructions it is not ordinarily required that any one instruction should state all the law of a case, but if an instruction is correct so far as it goes, and does not assume to point out all the elements of proof necessary to a recovery and direct a verdict, it may be supplemented by other instructions, and omissions therefrom may be supplied by other instructions.' Taking the instructions in this case as a series, the question of the injury to appellee was fully presented to the jury as an element that must be proved before she could recover."

23—Hotel Ass'n. v. Walters, 23 Neb. 380, 36 N. W. 561 (564).

termine what effect to give to said declaration, and also whose fault was the real cause of the injury, and find their verdict accordingly.²⁴

(d) If the jury believe from all the evidence before them that plaintiff did not receive any of the injuries complained of in his petition, then it will be their duty to find for the defendant.²⁵

§ 1344. Instructions Referring Jury to Pleadings as to Negligence Alleged. The specific acts of negligence alleged by plaintiff are set out in his declaration, and in an amendment filed to it. You will have that declaration out with you in your jury room with the amendment, and by a careful reading of it you will see the various acts of negligence which are alleged by the plaintiff in this case.²⁶

§ 1345. Recovery on Proof of Allegations Contained in One or More Counts of Declaration. (a) If the jury believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of her declaration by a preponderance of the evidence, and if the jury believe, from the evidence, that the plaintiff was injured as therein alleged, and if the jury believe, from the evidence, that the plaintiff, at the time of such injury, was in the exercise of reasonable care for her safety and if you further believe, from the evidence, that such injury, if proved was caused by or through the negligence of the defendant, as alleged in such count of the

24—*Hasie v. Ala. & V. Ry. Co.*, 78 Miss. 413, 28 So. 941 (1942), 84 Am. St. 632.

25—*Weeks v. Texas Mid. R. R. Co.*, 29 Tex. Civ. App. 148, 67 S. W. 1071.

26—*Central of Ga. Ry. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430.

"The assignment of error upon this charge is that it was the duty of the court to state the contentions of the parties and explain them to the jury, and that it was error to instruct them simply that they might ascertain these contentions from an inspection of the pleadings. In *City Ry. v. Findley*, 76 Ga. 311, it was held: 'It is the right and duty of the presiding judge to state to the jury the several contentions between the parties, the only restriction being that he shall state them fairly to each side.' In that case complaint was made because the court stated to the jury the contentions of the parties, and the ruling made was, in effect, simply that it was proper for the judge to do this, being careful to state the contentions of both sides fairly. It certainly cannot be held that in every case the mere failure of the judge to state the contentions of

the parties in his own language is such an error as requires the granting of a new trial. If a case should arise where the omission plainly operated to the prejudice of the losing party, a new trial might be required, but the present record presents no such case. The case of *Sackett v. Stone*, 115 Ga. 466, 41 S. E. 564, was a case of this character. The really important thing is for the judge to give the jury clearly and fairly the law applicable to the issues involved, and if he does this, his failure to formally state the contentions as shown by the pleadings will not, as a general rule, be cause for a new trial. See in this connection, *Atlanta Con. Ry. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191; *Maddox v. Morris*, 110 Ga. 309, 35 S. E. 170. The charge of the trial judge in this case, fully, fairly and lucidly stated the law applicable to the issues involved. It is not to be presumed that the jury were unable to understand the issues involved in the case as set forth in the pleadings, and it cannot be said that the judge's omission to state more definitely the contentions of the parties resulted in any injury to the defendant."

declaration, then the plaintiff is entitled to recover such damages as you believe, from the evidence, will compensate her for the injury sustained.²⁷

(b) The court instructs the jury that, if you believe and find from the evidence, that the plaintiff, while exercising ordinary care to avoid injury, was injured by and in consequence of the negligence of the defendant, as charged in the declaration, then you should find the defendant guilty.²⁸

(c) The court instructs the jury that if they believe from the evidence that the plaintiff has proven the allegations of any one or more counts of the declaration herein, by a preponderance of the evidence, and that the plaintiff suffered and sustained injuries in the mode and manner charged in one or more counts of the declaration herein, and that he was then in the exercise of ordinary care for his own safety, then they should find the defendant guilty.²⁹

27—*C. & J. Elect. Ry. Co. v. Patton*, 219 Ill. (217), 76 N. E. 381. See also instructions to the same effect in *Penn. Co. v. Reidy*, 99 Ill. App. 477 (478), 198 Ill. 9, 64 N. E. 698; *Johnson v. McNiff*, 113 Ill. App. 1 (2); *C. U. T. Co. v. Lawrence*, 113 Ill. App. 269 (273), aff'd 211 Ill. 373, 71 N. E. 1024.

In the first case the court said:

"It is objected that the first clause of the instruction submits a question of law to the jury. This court has repeatedly held that an instruction telling the jury that if they believe, from the evidence, the plaintiff has proved his or her case as laid in his or her declaration they will find the issues for the plaintiff, not to be objectionable. *Mt. O. & S. Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888; *Central Ry. Co. v. Bannister* 195 id. 48, 62 N. E. 864; *W. C. St. Ry. Co. v. Lieserowitz*, 197 id. 607, 64 N. E. 718.

"It is further objected that the subsequent clauses of said instruction fail to instruct the jury as to the degree of proof required to establish plaintiff's case. In *Village of Altamont v. Carter*, 196 Ill. 286. In passing upon a similar objection, it was said: 'A requirement in the first part of an instruction that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sentences to inform the jury that they must find from a preponderance of the evidence.

The objections urged as to the second instruction are not well taken.'"

Where a defense is made on the question of "assumed risk," the instruction in the text would be erroneous, unless it included the theory of the assumed risk, provided there was evidence that fairly tended to support the view that the risk was assumed, and provided further the declaration does not contain the allegation that the risk was not assumed. *Terra Cotta Lbr. Co. v. Hanley*, 214 Ill. 243, rev'g 116 Ill. App. 359, 73 N. E. 373.

28—*Chicago U. T. Co. v. Lawrence*, 113 Ill. App. 269 (273), aff'd 211 Ill. 373, 71 N. E. 1024. Citing *C. & A. Ry. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *L. S. & M. S. Ry. Co. v. Ouska*, 151 Ill. 232, 37 N. E. 897.

29—*Johnston v. McNiff*, 113 Ill. App. 1 (2).

"If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, becomes harmless. We deem it unnecessary to determine whether or not the sixth and seventh counts were so faulty as to be insufficient to sustain a verdict, for even if they were, there being five good counts, and the instruction being general as to the whole declaration, was properly given."

The court cited *Cons. Coal Co. v.*

(d) If the jury believe, from the evidence, that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration, or either one of the counts thereof, then you should find the defendant guilty.³⁰

(e) If in this case the jury believe from the evidence, that the plaintiff, while using such reasonable care for his own safety, was injured in the manner as charged, in the declaration, and that such injury was occasioned by the negligence of the defendant, or of its agents in charge of the train of cars mentioned in the evidence, and as charged in the declaration, then the jury should find the defendant guilty.³¹

(f) The court instructs the jury that if the jury believe from the evidence that the injury complained of in this case resulted from the defendant's negligence as charged in the declaration, and that the plaintiff was exercising ordinary care for his own safety before and at the time of his injury, the defendant is liable and the plaintiff is entitled to a verdict.³²

§ 1346. Circumstantial Evidence Supporting Plaintiff's Theory Must Be Inconsistent with Any Other Conclusion. The court instructs the jury that to justify you in finding that deceased was killed by a swinging door striking a crowbar as claimed by plaintiff, it is necessary, not only that the circumstances should all concur to show that he was so killed, but that they are inconsistent with any other rational conclusion.³³

§ 1347. Burden of Proof. (a) The burden of proving negligence rests on the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence, by a preponderance of evidence. And in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant.³⁴

Scheiber, 167 Ill. 539, 47 N. E. 1052; Chi. & A. R. R. Co. v. Anderson, 166 Ill. 572, 46 N. E. 1125; H. & St. J. R. R. Co. v. Martin, 111 Ill. 219; Shreffler v. Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Franklin Printing Co. v. Behrens, 181 Ill. 340, 54 N. E. 896; Penn. Co. v. Backes, 133 Ill. 255, 24 N. E. 563.

30—C. & A. R. R. Co. v. Fisher, 141 Ill. 614 (624), 31 N. E. 406.

"The qualifying words 'if the jury believe from the evidence' apply to the entire sentence . . . The word 'while' means 'during the time that,' and seems to necessarily imply some degree of continuance . . . We have on several occasions interpreted the

phrase 'at the time' found in the instruction as having relation to the entire transaction under examination. L. S. & M. S. Ry. Co. v. Johnsen, 135 Ill. 641, 26 N. E. 510; McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362."

31—C. & A. R. R. Co. v. Gore, 202 Ill. 188 (196), aff'g 105 Ill. App. 16, 66 N. E. 1063.

32—C. & A. R. R. Co. v. Harrington, 90 Ill. App. 638 (641), aff'd 192 Ill. 9 (25), 61 N. E. 622.

33—Wheelan v. C. M. & St. P. Ry. Co., 89 Iowa 167, 52 N. W. 119 (121).

34—Cooley on Torts (3d Ed.) 1439; McQuilken v. Cent., etc., Co., 50 Cal. 7; Q. A. & St. L. R. R. Co.

(b) The court instructs the jury that the burden of proof is upon plaintiff to establish by a preponderance of the testimony the facts on which plaintiff charges negligence on the defendant, and unless plaintiff has so established said facts then the verdict of the jury should be for the defendant.³⁵

(c) The jury are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not established his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty.³⁶

(d) The burden is upon the plaintiff to show that his injury was caused by the negligence of the defendant, and, if he has failed to do this by a preponderance of the proof, the answer to the first issue should be, "No."³⁷

(e) The court instructs the jury that the burden of proof in this case is upon the plaintiff, and you are not at liberty to find a verdict in his favor unless you believe from the evidence that he has proved the material allegations of some one or more counts of his declaration by a preponderance of the evidence.³⁸

(f) I charge you that the burden of proof is upon the plaintiff to reasonably satisfy you by the evidence that the defendant was guilty of negligence as charged in some count of the complaint, and if from all the evidence you are not reasonably satisfied of the truth of the averments of negligence as alleged in the complaint, then you must find a verdict for the defendant, without regard to the question of contributory negligence.³⁹

(g) The jury are instructed that with respect to the ailments and disabilities claimed for the plaintiff in this case, the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show, by a preponderance of the evidence, not only that such ailments really exist or have existed, but also that such ailments and disabilities are the result of the action in question; and the burden of proof is not upon the defendant to show that such alleged ailments do not proceed or arise from any other cause.

v. Wellhoener, 72 Ill. 60; Hoyt v. Hudson, 27 Wis. 656; St. Paul v. Kuby, 8 Minn. 154; Jeffersonville, etc., v. Lyon, 55 Ind. 477; Murphy v. Chicago, etc., Rd. Co., 45 Ia. 661; Strand v. C. & W. M. Ry. Co., 67 Mich. 380, 34 N. W. 712 (715).

35—Shafstette v. St. Louis & M. R. R. Co., 175 Mo. 142, 74 S. W. 826 (830).

36—Chicago U. T. Co. v. Mee, 218 Ill. 9, 75 N. E. Rep. 800. See

also instructions in C. C. Ry. Co. v. Nelson, 116 Ill. App. 609, aff'd 215 Ill. 436, 74 N. E. 458; C. & A. R. R. Co. v. Eselin, 86 Ill. App. 94 (99).

37—Norton v. N. Car. R. Co. 122 N. C. 910, 29 S. E. 886 (888).

38—Fidelity & Cas. Co. v. Oehne, 94 Ill. App. 117 (121).

39—Birmingham Belt R. Co. v. Gerganous, 142 Ala. 238, 37 So. 929 (931).

(h) The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident. Whether it is or not must be determined by the jury from the evidence. The jury are not to understand from this or any other instruction that the court intends to intimate any opinion upon that or any other question of fact in this case. All such questions and matters are solely and exclusively for the jury, and they must determine them from the evidence and from that alone.⁴⁰

(i) The burden is upon the plaintiffs to establish that the death of the deceased was caused by the negligence of the defendant; and, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict must be in that case for the defendant. The negligence of the defendant company must be established by a preponderance of the evidence; and by a preponderance of the evidence is not meant the greatest number of witnesses, but it means the evidence which is most convincing to your minds.⁴¹ ✓✓✓✓

(j) The plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by the preponderance of the evidence. The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor.⁴² ✓✓✓✓

40—C. U. T. Co. v. Fortier, 205 Ill. 305 (306), 68 N. E. 948.

41—Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111 (113).

"It is argued that the sentence, 'and, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant' is erroneous. But the whole instruction must be construed together. So construed it is not error. It is true that this sentence is not technically correct; but this error is not of moment, especially when the intent of the whole is clearly expressed that the burden is upon the plaintiff's to prove negligence. The court has frequently held that where an isolated portion of an instruction, standing alone, may be technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld. Seattle G. & E. L. & M. Co. v. Seattle, 6 Wash. 101, 32 Pac. 1058; Dug-

gan v. Boom Co., 6 Wash. 593, 34 Pac. 157, 36 Am. St. 182; McQuillan v. City of Seattle, 13 Wash. 600, 43 Pac. 393; State v. Surry, 23 Wash. 655, 63 Pac. 557; Henry v. Railway Co., 24 Wash. 246, 64 Pac. 137; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804."

42—Chicago City Ry. Co. v. Nelson, 116 Ill. App. 609, aff'd 215 Ill. 436, 74 N. E. 458.

"Appellee's above instructions are said to be erroneous, because of the use of the phrases 'plaintiff's case' and 'his case.' It is said that these phrases are equivalent to material allegations of the declaration,' the use of which latter phrase, in an instruction, has been held, in a number of cases, to be erroneous. It seems unnecessary to discuss the point, since similar instructions containing the phrases 'his case,' and 'plaintiff's case,' have been frequently approved by the Supreme Court. Taylor v. Felsing, 164 Ill. 331-6, 45 N. E. 161; City of LaSalle v. Kostka,

§ 1348. **Proof May Be Made by Defendant's Own Witnesses.** The court instructs you, that if you believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby, then, as regards the defendant's liability, it makes no difference whether such negligence appears or is proved by the testimony on the part of the plaintiff, or by the defendant's own witnesses.⁴³

§ 1349. **Coroner's Verdict Not Evidence of Negligence.** (a) The court instructs you that the verdict of the coroner's jury is not to be considered as evidence that the deceased was, at the time of the injury, in the exercise of reasonable care and prudence as charged in the declaration.

(b) The court further instructs the jury that the finding of the coroner's jury or inquest is not to be considered by you as evidence that the defendant was guilty of the negligence charged in the declaration.⁴⁴

(c) The court instructs you that the inquest in evidence is no evidence in this case that the switch stand spoken of by witnesses was

190 Ill. 130-3, 60 N. E. 72; N. C. St. R. R. Co. v. Polkey, 203 Ill. 225-31, 67 N. E. 793; and cases cited; Chicago C. Ry. Co. v. Carroll, 206 Ill. 318-31, 68 N. E. 1087, and cases cited.

"It is also said that the eighth instruction is erroneous because it in effect tells the jury that if the plaintiff's evidence 'preponderates in his favor, although but slightly,' then they might find a verdict in his favor. It is true that this court in *O'Donnell v. Armour C. H. Works*, 111 Ill. App. 516-23, criticised this phrase in an instruction, but did not hold it reversible error to refuse it when asked by the plaintiff. In the *Taylor* case, *supra*, as well as in *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714, and *Chicago C. Ry. Co. v. Fennimore*, 199 Ill. 9-18, 64 N. E. 985, the Sup. Ct. held that the giving of similar instructions was not reversible error."

43—*Keokuk, N. L. P. Co. v. True*, 88 Ill. 608.

44—*C. M. & St. P. Ry. Co. v. Staff*, 46 Ill. App. 499.

"That the conclusions of a tribunal in a matter wherein a party had no opportunity either to influence its determination, or to have prevented his adversary from doing so, ought not to be adduced as evidence against him, seems too clear for discussion. The first

maxim in the administration of the law is 'Audi altera partem,' or, as expressed in *Broom's Legal Maxims*, 'No man should be condemned unheard.'

To permit the conclusions of a coroner's jury, imputing negligence and casting the blame for the death of an individual upon a party who was in no wise, save as one of the human beings of the world, a party to its proceedings, and had neither voice in the selection of the triers nor opportunity to place before them aught that might tend to show his own innocence, is to condemn one unheard, and to violate the most fundamental of all principles applicable to proceedings in courts of justice. We do not understand that our Supreme Court have authorized the reception in evidence of such verdicts as this, and we look upon the case of *P. C. & St. L. Ry. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439, as containing an intimation that they are not to be admitted. What is said in *L. S. & M. S. Ry. Co. v. Taylor*, 46 Ill. App. 506, as to the admissibility of the verdicts of coroners' juries, is applicable to this one." The verdict in this case found that the deceased came to his death through the negligence of the defendant company.

too close to the tracks of the defendant at the point where they may believe from the evidence the deceased ———, was injured.⁴⁵

§ 1350. **View by Jury of Scene of Accident as Evidence of Negligence.** The jury has been taken out to view the scene of this accident twice,—the first time for the purpose of being able to understand the testimony, and the second time to witness certain experiments by agreement of both parties. I charge you that you are not to consider as evidence what you saw on the first view, but what you saw on the second view that was shown to you by the parties under their agreement you should take and consider as evidence in this case.⁴⁶

45—*L. S. & M. S. Ry. Co. v. Taylor*, 46 Ill. App. 506 (509).

"It is no longer a question in this state that the coroner's inquisition is admissible in evidence, and though not conclusive, is competent evidence to be considered by the jury. *P. C. & St. L. Ry. Co. v. McGrath*, 115 Ill. 172; 3 N. E. 439; *U. S. Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; *Gooding, Adm'r, v. U. S. Life Ins. Co.*, 46 Ill. 307. The same authorities have established that the depositions taken upon the inquest are not admissible as evidence. * * * The public and general interest sought to be subserved by the inquest was satisfied by the proper finding of the jury, that the deceased came to his death by being knocked off the car by a standing switch; but whether that result was caused by the negligent placing of the switch, or by the negligent conduct of the deceased while on the car, in approaching or passing the switch, or in boarding the car in the first instance, was purely a matter of private inquiry between the representative of the deceased and the railroad company."

46—*Schweinfurth v. Cleveland C. C. & St. L. Ry. Co.*, 60 Ohio St. 215, 54 N. E. 89 (92).

"The record shows that during the progress of the trial, and before the conclusion of the evidence, counsel for the defendant moved the court for an order directing the jury to be taken to the crossing where the deceased was killed, at about the same time in the evening, for the purpose of witnessing certain experiments which the defendant proposed to have made in the running of a train of cars there, under circumstances

like those present at the accident, for the purpose of informing the jury in regard to the cause and manner of its occurrence. No objection was made by plaintiff's counsel, 'and thereupon,' as stated in the record, 'it is agreed that the jury shall go to said crossing at 7 o'clock this evening, April 14, 1898, in charge of the sheriff, to witness certain experiments made with the engine and train there. And thereupon the jury reported at the court house at said hour, and, in charge of the sheriff, went to the scene of the accident, and witnessed certain experiments made with said engine and train, horse and buggy, men seated in the buggy,' etc. The question made on this charge is whether the jury might properly consider the information obtained from these experiments as evidence in the case, and is, in this form, a new question in this state. We are not aware of any reported decision of this court in which a like question was involved. It was held in *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324, that the preliminary view, authorized by section 5191 of the Revised Statutes, of the property or place involved in a litigation, is merely for the purpose of enabling the jury to apply the evidence offered on the trial. But experiments, made in the presence of the jury, with a view of reproducing to their senses, as nearly as may be, the transaction or occurrence, in whole or in part, which is the subject matter of investigation by them, would seem to have a different purpose. They serve to put the jury in possession of knowledge, important in the determination of the issues on trial, that

§ 1351. **Contributory Negligence Defined.** (a) "Contributory negligence" is such negligence on the part of plaintiff as helped to produce the injuries complained of, and if the jury find, from a preponderance of all the evidence in this case, plaintiff was guilty of any negligence that helped to bring about or produce the injuries complained of, then, in that case, the plaintiff cannot recover in this action.⁴⁷

(b) The want of ordinary care and prudence on the part of a

they could not obtain so readily or accurately from the testimony of witnesses. They are, in a measure, a substitute for oral testimony, and often may afford evidence more satisfactory and reliable. In *Smith v. State* 2 Ohio St. 511, where the prosecuting witness on a trial of an indictment for malicious shooting had testified that he saw and identified the defendant through a glass window, after dark, from the flash of the pistol which he fired, it was held competent for the defendant to prove experiments made by witnesses under similar circumstances, and, as a result of them, that a person could not be so identified. If the testimony of witnesses relating to such experiments, and the information obtained from them, furnish competent evidence which the jury may consider in making up their verdict, it is difficult to assign any satisfactory reason why such experiments, when made in the presence of the jury for their information, and by which the results are made obvious to their senses, should not afford evidence of equal, or even greater, force and certainty. Witnesses observing the experiments, when called upon to testify, may imperfectly describe them, or fail to make themselves fully understood, while these imperfections are removed when the jury is placed in the position of the observing witnesses, with all the opportunities of observation. As said in 2 Jones Ev. para. 395: 'For obvious reasons, there is no class of evidence so convincing and satisfactory to a court or jury as that which is addressed directly to the senses of the court or jury.' In patent cases, experiments before the court and jury are constantly re-

sorted to as a means of proving novelty of inventions, and the principles of their construction and operation. And in the American notes to *Tayl. Ev.* p. 365, it is said that 'a particularly cogent method of proving a fact is to test its existence by experiments in open court.' True, the experiments in this case were not made in court. It was impractical to do so. Nor, without the consent of the parties could they have been ordered to be made elsewhere. But they were made out of court, at the request of the defendant, in pursuance of an order procured by it, and under conditions which, to its satisfaction, constituted a sufficiently accurate representation of the occurrence that resulted in the death of the plaintiff's intestate; and they were necessarily of the same probative character as if made in open court. They were intended to furnish information which the jury might use in determining the issues in the case, and which, indeed, might conclusively settle them in the minds of the jury. It would be a vain thing to attempt to require the jury to disregard the evidence so made manifest to their own senses."

47—*Balt. & O. S. W. Ry. Co. v. Young*, 153 Ind. 163, 54 N. E. 791 (793).

"It will be observed that no attempt is made to state what acts or omissions on the part of the plaintiff would, under the circumstances of this case, constitute contributory negligence. The general statement that contributory negligence is such negligence as helped to produce the injuries complained of includes the idea of both acts and omissions, and is not a misstatement of the law."

person injured, contributing directly and approximately to the injury complained of, is contributory negligence.⁴⁸

(c) Contributory negligence is any degree of carelessness, however slight, on the part of a person injured, which co-operates in producing the injury complained of.⁴⁹

(d) Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act or omission of the defendant, is the proximate cause or occasion of the injury complained of.⁵⁰

(e) Contributory negligence, in its legal signification, is such an act or omission on the part of the plaintiff, amounting to a want of ordinary and proper care and prudence, as, concurring or co-operating with some negligent act of the defendant, is the proximate cause of the occasion of the injuries complained of.⁵¹

(f) Contributory negligence is the doing an act by the person complaining of injury which a prudent man would not have done under similar circumstances, that contributed to the injury, and but for which act on the part of the person injured such injury would not have occurred.⁵²

§ 1352. Effect of Contributory Negligence. (a) The law places upon all persons the duty of exercising reasonable care to avoid injury, and even though the jury should believe, from the evidence, that the defendant was negligent and that plaintiff was injured thereby, if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff, and that the plaintiff did not exercise such care, you should find the defendant not guilty.⁵³

48—*Todd v. Danner*, 17 Ind. App. 368, 46 N. E. 829.

49—*Kitzberger v. C.*, R. I. & P. R. Co., 4 Neb. (unof.) 324, 93 N. W. 935 (936).

50—*Norton v. N. C. R. R. Co.*, 122 N. C. 910, 29 S. E. 886 (890).

51—*Int. & G. N. R. Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557 (559).

"It is contended that the effect of this charge, as worded, was to inform the jury that there would be no contributory negligence upon the part of plaintiff unless there was concurrent negligence on the part of defendant. There is nothing of a substantial nature in the point. If no negligence of defendant appeared, plaintiff could not recover at all. Contributory negligence becomes important in any case only where defendant's negligence is found to exist. It necessarily must concur or co-operate to produce the injuries."

52—*Houston & T. C. Ry. Co. v. Moss*, — Tex. Civ. App. —, 63 S. W. 894 (895).

Note—For particular instructions on contributory negligence see under the heading of "Negligence," "Master and Servant," "Passenger Carrier," "Railroads," etc.

53—*Cullen v. Higgins*, 216 Ill. 78 (83, 84), 74 N. E. 698.

"It is not denied but this instruction is an accurate statement of the law and applicable to the case, but it is insisted that the principles sought to be announced to the jury thereby are fully covered by other instructions which were given to the jury. We cannot agree with this view. The giving of an instruction in abstract form does not deprive a litigant of the right to have the jury fully instructed as to the law of the case, in view of the evidence introduced upon the trial. The contention of the appellee was the appellant was guilty of negligence, while the contention of the appellant was that the appellee was guilty of contributory negligence, and, even though the appellant was guilty of negligence, that the

(b) If the accident was caused either wholly or in part by a want of reasonable care or attention to his situation on the part of the plaintiff, he cannot recover. In other words, if the accident was caused by a want of due care on the part of both parties contributing thereto, the law will not aid the plaintiff.⁵⁴

(c) One who is injured by the negligence of another cannot recover damages therefor, if the injured party, by his own negligence or willful wrong, approximately contributed to the injury, so that it would not have happened but for his own fault. If, therefore, you find that said P——, by his own carelessness substantially contributed to the injury, or that he might by the exercise of ordinary care, such as a prudent person generally would have used under similar circumstances, have avoided the injury, he cannot recover damages.⁵⁵

(d) To entitle the plaintiff to recover under either the first or third paragraph of the complaint, it must appear from a fair preponderance of the evidence, not only that the injuries complained of were caused by the negligent acts, or some of the negligent acts of the agents, servants and employes of the defendant, as charged, but that she was herself free from all negligence contributing directly to said injuries.⁵⁶

(e) The jury are instructed that, if they believe, from the evidence, that the plaintiff in this case was guilty of any negligence which contributed in any degree to the injury of which he complains, then he cannot recover in this case, and your verdict should be for the defendant.⁵⁷

(f) The court instructs the jury that to entitle the plaintiff to recover the jury must believe from the evidence that the injury complained of was occasioned by the carelessness or negligence of the defendants or their servants in the manner charged in the declaration. And if the jury believe from the evidence that the plaintiff was guilty of negligence contributing to the injury, then the plaintiff cannot recover, and the jury should find for the defendants.⁵⁸

appellee, by reason of her contributory negligence, could not recover. The appellant had the right to have an instruction given to the jury which clearly presented to them that phase of his defense, and as no instruction given to the jury presented appellant's contention fully and clearly in that regard it was error to refuse said instruction."

54—*Hotel Ass'n v. Walters*, 23 Neb. 380, 36 N. W. 561 (564).

55—*Pledger v. C., B. & Q. Ry. Co.*, 69 Neb. 456, 95 N. W. 1057 (1906).

56—*Chicago, St. L. & P. R. Co. v. Sp'iker*, 134 Ind. 380, 33 N. E. 280 (286).

"This is correct. The jury must be the judge of the fair preponderance of the evidence, and they are instructed that they must find accordingly. This covers what is asked for by appellant,—that 'if, from the whole evidence in the cause, the jury cannot determine whether or not plaintiff was free from such negligence, then it would be your duty to find for the defendant.'"

57—*Wierzbicky v. Illinois Steel Co.*, 94 Ill. App. 400 (401).

58—*Beidler v. King*, 108 Ill. App. 23 (40), *aff'd* 209 Ill. 302, 70 N. E. 763.

(g) The court instructs the jury that one who is injured by the mere negligence of another cannot recover at law or equity any compensation for his injury, if he, by his own or his agent's ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operative fault, the injury would not have happened to him.⁵⁹

§ 1353. **Ordinary Care of Plaintiff Defined.** (a) By ordinary care, the law means such a degree of care under the circumstances, and in the situation in which the plaintiff was placed, so far as they may be shown by the evidence, as an ordinarily prudent person would exercise under the circumstances and in the same situation, for one of his age, capacity and experience.⁶⁰

(b) The court instructs the jury that ordinary care as mentioned in these instructions, is that degree of care which an ordinarily prudent person, with deceased's knowledge or means of knowledge of electrical affairs, and situated as deceased was, before and at the time of the accident, would exercise for his own safety.⁶¹

§ 1354. **Contributory Negligence of Children.** (a) The jury are instructed that the rule of law as to negligence in children is that they are required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally and ordinarily use in the same situation and under the like circumstances, provided that the parents or persons having control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances.⁶²

59—So. Exp. Co. v. Hill, — Ark. —, 98 S. W. 371.

Little Rock & F. S. Ry. Co. v. Pankhurst, 36 Ark. 371; Little Rock & F. S. Ry. Co. v. Cavaness, 48 Ark. 106, 2 S. W. 505; Kansas C. So. Ry. Co. v. McGinty, 76 Ark. 356, 88 S. W. 1001. "This doctrine of contributory negligence so often announced by this court was correctly applied to the facts of this record."

60—P., F. W. & C. R. R. Co. v. Moore, 110 Ill. App. 304.

61—Commonwealth El. Co. v. Rose, 114 Ill. App. 181 (184), aff'd 214 Ill. 545, 73 N. E. 780.

62—Ill. C. R. R. Co. v. Slater, 129 Ill. 91 (99), aff'g 28 Ill. App. 73, 21 N. E. 575, 16 Am. St. 242, 6 L. R. A. 418.

"The giving of this instruction is urged as error, and is said to be directly contrary to the law in this class of cases. We find, however, in Weick v. Lander, 75 Ill. 93, which was an action by a father as administrator for the wrongful killing of his son, twelve years of age,

it was said: 'It is not to be expected that a boy twelve years of age will use the same degree of caution and care as a person of mature years; nor does the law require it. It was proper for the jury in passing upon the negligence of the deceased to take into consideration his age and experience.' In C. & A. R. Co. v. Becker Admr., 76 Ill. 25 (a similar action), the deceased son being only six or seven years of age, it was again said: 'The age, the capacity and discretion of the deceased to avoid danger were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess.' (See also same case, 84 Ill. 483). So in Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267, the deceased being a lad between ten and eleven years of age, an instruction given at the request of the plaintiff limited the degree of care required of the deceased to such as 'from his age and intelligence under the circumstances in evidence was

(b) The jury are instructed that in determining the relative degree of care or want of care manifested by the parties at the time of the injury, the age and discretion of the party injured are proper subjects for the jury. The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of his age and discretion would naturally and ordinarily use.

(c) The jury are instructed that the rule as to contributory negligence of a child is that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use in the same situation and under the same circumstances.⁶³

required.' The phraseology was condemned, but it was held that inasmuch as it was in effect the same as if it had been limited to 'such care as might be expected of a person of his age and discretion,' there was no substantial error in giving it. And it was further said: 'The circumstances in evidence are always to be taken into consideration in such cases, and if the intestate exercised such care as, under the circumstances, might be expected from one of his age and intelligence, it was sufficient.' These decisions are in harmony with those of other states on the same subject, and but recognize the rule laid down by approved text writers on negligence. *Shearman & Redfield Neg.*, sec. 49; *Wharton Neg.*, sec. 309. The instruction was proper."

For a case in which an instruction was given on the assumption that the child in question was thirteen when he was in fact fourteen, see *Mester v. Wuest*, 57 Ill. App. 122 (125).

See also *United Breweries Co. v. O'Donnell*, 221 Ill. 334, 337, 77 N. E. 547; *St. Louis, etc., Rd. Co. v. Valrius*, 56 Ind. 511; *McMillan v. Burlington, etc., Rd. Co.*, 46 Ia. 231; *Cleveland, etc., Rd. Co. v. Manson*, 31 Ohio St. 451; *Chicago, etc., Rd. Co. v. Murray*, 71 Ill. 601; *Baltimore, etc., Rd. Co. v. McDonnell*, 43 Md. 534; *Gov. St. Rd. Co. v. Hanlon*, 53 Ala. 70; *Isabel v. Hannibal, etc., Rd. Co.*, 60 Mo. 475.

63—*Norton v. Volzke*, 158 Ill. 402, aff'g 54 Ill. App. 545, 41 N. E. 1085, 49 Am. St. 167.

"These instructions inform the jury that the age and discretion of the party injured are proper subjects for enquiry, that the law

does not require one of tender years to exercise the same degree of care and caution as a person of mature years, and that a child is only required to exercise that degree of care which one of that age would naturally and reasonably use in the same situation and under like circumstances. In *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944 (a case similar in many respects to this), this court said (p. 33): 'If plaintiff had been an adult and unimpaired in faculties, he would unquestionably on the case made be held to have assumed the risk of his employment with the machinery uncovered as it was when he entered the service of appellant. It is not claimed that the danger to which he was exposed by reason of the gear being left uncovered was not patent to everyone of ordinary intelligence and experience. It is alleged in the declaration that for a year prior to the injury, plaintiff had been in the same employment, the machinery remaining in the same condition. That, as between employer and employe, the latter assumes all the usual known dangers incident to the employment, that he also takes upon himself the hazard of the use of defective tools and machinery if, after his employment, he knows of the defects but voluntarily continues in the employment without objection, are familiar rules of law often recognized by the decisions of this and other courts. That this general rule does not apply to employes who, from youth or want of their natural faculties are unable to appreciate the danger incident to the employment, or which may result from the continued use of defective machinery or tools, is

(d) The court further instructs the jury that, if they believe from the evidence that the plaintiff at the time of the accident was a child between the age of five and six years, then he cannot, because of his tender years, be guilty of, or be charged with, carelessness or negligence in respect to the accident in this case, so as to relieve at all any want of due care on the part of the railroad company, so that, if the jury further believe from the evidence that the accident causing the injury to plaintiff was due to the want of due and ordinary care by the defendant railroad, then you must find a verdict for the plaintiff, and no want of care by the plaintiff will save the defendant from the liability for the accident.⁶⁴

(e) In this connection I further charge you that the conduct of a child of tender years is not to be judged by the same rule which governs that of adults. While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting to him from the fault or negligence of another, he must himself have been free from negligence and fault. This rule, however, when applied to a child of tender years will not prevent a recovery by it unless it is possessed of that degree of intelligence, prudence and caution which will cause it to know and to appreciate and to understand the dangers incident to itself from its wrongful acts and omissions.⁶⁵

(f) The degree of diligence that the law requires of the plaintiff was that care which would reasonably be expected of a boy of his age

equally well settled. Such employees are entitled at the hands of their employers to instructions as to the danger and how to avoid it—in other words, they are entitled to be put in possession of that knowledge which to adults comes from experience and mature judgment. (2 Thompson on Negligence, 978; Deering on Negligence, sec. 197; Wood on Master & Servant, sec. 350). See also *Jones v. Florence Min. Co.*, 66 Wis. 268, 28 N. W. 207, 57 Am. Rep. 269; *Springfield Cons. Ry. Co. v. Welch*, 155 Ill. 511, 40 N. E. 1034. . . . While it is true, perhaps, that these instructions might have been more skillfully drawn, they correctly state the law in this state, and the jury could not have been deceived or misled by them."

64—*C. C. Ry. Co. v. Toohey*, 196 Ill. 410 (418), 63 N. E. 997, 53 L. R. A. 270. "We are of opinion that there was no error in giving this instruction in analogy to the rule in law which exempts children under seven years of age from criminal responsibility, that up to the age of seven years 'a child is in-

capable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law.' (*C. C. Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.) The rule has its basis in the well-known immaturity of a child of such tender years" (p. 427).

65—*No. Texas Con. Co. v. Bostwick*, 83 Tex. Civ. App. 12, 80 S. W. 109 (110).

"If the plaintiff was possessed of sufficient knowledge and discretion to understand the danger to himself of being in appellant's gin house while its machinery was being operated, the law of contributory negligence applicable to an adult was applicable to him; while on the other hand, if he was not possessed of such knowledge and discretion, a different rule, as announced by the charge, should be applied. But whether the charge is to be defended upon this ground or not, we think it a very clear statement of the rule of contributory negligence when applied to a child of tender years, and therefore unobjectionable in the present case."

and capacity. You heard the testimony as to his age; you saw him when he was upon the stand; and, in passing upon what degree of care he should have exercised on that occasion, you may take into consideration his appearance on the stand, his manner of testifying, and the capacity that he exhibited while a witness on the stand. As I stated to you, the care that the law requires of him was that care which might be reasonably expected of a person of his age and capacity.⁶⁶

§ 1355. Same Subject—Failure of Infant Plaintiff to Use Adequate Care. (a) Although the jury may believe from the evidence the defendant was guilty of negligence, still if they shall further believe from the evidence plaintiff failed to exercise that degree of care and caution which persons of his age, capacity and experience may reasonably be expected to use, in the same situation and under like circumstances, and that but for the failure to use such care and caution the injury to him would not have occurred, the plaintiff was guilty of contributory negligence, and the law is for the defendant, and the jury should so find.⁶⁷

(b) The court instructs the jury, if they believe from the evidence that S. W., the infant plaintiff, was warned of the danger in playing upon the hand car, and was of sufficient intelligence to comprehend the danger incident to doing so, yet he persisted in playing with said machine, the court instructs the jury that such action on his part amounts to contributory negligence such as will bar his right of recovery, although they may further believe that it was grossly negligent in the defendant company to leave said machine where it was left.⁶⁸

(c) If the jury believe from the evidence in this case that the plaintiff at the time of the injury complained of, had sufficient age and sufficient intelligence and experience to properly apprehend and understand the risks he took in jumping on to the rear of a passing wagon and thus remaining and riding, then you are instructed that the law charges him with the same responsibility for his conduct as if he were of full age, and that want of ordinary care on the part of the plaintiff, if shown by the evidence, would be a complete defence to his suit, the same as if he were of full age.⁶⁹

(d) The jury are instructed that, while a minor is not required to exercise the same degree of care and prudence for his or her safety which is required of a person of mature age, yet he or she is required to exercise such ordinary care for his or her own safety as is commonly exercised by one of like years, experience and intelligence. Unless the plaintiff in this case has proven by a preponderance of the evidence that she did exercise such degree of care for

66—Georgia, C. & N. Ry. Co. v. Watkins, 97 Ga. 381, 24 S. E. 34 (35).

67—I. C. R. R. Co. v. Wilson, 23 Ky. L. 684, 63 S. W. 608.

68—I. C. R. R. Co. v. Wilson, supra.

69—Ill. Iron & M. Co. v. Webber, 196 Ill. 526 (535), 63 N. E. 1008.

her own safety at the time of the alleged injury, the jury should find for the defendant.⁷⁰

(e) The mere fact that there is negligence shown by the plaintiffs to have existed on the part of the defendant or the defendant's servant would not entitle the plaintiffs to a verdict, if there was negligence on the part of the plaintiff which contributed to bring about the accident. Negligence, to be a subject of recovery, must be the cause of the injuries which are complained of; and, if those injuries are brought about by carelessness on the part of the man who is injured, the consequences and the results of the injuries lie just where they have fallen. So that if you come to the conclusion that, under the circumstances here, the defendant's driver was guilty of negligence, you are confronted with the question whether the boy, ———, himself, was careless, and whether he failed to take that care for his safety which, under the circumstances in question, he or any boy of his age of an equal degree of intelligence with that possessed by him would have taken. Was he inattentive to what was before him? Did he shut his eyes to that which he was bound to see and which was obvious? If he was lacking in the degree which you have a right to expect from him under the circumstances, and if his failure to take care of himself contributed to bring about his injuries, neither he nor his father are entitled to any damages.⁷¹

§ 1356. **Intoxication as Contributory Negligence.** (a) The court instructs the jury, as a matter of law, that a man cannot voluntarily place himself in a condition, whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and by such loss of control contribute to an injury to himself, and then hold one ignorant of his condition liable in damages. And if you believe, from the evidence, that at the time of the alleged injury, the plaintiff was so intoxicated, that he had lost control of his brain or muscles as an ordinarily prudent and cautious man in the full possession of his faculties would exercise under similar circumstances, and that the defendants were ignorant of such condition, and if you further find, from the evidence, that such intoxication contributed to the alleged injury, then the plaintiff cannot recover.⁷²

(b) Since a person, when intoxicated, is less likely to use ordinary care in a given instance than when he is sober, it is always proper to inquire into his condition in this respect. If he has been called upon to use such care, and if it is found that at the time he was intoxicated, this circumstance may be considered upon the question whether he did in fact use ordinary care at the time in question.⁷³

70—Lieserowitz v. W. C. St. R. R. Co., 80 Ill. App. 248 (255).

71—Foote v. American Pro. Co., 201 Pa. 510, 51 Atl. 364 (365).

72—Strand v. C. & W. M. Ry. Co., 67 Mich. 380, 34 N. W. 715.

73—Guertin v. Town of Hudson, 71 N. H. 505, 53 Atl. 736 (738).

"The instruction of the court on the question of intoxication, taken as a whole, was in accordance with the law." Stuart v.

§ 1357. **Defective Hearing.** (a) You are instructed that wherever, in any of the instructions, you are told that J. H. was bound to exercise due care for his safety, it is meant that the law required him to exercise the degree of care that a reasonably prudent person in possession of the ordinary senses and capacities would have exercised under the facts and circumstances in evidence. If you believe he was old or hard of hearing, yet that did not excuse him from the duty to exercise the full degree of care, as above explained.

(b) You are instructed that if you believe the plaintiff was old or his hearing defective, yet that would not excuse him from the obligation to exercise due care. He was bound to exercise that degree of care that an ordinarily prudent person would have exercised under the circumstances shown in evidence, and the law is that any defect in hearing not only did not excuse him from the exercise of care, but it required of him the greater use of his other senses to discover whether a car was approaching. If he failed to exercise such care then he cannot recover and your verdict should be not guilty.⁷⁴

§ 1358. **Contributory Negligence—Effect of Terror in Sudden Emergency.** The court instructs the jury that if they believe from the evidence that W. H. F., through the negligence of the defendant, was in terror of an emergency for which he was not responsible, and for which the defendant was,—he acted wildly and negligently, and lost his life in consequence,—said negligent conduct, under such circumstances, is not contributory negligence. In such case the negligent act of the defendant is the proximate cause of the injury.⁷⁵

§ 1359. **Danger Must Be Impending for Contributory Negligence to Be a Defense.** The duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence. Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should be reasonably apprehended, would not preclude a recovery, but would authorize a jury to diminish the damages in proportion to the fault of the person injured.⁷⁶

Machias Port, 48 Me. 477; Alger v. Lowell, 3 Allen 402; Thorp v. Town of Brookfield, 36 Conn. 320; Kingston v. Ft. W. & E. R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 138e; Thomp. Neg. §§ 340, 452, 494.

74—T. P. & W. Ry. Co. v. Hammett, 220 Ill. 9, 77 N. E. 72.

75—B. & O. R. R. Co. v. Few's Exr., 94 Va. 82, 26 S. E. 406 (407).

76—Atlanta K. & N. Ry. Co. v. Gardner, 122 Ga. 82, 49 So. 818 (820, 821, 822).

"We do not think that there is

any merit in the exception that this charge, 'without qualification or further explanation, was calculated to mislead the jury, and was an expression of opinion that the danger was not impending, and should not have been apprehended by the plaintiff, at the time she was injured.' There was no expression of opinion involved in the charge, and we do not see how the jury could have been misled into believing that there was. The failure of the court to distinctly charge the principle that

§ 1360. **Injury After Defendant Saw Danger in Time to Avert It—Willful or Wanton Defined.** (a) If you believe, from the evidence, that the defendant, or its servants, were guilty of negligence, as explained in these instructions, upon the occasion referred to, and that the plaintiff was injured thereby, as stated in the declaration, and that he has sustained damage by reason thereof; and also that the plaintiff was himself guilty of slight negligence, which contributed to the injury, and without which the accident would not have happened, still the defendant would be liable in this case; provided, you further believe, from the evidence, that the servants of the defendant saw the danger, to which the plaintiff was exposed, in time to have averted it, and by the exercise of ordinary care and prudence could have prevented the injury.⁷⁷

(b) The court instructs the jury that what is meant by willful and wanton misconduct is such conduct as amounts to an intentional wrong, or of such a reckless character, as shows that the person or persons, guilty of such misconduct, were at the time acting in such manner, as shows that they had an utter disregard for the safety and lives of other persons.⁷⁸

§ 1361. **Burden of Proof as to Contributory Negligence—States Holding Burden Is on Plaintiff to Prove Freedom from Contributory Negligence.** (a) The jury are instructed that before the plaintiff can recover a verdict in this case, the law requires him to prove by a preponderance of evidence that at the time he received the injury complained of he was exercising that degree of care and caution which a reasonable, prudent and cautious man would have exercised under like circumstances, and in the situation that plaintiff was placed, as shown by the evidence; and if the jury believe, from the evidence, that the plaintiff at the time he received the injury complained of did not exercise such care and caution for his personal safety, he cannot recover in this action, and your verdict should be for the defendant.⁷⁹

the plaintiff could not recover if she could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, did not make the charge here excepted to erroneous. The failure to give this principle in charge at all has been properly excepted to in another ground of the motion, which we will hereinafter consider. . . ."

"The law of contributory negligence is not applicable to a case in which the facts show that the person injured did not fail to exercise ordinary care before the negligence of the defendant was either apparent or should have been apprehended by him, and could not after that time have avoided the consequence of such

negligence by the exercise of ordinary care. This we understand to be the doctrine laid down in *Western & Atlantic Railroad Company v. Ferguson*, 113 Ga. 708, 39 S. E. 305, 54 L. R. A. 802."

77—Wharton on Neg., § 301; Cooley on Torts (3d Ed.) 1443; *Harlan v. St. Louis, etc., Rd. Co.*, 65 Mo. 22; *Floyd v. Paducah R. & L. Co.*, 24 Ky. L. R. 2364, 73 S. W. 1122; *Norfolk & W. R. Co. v. Spencer's Adm'r*, 104 Va. 657, 52 S. E. 310.

78—I. C. R. R. Co. v. *Leiner*, 202 Ill. 624, aff'd 103 Ill. App. 438, 67 N. E. 398, 95 Am. St. Rep. 266.

79—*Donley v. Dougherty*, 75 Ill. App. 379 (382), aff'd 174 Ill. 582, 51 N. E. 714.

(b) The court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty of the specific negligence charged in the declaration, or in some count thereof, but the burden is upon the plaintiff to prove that the defendants are guilty, and also to prove that he himself was in the exercise of ordinary care for his own safety, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict, the jury should adhere to said rule.⁸⁰

(c) The court instructs the jury that the burden is upon the plaintiff to prove, by the greater weight of the evidence, not only the negligence of the defendant as charged in the declaration, but also to prove by the greater weight of the evidence that the deceased was free from negligence which contributed to the collision which caused his death, and if you find from all the evidence in this case that the plaintiff has not so proven both of said facts, then you should find the defendant not guilty.⁸¹

(d) The jury are further instructed that the burden is on the plaintiff to prove by a preponderance of the evidence that he was exercising such care and caution for his safety in going on to the north part of this viaduct while it was being repaired in view of the condition existing at that place at the time in question as could be reasonably expected from a boy of his age and intelligence.⁸²

§ 1362. **Same Subject—States Holding Burden of Proof Is on Defendant to Establish Plaintiff's Contributory Negligence.** (a) The burden of proof in this action is upon the plaintiff to establish by competent evidence every material allegation of his petition; and, the defendant in his answer having alleged contributory negligence on the part of the plaintiff, the burden of proof is upon the defendant to establish this allegation by a preponderance of the evidence, unless you find from the plaintiff's own testimony that he was guilty of contributory negligence.⁸³

80—C. U. T. Co. v. Mee, 218 Ill. 9, 75 N. E. 800.

81—C. B. & Q. R. R. Co. v. Appell, 103 Ill. App. 185 (187, 188).

"That this instruction stated the law correctly can not be questioned. We do not find that the principle of law sought to be presented to the jury by this instruction is fully covered by another instruction, and appellant therefore had a right to have it go to the jury."

82—Chicago v. Walter, 93 Ill. App. 228 (230).

83—Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890.

"In Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113, this court held

that, 'in an action for negligence where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant.' That decision was rendered after a very careful examination of the authorities for and against the proposition, and the conclusion reached in our view is right, and will be adhered to. The doctrine of that case, however, can have no application where the plaintiff in his testimony has stated facts from which the jury could find that his own negligence had contributed to the injury. This element is entirely

(b) If you believe, from the evidence, that the carelessness and negligence, if any there was, on the part of the plaintiff contributed to the alleged injury complained of, I instruct you that the plaintiff in this action cannot recover; but the burden of proof is upon the defendant to show that the plaintiff was guilty of contributory negligence, if any there was, and the defendant must prove that fact by a fair preponderance of the evidence.⁸⁴

(c) If you should find that the injuries occurred by reason of any negligence on the part of the defendants, then the plaintiff is entitled to recover, unless it affirmatively appears by a preponderance of evidence on that point that the plaintiff was guilty himself of negligence which contributed to the injuries in question. The question of contributory negligence of the plaintiff is a matter of defense, which must be affirmatively established by a fair preponderance of evidence. If, on this question of contributory negligence you should find that the evidence was equally balanced, then upon that question you would have to find in favor of the plaintiff.⁸⁵

§ 1363. Imputed Negligence—Rule in Ohio. The court instructs the jury that the doctrine of imputed negligence does not prevail in the state of Ohio; and if you find that X. died through the wrongful act, neglect or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action in this case by reason of contributory negligence on the part of her husband or any one else, unless such person was acting as her agent at the time.⁸⁶

§ 1364. Same Subject—Negligence as Regards Children. (a) The jury are instructed, that negligence is the omission of such care or

ignored in the instruction given. The court, therefore, should have added to the instruction the qualification, 'unless you find from the plaintiff's own testimony that he was guilty of contributory negligence,' this would have adapted the instruction to the evidence."

84—*Van Camp H. & I. Co. v. O'Brien*, 28 Ind. App. 152, 62 N. E. 464.

85—*Parsons v. Lyman*, 71 Minn. 34, 73 N. W. 634.

"The propositions stated in the request were clear, precise and intelligible. As abstract statements of the law, they were correct. The objection to the instruction embodied in the request could not have been that the language was obscure or ambiguous, but, rather, that it might not be properly applied by the jury to the evidence, without something further and explanatory. That the jury might not fully

appreciate that plaintiff's contributory negligence could be as well established by his own evidence if it appeared therein as by that of his adversary was no justification for the refusal to instruct as requested, and, evidently, was not the reason for the refusal. If it was feared that the abstract propositions found in the request might not be correctly applied by the jury to the facts as proven, the court, of its own motion, or upon the suggestion of counsel, could easily have instructed upon this point, and should have done so. As the rejected request contained a pertinent and material instruction, and the ground was not covered elsewhere in the charge, but, on the contrary, the jury was incorrectly charged, there was error for which a new trial must be had."

86—*Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 548.

caution, as persons of ordinary prudence usually exercise or deem sufficient, under the same or similar circumstances of the case. And in this case, if the jury believe, from the evidence, that the child in question was injured through the negligence of the defendant, as charged in the declaration, then it will be for the jury to determine, from the evidence, whether the parents of the child were in the exercise of ordinary care and prudence, for the safety of the child, regard being had to his age and intelligence and all the surrounding circumstances.⁸⁷

(b) The jury are instructed that, if they believe, from the evidence, that deceased, at the time of his injury, from his age, required the care and oversight of some older person in order to insure his personal safety, and further, that at the time of the injury reasonable care and oversight were not exercised by the parents (or either of them) of the child for its personal safety, and that such want of reasonable care contributed directly to the injury, then the plaintiff cannot recover.⁸⁸

(c) Where the parents of an infant or a child, too young to be allowed on the public streets alone, are unable to give him their personal care, but do intrust him to the care and supervision of a suit-

"The court below was asked to apply the familiar principle of contributory negligence as a defense to the plaintiff's action. To do this it became necessary in case the jury should find the wife without fault, to insist that the negligence of the husband contributed with that of the defendant to produce the injury complained of. This defense necessarily involved the assumption either that the husband was the agent of the wife, or that, by reason of their marital relations, his negligence was to be imputed to her. The contention now is that the doctrine of imputed negligence still prevails in Ohio, so far as relates to husband and wife. In *Bellefontaine & Ind. R. R. Co. v. Snyder*, 18 Ohio St. 399, it was held that the negligence of a parent or custodian of a child cannot be imputed to the child to bar its right of action against others for injuries resulting from their wrongful acts. Again, it was said by this court in *Cleveland, C. & C. R. R. Co. v. Manson*, 30 Ohio St. 451, (first paragraph of the syllabus): 'The doctrine of imputed negligence does not prevail in Ohio; and a child of tender years, injured by the fault of another is not deprived of a right of action by reason of contributory

negligence on the part of a parent or guardian. In *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, it was held that in an action by a railroad passenger (without fault himself) for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury. In *Street Railway Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519, a minor fully capable of taking reasonable care of herself was riding with her father in his wagon, when she was injured by a collision between the wagon and street car, caused by the mutual negligence of her father and a street car driver, but without fault on her part. It was held that her father's negligence was not to be imputed to her to bar her recovery against the street car company."

87—*Johnson's Adm'r. etc., v. Chi. & N. W. Ry. Co.*, 49 Wis. 529, 5 N. W. 886.

88—*True & True Co. v. Woda*, 201 Ill. 315, 66 N. E. 369, aff'g 104 Ill. App. 15; *J. M. & L. Rd. Co. v. Bowen*, 40 Ind. 545.

able person, the negligence of the latter cannot be imputed to the parents nor to the child.⁸⁹

(d) As pertinent to the question of reasonable care, regarding the child, the jury may consider whether it appears, from the evidence, that he was of such tender years as to need, for his personal safety, the care and oversight of some older person; and, if the jury so find, from the evidence, then they should inquire whether it appears, from the evidence, that at the time of the accident some older person was exercising such care and oversight over the person of the child, as ordinarily judicious and careful persons, having the care of children of like age, usually exercise over them.⁹⁰

§ 1365. Parties to Action for Negligence—Several Defendants.

(a) The court instructs the jury that notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants which negligence resulted in injury to plaintiff, as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence.⁹¹

(b) If the jury believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of his declaration by a preponderance of the evidence, and if the jury believe, from the evidence, that the plaintiff was injured as alleged, and if you believe, from the evidence, that the plaintiff at the time of such injury was in the exercise of reasonable care for his safety, and if you further believe, from the evidence, that such injury, if proved, was caused by or through the negligence of the defendants, or either of them, as alleged in either count of the declaration, then the plaintiff is entitled to recover from the defendant or defendants proven guilty such damages as you believe, from the evidence, will compensate him for the injury sustained.⁹²

§ 1366. Corporation Has Same Status as Individual. You are instructed by the court that it is your imperative duty to try this case and decide the same as if it was a suit between two individuals. The fact that the person injured was a boy, and the defendant a corpora-

89—Walters v. C., R. I. & P. Rd. Co., 41 Ia. 71.

90—Evansville, etc., Rd. Co. v. Wolf, 59 Ind. 89.

91—Carson v. Southern Ry. Co., 68 S. C. 55, 46 S. E. 525 (532).

92—Chi. Telephone Co. v. Hiller, 106 Ill. App. 306 (310), aff'd 203 Ill. 518, 68 N. E. 72.

"This instruction was literally correct in stating that if the injury was caused by the negligence

of the defendants or either of them as alleged in either count of the declaration, plaintiff was entitled to recover; for where two defendants are sued for a tort, it is not necessary that both must be found guilty or neither, but one may be found guilty and the other acquitted. C. & W. I. Ry. Co. v. Doan, 93 Ill. App. 247." Aff'd 195 Ill. 168, 62 N. E. 826.

tion, should make no difference with you in the trial of this action. In considering and deciding this cause, you should look solely to the evidence for the facts, and the instructions of the court for the law, in the case, and find your verdict accordingly, without any reference to who is plaintiff and who is defendant. The fact that the plaintiff has brought suit in this action constitutes no ground whatsoever on which to base the presumption that he is entitled to a verdict against the defendant. That he is a poor boy constitutes no reason why the plaintiff should be entitled to a verdict. All these things are outside of what you are to consider.⁹³

§ 1367. **Contractor's Negligence.** (a) The court instructs the jury, as a matter of law, that when work is contracted to be done by a contractor, the owner retaining or exercising no control over the manner of doing the work, and the work is not of itself dangerous, but only becomes so by the negligence of the contractor, then the employer is not liable for injuries resulting from the negligence of the contractor.⁹⁴

(b) Although the jury may believe, from the evidence, that the defendant was the owner of the premises adjoining the sidewalk in question, and that the work on the building and walk was being done for hire, and that a dangerous and unsafe opening had been left in the walk by reason whereof the plaintiff was injured, as alleged, while exercising reasonable care himself, still, if you further believe, from the evidence, that before the time of the alleged injury, the defendant had entered into a written contract with A. & B. for an erection of a building on said premises, and that the said A. & B. were then reputed to be skillful, reliable and competent builders, and that, at the time of the injury, said contractors were in the exclusive possession of said premises and sidewalk, pursuant to the terms of said contract, for the purpose of erecting said building and doing said work, and were not subject to the control or direction of the defendant as to the manner of doing the work, and that the acts charged as the cause of the injury were acts of the said contractors or their employes, and not of the defendant nor of his servants or agents, then the defendant would not be liable for such injury.⁹⁵

(c) That when work is contracted to be done which is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and makes no reasonable effort to guard it himself, then he is negligent, and, if injury results therefrom, he cannot escape liability, on the ground that the work was done by a contractor.⁹⁶

(d) The court instructs the jury, that it is a rule of law that when certain work, and the manner of doing it, are assented to by

93—Pledger v. C., B. & Q. R. Pierrepont v. Loveless, 72 N. Y. Co., 69 Neb. 456, 95 N. W. 1057 211. (1059).

94—Myer v. Hobbs, 57 Ala. 175;

95—Ryan v. Curran, 64 Ind. 345.
96—Wood v. Ind. S. D. 44 Ia. 27; Hale v. Johnson, 80 Ill. 185.

the employer, and damage to a third party must necessarily or naturally result from the work and the manner of doing it, then the employer will be liable. And in this case, if the jury believe, from the evidence, that the defendant employed the said A. B. to blast the rocks in question, for the purpose of getting out the stone from the quarry, and that the said A. B., in pursuance of such contract, did blast out the stone in question, and that plaintiff's property was damaged in consequence of such blasting, then the defendant would be liable for such damage, provided you further believe, from the evidence, that the said A. B. was not guilty of any special negligence or want of ordinary care in doing said work, which resulted in or contributed to such injury.⁹⁷

§ 1368. Effect of Release of Cause of Action by Plaintiff. (a) If you believe from the evidence that on or about the — day of ———, the plaintiff agreed with the defendant upon a compromise of his claim for damages sued on in this case for the sum of \$1, and the promise to employ him for one day as a section foreman, and the further promise of the general claim agent of the defendant company to pay to the plaintiff the full time lost by him on account of his injuries, same to be ascertained by a statement of the attending physician; and if you believe that the plaintiff then and there accepted said promise and agreement, together with the one dollar, and the employment of him for one day as a section foreman, in satisfaction and discharge of his original cause of action on account of his injuries, and that he agreed and expected to look to and demand of the defendant the sum of the time lost by him on account of such injuries, when same were ascertained by his physician, under said promise and agreement, and not to demand of defendant damages on account of his original cause of action, as it stood before such promise and agreement was made—then you will find a verdict for the defendant.⁹⁸

(b) In this case you are instructed that, as a defense, defendant pleads a settlement and release made with the plaintiff, and, in avoidance of such settlement and release, the plaintiff claims that, when such settlement was made and such release executed, he did not have the mental capacity to do such things, and you are instructed to return a verdict for the defendant unless you believe from the evidence that, at the time plaintiff made such settlement and executed such release, he was mentally incapable of understanding the nature and effect of such settlement and release.

§ 1369. Release Obtained by Fraud or Misrepresentation. The court instructs the jury that if they find and believe from the evidence that the plaintiff is an ignorant and illiterate woman, and that within a few days after her injury defendant's claim agent called on

97—Tiffin v. McCormack, 34 Ohio St. 638. Minter, — Tex. Civ. App. —, 85 S. W. 477 (479).

98—Gulf, C. & S. F. Ry. Co. v.

her, and repeated his visits to her during the succeeding week, and induced her to accept from him the sum of ten dollars (\$10), by representing to her that the defendant could not be compelled by law to pay her anything, but that it had authorized him to give her five dollars (\$5) as a gratuity, and that he himself would add five dollars (\$5) to that amount, and desired her to sign a receipt so that he could show defendant that he had paid out this money, and if you believe that when plaintiff signed said release she did not understand its contents or character, and thought it was a receipt, and not a release of her rights, and that its nature was misrepresented (as above stated) to her by defendant's agent, then said release is invalid and constituted no defense to this suit.⁹⁹

99—Austin v. St. L. Transit Co., 115 Mo. App. 146, 91 S. W. 450.

"This instruction authorized the jury to find for the plaintiff if they found that defendant's claim agent made false representations to plaintiff, representations which

he knew to be false, and that the representations were believed to be true by plaintiff and were relied on by her; and we can see no objection to it or just ground for criticism."

CHAPTER LXIII.

NEGLIGENCE—MASTER AND SERVANT.

See Erroneous Instructions, same chapter head, Vol. III.

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PART I.

LIABILITY OF MASTER FOR ACTS OF SERVANT.

§ 1370. Master Liable for Negligence of Servant. (a) The master is civilly liable for the tortious acts of his servants, whether of omission or commission; or whether negligent, fraudulent or deceitful, if done in the course of his employment, even though the master did not authorize or know of such acts, or may have forbidden them. But the act must be done, not only while the servant is engaged in the service he is employed to render, but it must pertain to the particular duties of that employment.¹

(b) The court instructs you, that where a tort or wrong is committed by an agent or employe, in the course of his employment, and while pursuing the business of his employer, the employer will be liable for the damages resulting from the wrongful act, although it is done without the employer's knowledge or consent, unless the wrongful act is a willful departure from such employment or business.²

§ 1371. Liable for the Torts of Servants, When. Railroad companies are responsible to passengers for the unlawful acts of their servants and agents employed in running their trains, when such wrongful acts are committed in connection with the business intrusted to them, and spring from, or grow immediately out of, such business.³

§ 1372. Liability of Master for Malicious, Vexatious or Wanton Acts of Servants. (a) The jury are charged that unless they are reasonably satisfied from the evidence before them in this case that the assault and battery alleged to have been committed by C. upon the plaintiff in this cause was committed in the attempt of said C. to collect a fee alleged to be due from the plaintiff as a tax payer, which said fee the said C. by virtue of his employment as a deputy tax collector was authorized to collect, and which was an unlawful charge against the plaintiff they must find for the defendant.

(b) The jury are charged that if they shall be reasonably satisfied from the evidence that the alleged assault and battery by C.

1—Snyder v. Hannibal Rd. Co., 60 Mo. 413; Robinson v. Webb, 11 Bush (Ky.) 464; Eckert v. St. Louis, etc., 2 Mo. App. 36.

2—Cooley on Torts (3d Ed.) 1017 et seq.; 1 Add. on Torts 31; Goddard v. Grand Trunk R. R. Co., 57 Me. 202; Phlla., etc., R. R. Co.

v. Derby, 14 How. U. S. 468; Bryant v. Rich, 106 Mass. 180; Ind. R. R. Co. v. Anthony, 43 Ind. 183.

3—Gasway v. Atlanta, etc., Rd. Co., 58 Ga. 216; Bass v. Chicago, etc., Rd. Co., 42 Wis. 654; Brown v. Hannibal, etc., Rd. Co., 66 Mo. 588.

upon the plaintiff in this cause was the result of malice, vexation or wantonness on the part of said C., they must find a verdict for the defendant, notwithstanding the fact that the said C. was in the employ of the defendant when he so assaulted and beat the plaintiff, unless they shall be reasonably satisfied from the evidence that the defendant authorized or participated in such act, or that said assault was committed while acting within the scope of the employment of said C.⁴

§ 1373. **Wrongful Act of Servant.** If the jury believe, from the evidence, that defendant's engineer, with intent to frighten plaintiff's horses, unnecessarily and wantonly let off steam or blew a whistle, and thereby frightened plaintiff's horses, so that they ran off and injured him while he was in the exercise of all reasonable care and prudence in that behalf, then the defendant is guilty, and the jury should find for the plaintiff.⁵

§ 1374. **Authority of Watchman to Guard Premises Does Not Include Authority to Shoot Trespassers.** (a) If you believe, from the evidence in this case, that the plaintiff, after being ordered to leave the premises of the defendant, immediately started peaceably to do so, without opposing or resisting the watchman, and that the plaintiff continued thus to go toward the fence alongside defendant's railway, and that just as he neared such fence or was about to step over the same, the watchman wantonly without lawful excuse or authority, and merely to satisfy some personal spite or feeling of anger toward the plaintiff or his companions, fired the pistol toward the plaintiff, and inflicted the wound of which the plaintiff complains in this case, and that such act on the part of the watchman was not necessary or proper to the protection of the cars inside the yards nor done in the performance of any duty in that respect, the plaintiff is not entitled to recover in this case, and your verdict should be for the defendant.

(b) The court instructs you that the law is that the master is not responsible for the acts of the servant done outside of the master's business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you believe from the evidence that the plaintiff A. B. was peaceably leaving the railroad property of the defendant, and was not threatening defendant's property nor refusing to go promptly outside its right of way, nor interfering in any way with the performance by the watchman of his duties in the defendant's railroad

4—Approved, *Case v. Hulsebush*, 122 Ala. 212, 26 So. 155. In some jurisdictions the use of the words "reasonably satisfied" have been held erroneous as requiring more

than a preponderance of the evidence.

5—*Toledo, etc., Rd. Co. v. Harmon*, 47 Ill. 298.

yard, and that, under these circumstances, the watchman fired the shot that struck the plaintiff for some purpose of his own, the plaintiff cannot recover in this case, and your verdict must be for the defendant.⁶

§ 1375. **Band Director Not Liable for Injury by Beer Bottle Carelessly Dropped by Band Member.** If members of the band were drinking beer on the platform, and one of them carelessly dropped the bottle which injured the plaintiff, the defendant would not be liable.⁷

PART II.

LIABILITY OF MASTERS TO SERVANTS.

IN GENERAL.

§ 1376. Master and Servant—Master Liable to Servant, When.

(a) The jury are instructed, that a master or employer is bound to use reasonable care, skill and judgment to furnish suitable machinery and implements, properly constructed, and ordinarily skillful and trustworthy agents or workmen; and if the employer does not use such care, skill and judgment, and injury results therefrom to an employe, the employer will be liable for such injury.

6—Belt Ry. Co. v. Banicky, 102 Ill. App. 642 (647-8-9).

"Appellee was a trespasser upon appellant's premises. A master is liable for the act of his servant done in the course of his employment about his master's business. Wood on Master & Servant, p. 522. The master is in this State responsible for acts of the servant done within the general scope of his employment while engaged in his master's business with the view to the furtherance of that business, whether he acts willfully or wantonly. A master is not liable for acts of his servant not within the scope of his employment. Tuller v. Voght, 13 Ill. 277-285; Oxford v. Peter, 28 Ill. 434; C. M. & St. P. Ry. Co. v. West, 125 Ill. 320-323, 17 N. E. 788, 8 Am. St. Rep. 380; N. C. C. Ry. Co. v. Gastka, 128 Ill. 613-617, 21 N. E. 522, 4 L. R. A. 481; C. B. & Q. Ry. Co. v. Casey, 9 Ill. App. 632; Foster, Extrs. v. The Essex Bank, 17 Mass. 478-508-510; The Mechanics Bank v. Bank of Columbia, 5 Wheaton (N. Y.) 326; Bolinbroke v. Swindon Local Board, 8 Ad. & Ellis, 512; Bailey v. Manchester Ry. Co., L. R. 7

C. P. 420; Evans Ewell on Agency, 489 marginal paging; Wood on Master & Servant, 522; 9th ed. Story on Agency, sec. 456-456a; Vol. 14, pages 818-25, 1st ed., Am. & Eng. Ency. of Law; Thames Steamboat Co. v. Housatonic Ry. Co., 24 Conn. 40-53-54-56, 63 Am. Dec. 154; McCann v. Tillinghast, 140 Mass. 327, 5 N. E. 164; Cleveland v. Newson, 45 Mich. 621, 7 N. W. 222; Cantrill v. Colwell, new ed. 40 Tenn. 471; Golden v. Newbrand, 52 Ill. 59, 35 Am. Rep. 257.

"The mere employment of a watchman to guard property and keep away trespassers does not involve an authority to shoot trespassers. An authority for such shooting cannot be presumed.

"The shooting of a trespasser who is actually leaving the premises is not within the general or implied authority of a mere watchman."

7—Williams v. Mineral City P. Ass'n, 128 Iowa 32, 102 N. W. 783 (784).

"Certainly the mere fact that a member of the band whether he was the employe of the defendant, or of the band director, carelessly dropped a bottle upon the plaintiff,

(b) While a master is not an insurer that the servants he employs are skillful and prudent, or that the workmanship or materials employed in his business are absolutely proper or suitable, yet he is bound to use all reasonable care and skill in their selection and construction, so far as regards the safety of the persons in his employ.⁸

(c) The court instructs the jury that it is a positive duty which the master owes to his employe to furnish such employe with reasonably suitable and safe machinery, means and appliances for doing the work which the servant is employed to do, and to provide him a reasonably safe place in which to work; that this duty being one which the master is positively bound to perform in the first instance, he cannot be excused from its performance by intrusting it to another charged with the duty to make performance for him, but who neglects to discharge that duty.

(d) If the master furnishes his employe with adequate machinery, means and appliances and a safe place for the performance of his work, exercises reasonable care in keeping them in order and proper repair, and provides competent fellow servants, then the master is not responsible to one servant for the negligence of another servant in the management and use of the machinery and appliances furnished for performing his work.

(e) If then, one servant shall be injured through the negligence of a fellow servant while at work in the line of his employment, this is considered a risk incident to the employment, and the master is not liable.⁹

§ 1377. Reasonable Care Only Required for Safety of Employes.

(a) As respects the duty of a master or employer towards a servant

would not sustain a charge of negligence against the defendant. The negligence of the servant for which the master must respond to a third person is negligence in some act or failure to act within the scope of his employment. This is elementary and requires no citation of authorities. So far as the record shows, the employment of the band was for no other purpose than to provide music for the occasion, and ordinarily at least, the relation of beer to harmony of sound is not so obvious or necessary that the passing of bottles between members can be said to be within the scope of a musician's employment. We are unable to see how the instruction complained of could in any manner have prejudiced the plaintiff's case."

8—Shearm. & Red on Neg., § 89-92; Noyes v. Smith, 28 Vt. 59; Buzzell v. Laconia, etc., Co., 48 Me. 113; McGatrick v. Wason, 4

Ohio St. 566; Lewis v. St. Louis, etc., Rd. Co., 59 Mo. 496; Baxter v. Roberts, 44 Cal. 187; Ackerson v. Dennison, 117 Mass. 407; Strahlendorf v. Rosenthal, 30 Wis. 674; Richardson v. Cooper, 88 Ill. 270.

9—Metzler v. McKenzie, 34 Wash. 470, 76 Pac. 114 (115).

"Many illustrations of the application of these principles of law are furnished by the decisions. The following are some of the decisions by this court bearing on these propositions of law which may be cited in this connection: McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370; Allend v. Spokane Falls & N. Ry. Co., 21 Wash. 324, 58 Pac. 244; Shannon v. Cons., etc., Mining Co., 24 Wash. 119, 64 Pac. 169; Hammarberg v. St. Paul, etc., Lumber Co., 19 Wash. 537, 53 Pac. 727; Towle v. Stimson Mill Co., 33 Wash. 305, 74 Pac. 471."

or employe, in his service, the court instructs the jury, as a matter of law, that the master, or employer, is not bound to provide machinery which is absolutely safe. The law imposes on the master, or employer, only the obligation to use reasonable and ordinary care, skill and diligence, in procuring and furnishing suitable and safe machinery.¹⁰

(b) A master, such as the defendant, is bound to use ordinary and reasonable care to prevent injury to its servant, such as plaintiff, in the course of his employment; and if the master does not do this, and if the servant is injured in consequence of such failure so to do on part of the master, the latter will be answerable for the damages directly and approximately occasioned thereby.¹¹

(c) The court instructs the jury that the measure of care which should have been taken by the defendant company to avoid a responsibility of the injury to the said B. is that which a person of ordinary care, prudence and caution would use if his own interests were to be affected, or the whole of the risk were his own. It is such care as a person of ordinary prudence would exercise under the circumstances surrounding the accident at the time of the injury.¹²

(d) The jury are instructed that it is the law that the mere fact that the plaintiff in this case was at the time of the accident in the employ of the defendant, did not imply an obligation on the part of the defendant to take more than ordinary care for plaintiff's safety; it was only bound to use ordinary care, and the plaintiff was bound to use ordinary care for his own safety. The law required that both parties should use ordinary care.¹³

§ 1378. Servant's Right to Presume Master Has Performed Duty with Ordinary Care. The court instructs the jury that the servant has a right to presume that the master has performed his duty with ordinary care.¹⁴

§ 1379. Master Not An Insurer of Servant's Safety. (a) The court instructs the jury that the defendant was not an insurer of the plaintiff's safety at the time and place here in question; and you are further instructed that you cannot infer or presume that the defendant was negligent at said time and place, or find a verdict in the plaintiff's favor, from the mere fact, if it be a fact, that the spike

10—Wharton on Neg. § 205; Wright v. The N. Y. Cent. Rd. Co., 25 N. Y. 562; Cooley on Torts (3d Ed.), 1139-1141; Ladd v. New Bedford, etc., Rd. Co., 119 Mass. 412; Indianapolis, etc., Rd. Co. v. Love, 10 Ind. 554; Fort Wayne, etc., v. Gildersleeve, 33 Mich. 137; Camp Point, etc., Co. v. Ballou, 71 Ill. 417.

11—International & G. N. R. Co. v. Trump, — Tex. Civ. App. —, 94 S. W. 903.

12—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (651). "The

above instruction states the law properly, and should have been given."

13—Ill. S. Co. v. Wierzbicky, 107 Ill. App. 69 (77), aff'd 206 Ill. 201, 68 N. E. 1101.

14—M., K. & T. Ry. Co. of Texas v. Crowder, — Tex. Civ. App. —, 55 S. W. 380. "The charge announced the correct principle, and it was not improper for the court to so inform the jury. M. K. & T. Railway Co. v. Gordon, 11 Tex. Civ. App. 672, 33 S. W. 684, and authorities there cited."

maul described by the evidence slipped off of its handle and fell upon the plaintiff's foot and injured it.¹⁵

(b) The court instructs the jury that a railroad company is not an insurer of the lives and limbs of its servants, and it cannot be held liable for an injury sustained by its servants, unless it was guilty of some act of negligence which resulted in the injury, and which was not contributed to by the carelessness or negligence of the servant himself.¹⁶

(c) The court instructs the jury that the defendants were not insurers of the plaintiff against injury while in their employment, and that you cannot find a verdict for him merely because he was injured.

(d) The court instructs the jury that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury, and that the failure to use such care directly contributed to cause his injury, then you will find for the defendants; and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same circumstances.

(e) The court instructs the jury that, in considering its verdict, the jury should not be governed by sympathy for plaintiff because he met with an injury while in defendants' employ, or have any prejudice or feeling either in favor of or against the plaintiff or defendants, but the jury should only, in arriving at its verdict, be governed by the evidence and instructions of the court.¹⁷

(f) An employer is not bound to furnish his employes with absolutely safe materials and appliances. He is not an insurer of the safety of his employes or of the perfection of the materials or appliances upon or with which the employe may labor. But his obligation is to use ordinary and reasonable care to supply reasonably safe materials and appliances; and if the jury believe from the evidence that the defendant furnished ——— with an ingot reasonably cooled and hardened for moving through the air, held by tongs, and that the ingot fell from pure accident, or from any negligence on the part of ———, or because the hold upon the ingot was loosened without negligence of the defendant by reason of striking against, or resting upon, a car, so that the ingot fell over and injured ———, then the jury should bring in a verdict of "not guilty."¹⁸

(g) The jury are instructed that the defendant was not bound as an insurer for the absolute safety and suitability of the machinery and appliances furnished by him for use in his business, and that he was not bound to furnish the very best or most improved kind of machinery to be used in his factory. It was sufficient if the machine

15—*Deckerd v. Wabash R. Co.*, 111 Mo. App. 532, 85 S. W. 982 (1914).

16—*B. & O. S. W. Ry. Co. v. Spaulding*, 21 Ind. App. 323, 52 N. E. 410 (1902). "It stated the law clearly, and we do not know how

it could be more forcibly and explicitly expressed."

17—*Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167 (1912).

18—*Ill. S. Co. v. Trafas*, 69 Ill. App. 87 (1901).

and the pulleys and appliances connected with the same were reasonably safe and suitable for the purpose for which they were used.¹⁹

§ 1380. **Master Not Liable for Mere Accident.** The court instructs the jury that if they shall believe from the evidence that the plaintiff's intestate sustained the injuries complained of as the direct and natural result of an accident, and not as the direct and natural result of the defendant's negligence, they must find for the defendant.²⁰

§ 1381. **Duty of Master to Make Rules for the Guidance of Employees.** It is the duty of the master when the nature of the business required it to make and promulgate rules for the protection of his servants, and to use due care and diligence, after the making and promulgating of a necessary rule to have it enforced; and if you should find from the evidence in this case that the nature of the defendant's business was such as, in the exercise of due care and prudence for the safety of its employees, requiring the making and promulgating of rules, and should further find that the defendant failed to make and promulgate such rules, or having made and promulgated the same failed to use due care and diligence to have them enforced, and should further find that the injuries, if any received by the plaintiff, were caused by such failure, you should find for the plaintiff.²¹

19—*Harsha v. Babicx*, 54 Ill. App. 586 (587 and 588). "The instruction for which defendant asked should have been given. Nothing equivalent thereto was given, and for the error in this regard the judgment must be reversed and the cause remanded."

20—*De Witt's Adm'r v. Louisville & N. R. Co.*, 29 Ky. Law 1161, 96 S. W. 1123. "Taken as a whole, the jury could not have understood that the defendant's negligence was eliminated from their consideration when they were plainly told that the accident must not be the result of defendant's negligence if they would find for it."

21—*Johnson v. U. P. Coal Co.*, 28 Utah 46, 76 Pac. 1089 (1097). "The following rule stated in Barrows on Neg. p. 102, § 40, is generally sustained by both courts and text writers to-wit: 'It is the duty of the master to prescribe and publish such suitable rules as the circumstances may reasonably require for the proper and safe transaction of the business. This duty of the master to protect his servants by making suitable rules for the safe management of the business becomes more imperative

in proportion to the danger and complication of the work but whether any rule at all is required in the exercise of ordinary care in a particular case, or whether the one in effect at the time of the injury was reasonably sufficient are generally questions of fact for the jury. . . . And the master must also exercise ordinary care to see that the rules and regulations are enforced.' A failure upon the part of the master to perform this duty is negligence per se. *Wood on Mast. Liab.* § 403. Whether this duty has been performed depends upon the circumstances of each particular case, and when the evidence, as in this case is such as reasonable men might differ as to whether the duty has been performed, it is a question for the jury. In *Eastwood v. Retsoff Mining Co.*, 86 Hun 91 (96), 34 N. Y. S. 196 (198), the court said: 'It is quite clear in this case that the question whether or not the case was a proper one for requiring the defendant to establish rules for the government of its employees in drawing salt from this bin, when men were engaged inside of it, was one as to which reasonable

§ 1382. Instruction of Servant Ignorant of the Dangers of His Position. If, at the time plaintiff was employed by the agents of the defendant company to operate the engine and drive wheel thereof in question, he was ignorant of the duties of such position and the dangers incident thereto, and if such facts were known to the agent of defendant company who employed him, then it was the duty of such agent to have instructed plaintiff how to operate said engine and drive wheel, and to have warned him of the dangers incident to starting said drive wheel; and if such agent failed so to do, and if such failure was negligence on the part of said agent, and if plaintiff was thereby injured, and if such failure on the part of defendant's agent was the direct cause of such injury, and if plaintiff did not contribute thereto by some negligent acts, as hereinafter explained, you will find for the plaintiff.²²

§ 1383. Employment of Minor in Dangerous Position. (a) Persons who employ children must anticipate the ordinary behaviour of children, and must take notice of their lack of judgment, and must exercise greater care towards and for them than is required by law to be exercised towards and for adult persons.

(b) It is an actionable wrong for a person to place or employ a child of such immature judgment as to be unable to comprehend the danger to work with or about a machine of a dangerous character, likely to produce injury; and in this case if you are satisfied by a preponderance of the evidence that the defendants employed plaintiff at and about a machine of a dangerous character, and one likely to produce injury, and that he was injured while working at and about said machine, and at the time of his injury he was of such immature judgment as to be unable to comprehend the dangerous character of the said machinery, you ought to find for the plaintiff.²³

men might differ. . . . In every case this duty is performed by the exercise of reasonable care in deciding in the first place whether rules are necessary; and in the second place, in making such rules as appear to be sufficient. But the question in either case may be for the jury to determine whether in the first place the company took reasonable care to conclude whether rules were necessary, or in the second place, if they were, whether the rules thus made were proper for the purpose for which they were intended. When the question is whether the case was one in which rules ought to have been made, the fact that other people or corporations engaged in the same business had or had not found it necessary to make rules upon that subject is one that might well be considered. But the fact that no such rules had been

made is not conclusive against the necessity of making them. It is simply a fact to be considered.' Under the circumstances disclosed by the evidence, the instruction under consideration correctly stated the law, and properly submitted to the jury the question as to whether the defendant in respect to the matter of making, promulgating and enforcing necessary rules, was negligent."

22—*Gulf, C. & S. F. Ry. Co. v. Newman*, 27 Tex. Civ. App. 77, 64 S. W. 790.

23—*Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502 (504), 50 Am. St. Rep. 200. "It is argued that these instructions wholly ignore the question of contributory negligence, and are therefore erroneous. It is not necessary that each instruction should contain the whole law of the case, or any branch of the case, with the rec-

§ 1384. **Instruction of Minor by Master.** (a) When the master employs a minor to perform work which is dangerous or hazardous to the person of such minor, it is the duty of the master or employer to explain to such minor the proper manner of performing such work, and also to explain to such minor the dangers and hazards to his person incident to the performance of such work, and how to avoid

ognized exceptions. They should all be considered together, and construed with reference to each other. If an instruction contains a complete statement of a proposition of law, applicable to the facts in a given case, it will be held good as part of a series containing the entire law of the case. The subject of contributory negligence was fully and clearly expounded in other instructions, so this objection is not tenable. It is insisted, further, that these instructions are vicious, in that they declare it to be an actionable wrong to employ an infant in a dangerous position, under any circumstances. They do not bear any such an interpretation, and read in the light of the evidence, and in harmony with the other instructions, they correctly state the law. It should be kept in mind that the complaint proceeds upon two separate and distinct theories. In the first paragraph, the liability of appellants is predicated upon their alleged negligence in the employment of the appellee in a hazardous undertaking, without giving him sufficient instructions to enable him to guard against the dangers; while in the second paragraph it is alleged that the appellee lacked the capacity to understand and appreciate the dangers incident to the service, and was therefore unfit for that kind of work, and the appellants were culpable for engaging him in such work, knowing his incapacity. The instructions complained of are pertinent to the latter theory. The law recognizes the right of a master to employ an infant in hazardous occupation on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend the dangers and understand how to avoid them. But it is an actionable wrong for a master to expose in a hazardous employment one whom he knows to be lacking in capacity to under-

stand and appreciate the dangers surrounding him, however much he may have been instructed. A contrary rule of law would be egregiously inhuman. In the case of *Pitts. C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187, the supreme court said upon this question: 'A neglect of such duties may, in a case, the servant being without contributory negligence, render the master liable, regardless of the fact that he may have exercised reasonable care in making and keeping the premises, machinery and appliances in a safe condition. The person employed may be so young, inexperienced and immature in judgment that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work.' The rule is stated thus in *Shear. & R. Neg* (4th Ed., para. 219: 'And if he (the master) knows, or in the exercise of ordinary care and sagacity would have known, that the servant has not capacity enough to understand the warning and appreciate the danger, he will be liable for an injury which such servant may suffer in consequence, if continued at such work.' See also *Coombs v. Cordage Co.*, 102 Mass. 572; *Hamilton v. R. R. Co.*, 54 Tex. 556; *Hayden v. Manufacturing Co.*, 29 Conn. 548. It would be extremely difficult to formulate an arbitrary rule for the measurement of capacity in such cases; but it may be safely declared that, to justify a master in the employment of an ignorant and inexperienced infant in a hazardous calling, such infant should possess at least sufficient capacity to understand the dangers of the situation, and to appreciate the importance of heeding prudent warnings for his own safety. The question of the appellee's capacity in this case was properly submitted to the jury, and the instructions attacked by the appellants were not erroneous."

such dangers unless the dangers and risks incident to such work are patent and obvious to persons of like age and intelligence of such minor.²⁴

(b) The jury are further instructed that it is the duty of the master who sets a servant to work in a place of danger, or with dangerous machinery or appliances, to give him such notice and instructions as is reasonably required by the youth, inexperience or want of capacity of the servant; and, failing to do so, the master is liable for the damage suffered through such failure.²⁵

(c) It was the duty of the defendant, if he directed the plaintiff's intestate to manage the engine and turn on the steam, or allowed him to do so, in the course of his duties and if the defendant knew that he was young and inexperienced to instruct him as to its danger, and to use due care in directing his attention to the danger, if any, connected with the engine and valve. It would be negligence in the defendant, if he employed a boy 15 years old, without experience, and put him to running an engine without giving him careful instructions how to use it; and if that was the proximate cause of the injury, you should answer the first issue "Yes."

(d) It was the duty of the defendant to exercise due care in the employment of the boy to do such work as that of managing dangerous machinery; that is, was the hiring of a 15 year old boy to run a mill and manage machinery, without warning him of danger, if any, a thing that a prudent business man, under the same circumstances, would do? Was it due care to put the boy in charge of the engine without warning? Would a reasonable and prudent man do it, and if not was that the proximate cause? That's the question.²⁶

(e) If you find from the evidence that he was a minor at the time, but over fourteen years of age, and that when he applied for the position he stated that he knew the duties of a car coupler, and could discharge them, the defendant had the right to accept the statement as true, and act on it; and it would not be under any obligations to instruct the plaintiff as to the dangers attending the work, or as to how to avoid them, unless you should believe from the evidence that

24—Wood v. Texas Cotton P. Co., — Tex. Civ. App., 88 S. W. 496 (497). "It is contended that the duty to warn an inexperienced minor is not limited, as a matter of law, to only dangers which are not patent; that though the danger may be obvious and patent, yet the master should warn and instruct how to avoid it. The rule of law applicable to the question, we think, is clearly expressed by our Supreme Court in the case of the Tex. & Pac. Ry. Co. v. Brick, 83 Tex. 598, 20 S. W. 511."

25—Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569 (573). "It is urged by defendants that above

instruction given for plaintiff, is erroneous, because it assumes the dangerous character of the employment and the inexperience of plaintiff. There is no conflict in the evidence about either of these propositions. They are undisputed."

26—Marcus v. C. D. Loane & Co., 133 N. C. 54, 45 S. E. 354 (355). "The rule laid down by his honor for measuring the defendant's duty, assuming that the jury should find that the deceased was employed to manage the machinery or to run the engine was clearly correct."

the circumstances were such as to require a prudent person, in the exercise of ordinary diligence, to give such instructions.²⁷

(f) You are charged that it is the duty of the plaintiff to use ordinary care in the performance of his duty, and of the employer to take proper precautions for the safety of the employes when working about machinery, especially when such person, through youth, inexperience or want of capacity, may be unable to appreciate or avoid the danger to which he is exposed. Therefore, if you believe from the evidence that the plaintiff was employed to work about machinery which was dangerous, and that defendant knew or should have known of the peril to which the plaintiff would be exposed, and did not give the plaintiff reasonable notice of such danger, and he, without negligence on his part, through inexperience failed to perceive or understand the risk, and the plaintiff was injured, you will find for the plaintiff; otherwise find for the defendant. But the jury are charged that the fact that plaintiff was a minor does not relieve him from using ordinary care for his protection against risks incident to his employment. You are charged that ordinary care is such care that an ordinarily prudent person of the same age and capacity would exercise under the same or similar circumstances.²⁸

(g) The court instructs the jury that if they find from the evidence that the defendant put the plaintiff to work upon the machine, and that the said machine was dangerous to operate, and that the plaintiff had no previous knowledge of the mode of operating said machine or of its dangerous character, and that the defendant did not warn the plaintiff of the dangers incidental to operating said machine, and because of said failure of the defendant to warn or inform the plaintiff of the dangerous character of said machine, and without fault on the part of the plaintiff, the plaintiff was hurt while operating said machine, then the verdict of the jury should be for the plaintiff. Provided the jury further find that the duty of operating the machine was excluded by the contract of employment made with the plaintiff's mother, if the jury shall find the same, and that the plaintiff was at the time a boy of about 14 years of age, and that his father was dead.²⁹

(h) If you find that the place was dangerous, and that the defendant knew, or had reason to know, the peril to which plaintiff would be exposed, and did not give him sufficient or reasonable notice of it, and if he, without any negligence on his part, from youth or inexperience, failed to perceive or appreciate the danger, and was

27—Atlanta & W. P. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763.

28—Bering Mfg. Co. v. Femelat, — Tex. —, 79 S. W. 869 (871).

29—Nat'l E. & S. Co. v. Brady, 93 Md. 646, 49 Atl. 845 (846). "The appellant excepted specially to the granting of this prayer for want of legally sufficient evidence that the

appellee did not know how to operate the machine, or that the accident to him was caused by any failure on the part of appellant to warn him of the dangerous character of the machine. The learned judge below overruled this exception, and his action in so doing meets our approval."

injured in consequence, the defendant is responsible to him, in an action, for such damages as you shall find he has sustained by reason of the injury under the charge.

(i) A party entering upon a particular employment assumes the risk and perils usual thereto, when the usual and customary means to guard against accidents are adopted. If the servant with full knowledge of the danger, and understanding the increased risk occasioned thereby, consents to enter into the employment, then he voluntarily incurs the risk; and, if he suffers damages in consequence of injury received thereby, he will be without remedy. The fact that he remains in the master's employment under such circumstances, and with such knowledge, is what constitutes contributory negligence on his part. In such a case, the master, in permitting his machinery to be thus more than ordinarily dangerous is guilty of negligence; but the servant, with full knowledge thereof, by remaining, contributes thereto, and hence he cannot recover if he has such knowledge.³⁰

§ 1385. **Right to Rely on Representations of Minor as to Experience.** (a) The court instructs the jury that the fact that the deceased was in the employ of the defendant company as coal loader did not prevent the defendant employing the deceased to work as a helper on the mine machine; and if the jury believe from the evidence that said B. H. approached the deceased while he was engaged at his work as coal loader, and inquired of him whether or not he had worked upon a mine machine as helper, and the deceased informed said H. that he had so worked, and upon that information the said H. believed it to be true, and requested the deceased to assist him as a helper in running the machine in room No. 4 to cut it out, and the deceased consented thereto without making any sort of objection, then, although the deceased may have been but 17 years of age, if the jury believe from the evidence that he was possessed of ordinary intelligence, the said H. had the right to rely upon the representations of the deceased to him as to his experience and if, under such circumstances, he entered upon the work of assisting to run said mine machine as a helper, the deceased was required to exercise ordinary care to avoid danger and injury to himself while so at work, and the said H. would not be required to instruct him as to his duties unless it appeared from the manner in which he undertook to perform and did perform the same that he was incapable of doing it for want of knowledge and information as to what the duties of a helper upon a mine machine were.

(b) The court instructs the jury that if they believe from the evidence that the deceased represented to the said H. that he had worked upon a mine machine as a helper, and he consented to work as such helper in running the machine to cut-out room No. 4, and pro-

30—"These instructions were without error." *King v. Ford R. Lbr. Co.*, 93 Mich. 172, 53 N. W. 10 (12).

ceeded to do such work, and if the said H. believed it to be true, and did not discover before his injury any want of capacity in the said B., and the jury believe from the evidence that the said B. was a person of ordinary sense, the defendant cannot be held for the negligence on the part of said B. under such circumstances.³¹

§ 1386. Employing Child without School Certificate in Illinois.

(a) The court instructs you that, if you believe from the evidence before you in this case that the defendants were a firm and were carrying on a factory or manufacturing establishment, as alleged in the plaintiff's declaration; that they employed the plaintiff to work in their said factory or manufacturing establishment by the day, or for a longer period of time than one day, without having been first furnished with a certificate from the board of education or school directors of the school district in which the plaintiff then resided authorizing such employment; that the defendants after such employment put and placed the plaintiff to work at the sawing machine mentioned in the plaintiff's declaration; that the plaintiff at the time of such employment was under the age of thirteen years; that the plaintiff was injured as alleged in the plaintiff's declaration while he was working under such employment at and with the said sawing machine, and in such factory or manufacturing establishment, and while he was under the age of thirteen years, and by reason of being so employed in such factory or manufacturing establishment; and that the plaintiff was at the time he was injured and immediately before, exercising all due and ordinary care (that is such reasonable care as a child of his age might reasonably be expected to exercise), for his own safety, then you will find the defendants guilty and assess the plaintiff's damages at such sum as you find from the evidence will be a just and reasonable compensation for his injuries.

(b) The court instructs you that, if any person, firm or corporation employs a child under the age of thirteen years by the day, or for any greater period of time than one day, in any factory or manufacturing establishment, without a certificate issued by the board of education or the school directors of the school district where such child resides authorizing such employment, then such employment is an act of negligence on the part of such firm, person or corporation so employing such child, and if such child is hurt or injured in such factory or manufacturing establishment while it is so employed, or by reason of being so employed, and while such child is using due and ordinary care (that is, such reasonable care as a child of that age might reasonably be expected to exercise), for its own safety, then the person, firm or corporation so employing such child is legally liable for such injury.³²

31—*McVey v. St. Clair Co.*, 49 W. Va. 412, 38 S. E. 648 (652).

32—*Morris v. Stanfield*, 81 Ill. App. 264 (268). "It is insisted by

appellants that these instructions take from the jury the question of negligence on the part of appellants, if they find, from the evi-

§ 1387. Negligence of Master Not Presumed—Burden of Proof on Plaintiff. Negligence on the part of the defendant is not presumed. It is an affirmative fact, which plaintiff must prove by a preponderance of the evidence, and the negligent act or acts, proved, if any, must be such particular acts as are alleged in the plaintiff's complaint. The burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of the defendant is evenly balanced, or that it preponderates in favor of the defendant, then, in that case the plaintiff cannot recover, and your verdict must be for the defendant—no cause of action.³³

§ 1388. Effect of Admission of Plaintiff that Explosion Was His Fault. The court instructs the jury that, even if they believe from the evidence that defendant S., after the explosion, and injury of the plaintiff, stated or admitted that he was to blame in the matter, or that it was his fault, yet that does not entitle the plaintiff to recover unless the evidence in the case before the jury, including such statements of said S., if the jury believe it was made, under the instruction given by the court, shows that the said S. was negligent, and that his negligence was the direct and proximate cause of the plaintiff's injuries.³⁴

§ 1389. Foreman Assumes Risk of Carelessness of Employes Subject to His Control. (a) The testimony is undisputed that the plaintiff had charge of the wareroom in which said accident occurred, and of the unloading and depositing the merchandise brought into said building, as well as the direction and control of the employes whose duty it was to truck said goods, including all glass therein. If, therefore, you find from the evidence that the said injury was caused by the passageway being obstructed by the employes trucking goods therein, your verdict will be for the defendant, unless you find that

dence, that appellee was under thirteen years of age. Section 77, chapter 38, of the Criminal Code declares, 'that it shall be unlawful for any person, firm or corporation to employ or hire any child under thirteen years of age except as hereinafter provided.' . . . If by reason of this prohibition the employment of a child under thirteen years of age without a certificate, is negligence in law, and the injury occurs in consequence of such employment, there is no error in these instructions. It was held in the case of *T. H. & I. R. Co. v. Voelker*, 129 Ill. 555, 22 N. E. 20, that 'A statute commanding an act to be done creates an absolute duty to perform such act, and the duty of such performance does not depend upon and is not controlled by surrounding circumstances. Non-per-

formance of such statutory duty resulting in injury to another may therefore be presumed to be negligence as a conclusion of law.' To the same effect is *L. S. & M. S. Ry. Co. v. Parker*, 131 Ill. 566, 23 N. E. 237. If the non-performance of a statutory duty resulting in personal injury to another is negligence in law, the doing of something prohibited by statute resulting in personal injury to another must also be negligence in law. There is then no error in stating in the instructions that the employment of a child under the age of thirteen without a certificate from a school board is negligence."

33—*Downey v. Gemini Mining Co.*, 24 Utah 431, 68 Pac. 414 (417), 91 Am. St. Rep. 798.

34—*Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914 (916).

the defendant personally directed the obstruction of said passageway. And the court further instructs you that an order given by the defendant to pile said goods in the north end of the store was not an order to obstruct a permanent passageway therein.

(b) You are further instructed that the foreman and plaintiff in this case not only assumed all ordinary risks of the work he was personally doing, but he also assumed all the risk occasioned by the carelessness of the employes subject to his control, and over whom he was superintendent, while in the performance of their work, and it is therefore the duty of the plaintiff to see that those under his control and direction properly performed their work, and if, owing to the carelessness of said employes under said plaintiff's control in performing their work, said plaintiff was injured, then the plaintiff cannot recover, and your verdict must be for the defendant.³⁵

REASONABLY SAFE PLACE TO WORK.

§ 1390. Master Must Furnish Reasonably Safe Place and Surroundings. (a) The jury are instructed that it was the duty of the defendant in this case to use ordinary care and prudence in furnishing to the plaintiff at and before the time of the accident complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use reasonable care to maintain and keep such place in a reasonably safe condition.³⁶

(b) It is the duty of a master or employer to furnish his servant or employe with a safe place to work, and to make provisions for the safety of his employes or servants as will protect them against the dangers incident to their employment.

(c) You are instructed that S. and H. were not obliged to furnish the said P. with an absolutely safe place to work in or to make supports of the tunnel absolutely safe, but they were only required to use ordinary care to protect their employes against accident, etc.³⁷

(d) It is the duty of the employer to furnish a suitable and safe place for his employes to work.³⁸

(e) The court instructs the jury that it was the duty of the de-

35—Kennard v. Grossman, — Neb. —, 89 N. W. 1025 (1026).

36—Hansell-Elcock F. Co. v. Clark, 115 Ill. App. 209 (212), aff'd 214 Ill. 399, 73 N. E. 787. "We think this instruction states the correct rule as to appellant's duty to appellee as to furnishing him a reasonably safe place and reasonably safe surroundings in which to work, and in maintaining the same in a reasonably safe condition."

37—Pawley v. Swensen, 146 Cal. 471, 80 Pac. 722 (725). "We do not think the jury could have been

misled to accept the first instruction above given as meaning that defendants were required to furnish an absolutely safe place in which deceased was to work."

38—Grijalva v. S. P. Co., 137 Cal. 569, 70 Pac. 622 (624). "It stated the law as laid down by this court in Mullin v. Horseshoe Co., 105 Cal. 83, 38 Pac. 535. And there was no issue made by pleadings as to the character of the place, as the answer admits that it was a dangerous place, and that the work was dangerous."

The above instruction standing

fendant, except in so far as it may have been excused therefrom by the duty of the plaintiff, under the evidence, to use ordinary care and skill in the management of that kind of business for the protection of the plaintiff; and if they believe from the evidence that the defendant failed to do what, under the evidence, the jury may believe was incumbent on its part to do, in order to keep the room in which plaintiff worked in a reasonably safe condition in that nature of business, and that the injury to the plaintiff was directly caused by such failure, then they should find for the plaintiff.³⁹

(f) It was the duty of the defendant to keep the premises about which the plaintiff was employed in a reasonably safe condition—that is to say, in such a condition as the premises would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be performed.

(g) The defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. His duty, to express it tersely, was to use ordinary care to secure the plaintiff's safety. Ordinary care, you are instructed, is the care that is ordinarily exercised by persons of average prudence under the same or similar circumstances. Just what that degree of care is, or would be is for the jury to determine. Having determined what, under the circumstances, would have been ordinary care it is for you to say whether such care was exercised by the defendant about the premises in question.

(h) You are instructed that it was the duty of the defendant company to keep the premises about which the plaintiff was employed in a reasonably safe condition; that is to say, in such a condition as the premises would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be accomplished.⁴⁰

(i) The court instructs you that if the defendant furnished a place which was as safe and free from danger as other persons of ordinary care, prudence and caution, and engaged in like business, and in like circumstances, ordinarily furnish, then you must find that the defendant furnished to the plaintiff a reasonably and ordinarily safe place to work.⁴¹

§ 1391. **Insufficient Fastening or Nailing of Scaffold.** (a) If you believe from the evidence that S. B., the foreman of defendant X., ordered the carpenter S. to nail one of the planks of the scaffold, from

alone and outside the issue of the above case as made by the pleadings would ordinarily be erroneous. It does not state the correct rule of law, unless qualified in some such manner as the instruction just preceding it. This instruction, therefore, is not commended for general use.—[Editor.]

39—Russell C. Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614 (615).

40—Downey v. Gemini Min. Co.,

24 Utah 431, 68 Pac. 414 (415), 91 Am. St. 798.

41—Guinard v. Knapp, Stout & Co., 95 Wis. 482, 70 N. W. 671. "This proposed instruction undeniably states the law of negligence as applicable to the duty of the master to furnish a safe place to work, and to the facts of the case, with substantial accuracy. It should have been given as asked."

which plaintiff fell, to the trestle inside with eightpenny nails, and that said S. did so under and by direction of said B., and if you further believe from the evidence that said B. was guilty of negligence in having said plank so fastened and if you further believe from the evidence that while plaintiff was working on said scaffold the said fastening of said plank came loose, and thereby caused plaintiff to fall from said scaffold and to be injured; and if you believe from the evidence that the negligence, if any, of said B. was the proximate cause of said injury—then you will find for the plaintiff, unless you find for the defendant under the charges hereinafter given you.

(b) If you do not believe from the evidence that said plank was so fastened by the order of said foreman B., and that he was guilty of negligence in having it so fastened, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any, you will find for the defendant.

(c) Or, if you believe from the evidence that the plaintiff himself was guilty of negligence in the construction of said scaffold, and that such negligence, if any, proximately contributed to his injuries, if any, you will find for defendant; or if you believe from the evidence that either or any of the fellow servants with the plaintiff were guilty of negligence in the construction of said scaffold, and that such negligence, if any, proximately contributed to his injuries, if any, you will find for defendant; or if you believe from the evidence that when the plaintiff went upon said scaffold he knew it was unsafe for him to walk or stand thereon to do work, you will find for defendant.⁴²

§ 1392. Servant May Assume Master Has Furnished Safe Scaffold. It was not incumbent upon the servant to inspect the implement which the master provided him upon and with which to perform his work, but he had a right to rest upon the assurance that the master would perform the obligations and duties which the law cast upon him to exercise reasonable care to provide him a reasonably safe scaffold upon which to work.⁴³

§ 1393. Injury from Falling of Brick through Insufficient Platform of Scaffolding. If the jury believe from the evidence in this case, that the platform of the scaffolding in question did not have a sufficient covering or other proper provision to render its use reason-

42—Boettler v. Tumlinson, — Tex. Civ. App. —, 77 S. W. 824 (825). "If the charge given by the court is in itself unobjectionable, a party cannot complain of the failure of the court to give an instruction which he has neglected to ask. This we believe to be the rationale of the decisions upon charges excluding issues raised by the pleadings and evidence. Chamberlee v. Tarbox, 27 Tex. 140, 84 Am. Dec. 614; Johnston v. Johnston, — Tex. Civ. App. —, 67 S. W. 124; Eppstein v. Thomas, — Tex. Civ.

App. —, 44 S. W. 894; Smith v. Richardson Lumber Co., 92 Tex. 450, 49 S. W. 574; Scott v. T. & P. Ry. Co., 93 Tex. 625, 57 S. W. 801; Humphreys v. Edwards, 89 Tex. 517, 36 S. W. 333 (434); Cotton State Bldg. Co. v. Jones, 94 Tex. 497, 62 S. W. 741; Beazley v. Denson, 40 Tex. 433; Wenar v. Stenzel, 48 Tex. 489; Stude v. Saunders, 2 Posey, Unrep. Cas. 124."

43—Mormene S. Co. v. Turrell, 106 Ill. App. 160, aff'd 205 Ill. 515, 68 N. E. 1078.

ably safe to employes having business on the premises below and underneath said platform, and that the existence, location and use of the platform was not known to the plaintiff, A. B., and that the plaintiff was in the exercise of reasonable care at the time, and that for want of such covering, guard, railing or protection, the brick in question fell down from said platform, and struck and injured the plaintiff, then the defendants in this case are liable.⁴⁴

§ 1394. **Injury through Defective Sewer Cover.** The court instructs the jury if you find, from the evidence, that the defendant did not have actual notice of a defect in the sewer cover described in the declaration, yet if you find, from the evidence, that the cover of said sewer hole was in a defective condition and remained so for such a length of time prior to the accident to the plaintiff that the defendant might have discovered such defect by the exercise of reasonable diligence, then you will be justified in finding that the defendant had notice of such defect, and that it was the duty of the defendant to have repaired said defect.⁴⁵

§ 1395. **Failure to Keep Boards on Sill of Window Securely Fastened.** The court instructs you that it is the duty of the defendants to use reasonable care and diligence to keep the boards upon the sill of the building securely fastened, and, if the board which injured the plaintiff fell from the sill of the building on which said plaintiff was working, and was not securely fastened on said sill, and fell because of such insecure fastening, and the defendant knew, or by the exercise of reasonable care might have known, of such insecure fastening in time to have remedied the same, then the defendant was guilty of negligence, and is liable if the plaintiff was in the exercise of due care.⁴⁶

44—*Angus v. Lee*, 40 Ill. App. 304 (306). "It appears by this record that the practical men engaged in the construction of this building did not so understand the obligations of the respective contractors; for those for whom the appellee worked engaged, in their contract, to floor the joists of the story next over where their men might be at work, as a protection to them; this was not done; but there was a conflict of evidence as to whether the appellants were to, and did, in this instance, notify the foreman under whom the appellee worked, of where the appellants were going to work, so that men might be kept from under them. Why the particular brick that hurt the appellee fell 'can only be conjectured; there is no evidence upon the subject; and therefore the instruction puts the right to recover wholly upon the supposed duty of the appellants

as to the construction of the platform, before they began to work upon it. The law implies such a duty where the platform is over a thoroughfare. *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7."

45—*Wrisley v. Burke*, 106 Ill. App. 30 (31), aff'd 203 Ill. 250, 67 N. E. 888.

46—*Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177 (183), 50 N. E. 242, aff'g 68 Ill. App. 487. "This instruction expressly requires the jury to find that the defendant knew of or by the exercise of reasonable care might have known of the defect in question. The use of the words 'due care' instead of the customary words 'ordinary care' is overcome by the fact that the jury were given other instructions both by plaintiff and defendant that the plaintiff must be in the exercise of ordinary care. . . . We do not think that the words 'securely fastened' necessarily in-

§ 1396. **Elevator—Duty to Keep in Repair.** The plaintiff prays the court to instruct the jury that it was the duty of the defendant, ———, to use ordinary care and diligence in keeping the elevator used by it in repair; and if they shall find from the evidence that the accident resulting in injuries to the plaintiff, ———, occurred by reason of a defect in said elevator, which defect could have been discovered and remedied by the defendant previous to the accident by the use of ordinary care and diligence in inspecting said elevator, or if they shall find that the said accident happened by reason of an improper method of construction of said elevator, and shall further find that the plaintiff was in the usual, ordinary, and proper discharge of his duties as the conductor of said elevator when hurt, then their verdict must be for the plaintiff.⁴⁷

§ 1397. **Elevator—Failure of Master to Guard Opening.** (a) The court instructs the jury that under the pleadings and evidence in this case it was the duty of the defendant to have had the elevator opening in the shipping room, mentioned in the evidence, provided with inclosing railing or gate to effectually bar said opening, for the prevention of accidents therefrom, and to keep such opening closed by such railing or gate when such opening was not being used, and that a failure to do so, if the defendant did so fail, was negligence upon the part of the defendant. And the court further instructs the jury that if the defendant did provide such railing or gate, and, by its officers or agents authorized to direct and control said railing or gate as to its being kept open or closed, caused the same to be kept open when said elevator was not being used, then such providing of said gate or railing was no compliance with the ordinance read in evidence, and the defendant was guilty of negligence in that regard.⁴⁸

(b) If the jury find from the evidence that prior to and on the ———, the defendant occupied the premises, known as "814 and

volve the idea of absolute safety. The master is required to use reasonable care and prudence in providing the servant with safe and suitable appliances and instrumentalities to be used by him in the work, which he is employed to do. He must also use all reasonable care to furnish to his employe a reasonably safe place in which to work, and use proper diligence to keep such place in a reasonably safe condition. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Libby, McN. & L. v. Scherman*, 146 Ill. 553; 34 N. E. 801, 37 Am. St. 191; *Hess v. Rosenthal*, 160 Id. 621, 43 N. E. 743; *Ill. S. Co. v. Schymanowski*, 162 Id. 447, 44 N. E. 876. The implied contract of an employer with his servant to furnish a suitable place in which the servant, while exercising due

care, may perform his duty without exposure to dangers not arising within the obvious scope of his employment, is not to be understood as implying an absolute liability for the safety of the workman's place. *Northcoat v. Bachelder*, 111 Mass. 322. It cannot be said that the instruction required too much of the appellant in stating in substance that it was its duty to make a reasonable effort to make the board secure. The place where the appellee worked could not be reasonably safe unless the boards were securely fastened."

47—*Baltimore B. & S. Mfg. Co. v. Jamar*, 93 Md. 404, 49 Atl. 847 (849), 86 Am. St. 428.

48—*Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737 (740). "The validity of the

816 North Broadway," mentioned in the evidence, and used the elevator mentioned in the evidence; and if the jury find from the evidence that on said day the plaintiff was in the service of the defendant as a cabinet repairer, and that it was in the line of his duty to ride upon the elevator mentioned in the evidence in the discharge of his duties; and if the jury further find from the evidence that said elevator passed through a hatchway in the floor of the shipping room; and if the jury find from the evidence that the shipping room near said elevator opening on said day was dark and insufficiently lighted, and that the sunlight was partly excluded by the piling up of furniture therein; and if the jury find from the evidence that the defendant did not exercise ordinary care in maintaining said room near said elevator opening in such condition; and if the jury further find from the evidence that defendant was maintaining said elevator opening in said floor without keeping the guard or rail closed to prevent persons from falling therein, and sustaining injury; and if the jury further find from the evidence that defendant did not exercise ordinary care in maintaining said elevator hole in said floor without keeping the guard for protection closed and without having said room properly lighted; and if the jury further find from the evidence that on said day the plaintiff was at or near said elevator hole for the purpose of using said elevator in the discharge of the duties of his employment, and that while so near said elevator opening for said purpose he fell therein and sustained the injuries on account of which he sues; and if the jury further find from the evidence that the plaintiff was caused to so fall into said opening by reason of its being so open, unlighted and unguarded; and if the jury further find from the evidence that the plaintiff knew that said room was insufficiently lighted, and that there was no guard or protection kept closed around said elevator opening, and that thereby he incurred some risk in remaining in defendant's service and in discharging the duties of his employment; yet if the jury find from the evidence that the dangers arising to the plaintiff by reason of said unguarded elevator opening and said want of light near said elevator were not so obvious and imminent as to threaten immediate injury, and were not such that an ordinarily prudent person under the circumstances would not have remained in defendant's service and performed the duties plaintiff was hired to perform; and if the jury further find from the evidence that plaintiff was exercising ordinary care at the time of his injury, plaintiff is entitled to recover.⁴⁹

§ 1398. Mines—Failure to Partition off Stairway from Main Airway Escapement Shaft. (a) The jury are instructed that if plain-

ordinance in question, the obligation of defendant to obey it, and its liability for failure to do so, are propositions of law clearly established. *Murray v. Mo. Pac. Ry. Co.*, 101 Mo. 236, 13 S. W. 817, 20

Am. St. 601; *Brannock v. Elmore*, 114 Mo. 59, 21 S. W. 451; *Shear. & R. Neg. par. 13.*"

49—*Wendler v. People's H. F. Co.*, *supra*.

tiff did say he fell and was injured as a result, partly, of his own neglect, yet if the jury believe, from a preponderance of the evidence, that the plaintiff's injury was occasioned by reason of the willful failure of defendant to partition off the stairway from the main airway escapement shaft, and provide substantial hand-rails and platforms for the same, and that such injury would not have occurred but for such willful failure, then the verdict should be for the plaintiff.

(b) The jury are instructed that if they believe, from a preponderance of the evidence, that on the ———, 18—, defendant was the operator of said coal mine worked by shaft, which had been in operation for more than a year for hoisting coal for sale and use, and there were more than six men employed in such mine, and an escapement shaft had been constructed in addition to the hoist shaft, and that said mine was less than one hundred feet in depth, but defendant willfully failed to provide such escapement shaft with stairways partitioned off from the main airway, having substantial hand-rails and platforms, and by reason of such willful failure the plaintiff, while in the employ of defendant in said mine, fell to the bottom of said shaft and was injured, the verdict should be for the plaintiff.⁵⁰

§ 1399. Mines—Statutory Inspection of. (a) The court instructs you that in this case the plaintiff must prove all the material allegations of his declaration, and this being a suit for an alleged violation of a statute, the plaintiff must prove before he can recover, first, that the defendant itself or through its proper representative willfully and wrongfully violated the act in question, in the manner alleged in the plaintiff's declaration; second, the plaintiff must prove by the greater weight of evidence that this willful violation of this act as alleged in the declaration (if you believe there was a violation) was the principal and substantial cause of the injury.

(b) And you are instructed that if you should believe from the evidence that an examination of the mine was not made the day the deceased was injured, before he and other employes entered said mine,

50—*Carterville Coal Co. v. Abbott*, 181 Ill. 495 (498), 55 N. E. 131, aff'g 81 Ill. App. 279. "If one is injured as the result of some act of negligence on the part of the mine owner other than the failure to comply with the specific duties required by the statute, then the person injured must have been in the exercise of ordinary care before he can maintain an action, and must allege and prove that he was in the exercise of such care. The rule is different, however, under this legislation where there is a willful failure to comply with the provisions of the statute, and the right of recovery cannot

depend in such case on the exercise of ordinary care by the person injured, nor can he be precluded by mere contributory negligence. This legislation fixes a broad and distinct exception to the general rule. The court referred to section 14 of an Act amending an Act providing for the health and safety of persons employed in coal mines, the amendment being enforced July 1st, 1887, and stated that the principles herein argued are sustained by *Bartlett C. & M. Co. v. Roach*, 68 Ill. 178; *Litchfield C. Co. v. Taylor*, 81 Ill. 590; *Catlet v. Young*, 143 Ill. 74, 32 N. E. 447."

but yet if you further believe from the evidence that an examination of the mine was made by the defendant through its manager some hours before the deceased was injured, and said mine was apparently safe from danger of falling clods, rock, etc., and that you further believe from the evidence that even though the mine had been inspected early in the morning before deceased went to work, this accident would have happened, then the court instructs you that, under the evidence, the accident was not caused principally and substantially by a failure to inspect the mine as required by law.⁵¹

§ 1400. Mines—Failure of Mine Boss to Visit Room in Which Miners Work. The court instructs the jury that if they believe from the evidence that, under and by the rules of the defendant company, it was the duty of the bank or mine boss of said company to make daily visits to the room in which the miners were at work, for the purpose of seeing whether or not said rooms were in safe condition for the miners to continue their work, and if they further believe from the evidence that the mine boss of the defendant failed or neglected to visit the room in which the said plaintiff was at work, or failed, if he made such visit, to discover the danger which threatened the plaintiff if he continued his work in said room, if they believe such danger was threatening and could have been discovered by the use of ordinary diligence on the part of said boss, then said company was guilty of negligence.⁵²

§ 1401. Maintaining Coal Chute Without Guard Gate or Guard Board. If you do not find from the evidence that said coal chute was without a guard gate or guard board, or if you find it was without a guard board or guard gate, yet if you do not believe from the evidence that the defendant was guilty of negligence in having said chute in said condition, and that such negligence, if any was the proximate cause of plaintiff's injuries, if any, you will find for defendant.⁵³

§ 1402. Allowing Shavings to Accumulate in Passageway Near Molder. (a) If you find the facts to be that the defendant unnecessarily and dangerously permitted shavings to accumulate in the passageway near the molder, and that the plaintiff, in obedience to the superintendent's orders, was compelled to pass near them, and that they caused him to fall and slip and cut himself, that would be negligence, and you should answer the first issue "Yes."

(b) If you find the facts to be that the rip saw and molding machine were dangerously close, and that in order to comply with the superintendent's order the plaintiff was compelled to pass with a load in his arms between them, and that the defendant company had permitted the regular passageway for this lumber to become filled up

51—Mo. & Ill. Coal Co. v. Schwalb, 74 Ill. App. 567 (574).

52—Russell C. Co. v. Wells, 96 Va. 416, 31 S. E. 614 (615).

53—Int. & G. N. R. Co. v. Harris, — Tex. Civ. App. —, 65 S. W. 885 (888).

with plank, and failed to provide another, that would be negligence upon the part of the defendant; and, if the plaintiff was injured thereby,—if that negligence caused his injury,—your answer to the first issue should be “Yes.”

(c) So if the jury find that a counter shaft or loose pulley, or a covering for a saw running naked, was a proper and reasonable safeguard for its employes, and the defendant failed to provide it, that is negligence; and, if the jury find that the plaintiff was injured by reason of such negligence, they will answer the first issue “Yes.”⁵⁴

§ 1403. **Injury by Being Jolted from Car on Logging Road.** (a) The court charges the jury at the request of the defendant, that if they believe from the evidence that at the time immediately preceding the alleged accident the logging track of the defendant was in good condition,—that is, in as good condition as first-class logging roads of the same nature and kind are kept,—then they must find their verdict for the defendant under the first count of the complaint.

(b) And the court further charges the jury that if they believe from the evidence that at the time immediately preceding the alleged accident that the cars of the defendant were not in a defective and imperfect condition, then they must find for the defendant under the second count of the complaint.

(c) And the court further charges the jury that if they believe from the evidence that at the time of the alleged accident the engineer in charge of the locomotive which was drawing the said train was not guilty of any negligence in so running the said train over said track in its then condition, as alleged, as to negligently cause R. M. to be jostled and jolted and thrown from his position on the cars and killed, they must find their verdict for the defendant on the third count of the complaint.

(d) And the court further charges the jury that if they believe from the evidence that the engineer in charge of said train did not run the cars in a negligent and careless manner, so as to jolt any of said cars from said track, they must find for the defendant on the fourth count of the complaint.

(e) And the court further charges the jury that if they believe from the evidence that R. M. was so careless and negligent in his conduct and manner of riding upon the car from which he was thrown that it caused him to fall from, or to be jostled from, the car upon which he was riding, and fell (fall) under the wheels of other cars upon the train, and thereby met his death, then they must find for the defendant upon each and every count of the complaint, although they might further believe that the defendant was also guilty of simple negligence.⁵⁵

54—Myers v. Concord L. Co., 129 N. C. 252, 39 S. E. 960 (1961). “We see no error in the charge. The instructions were based on repeated

decisions of this court, and there was evidence upon which they were formulated.”

55—These instructions were ap-

§ 1404. Injury to Conductor of Street Car Through Defective Rail. The court instructs the jury that if they believe from the evidence that plaintiff was employed as a conductor on one of the cars owned and operated by the defendant, and that he was injured by reason of the car leaving the track on account of a defective rail of the said track, and not through or on account of any fault on his part, they should find in favor of the plaintiff and against the defendant, provided they further find that the defendant company knew, or could by the exercise of ordinary care have known, of the existence of the defective rail on the said track for a sufficient length of time prior to the accident for them to have made necessary repairs.⁵⁶

§ 1405. Telephone Wires—Burden of Proof as to Negligence in Adjusting. The court instructs the jury that the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, that the witness B. was negligent when engaged in stretching the wires in connection with the witness A., and that, in consequence of B.'s negligence or carelessness in adjusting the wires, they came into contact with the wires of the power company. If you find that the evidence bearing upon the point is evenly balanced, and does not preponderate in favor of the conclusion that B. was negligent in that respect, your verdict should be in favor of the defendant—no cause of action. It isn't necessary that negligence shall be established by direct evidence. It may be proved by circumstances, if they are such as to establish by fair and just inference to unbiased minds the existence of negligence.⁵⁷

SAFE AND SUITABLE APPLIANCES.

§ 1406. Master's Duty to Provide Safe Appliances and Keep Them in Proper Repair. (a) I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages. I charge you that, provided the negligence of the railway company was the direct and proximate cause of the injury, and the plaintiff did not contribute to the direct and proximate cause of the injury.⁵⁸

proved in *Davis v. Miller*, 109 Ala. 589, 19 So. 699 (702).

56—*Moore v. St. L. T. Co.*, 193 Mo. 411, 91 S. W. 1060 (1961). "This instruction is not subject to the interpretation that it assumes that the rail was defective. It leaves that fact to be found from the evidence, and makes its finding essential to the plaintiff's right to recover. It does leave out of view supposed contributory negligence

of the motorman and charges the plaintiff with the consequence of his own fault only, if any is found, and in that the instruction is correct."

57—*Black v. Rocky Mt. Bell Tel. Co.*, 26 Utah 451, 73 Pac. 514 (516).

58—*Carson v. So. Ry. Co.*, 68 S. C. 55, 46 S. E. 525 (535). "We do not see that the judge's charge was improper. He charged the law of this state. He did not use

(b) The duty which the defendants owed to the plaintiff to furnish him with safe machinery and appliances was a personal one, and such a duty as the law will not permit them to escape by trusting it to an employe who negligently performs it.

(c) To render defendants liable to plaintiff in damages, it is not necessary that they should have had actual knowledge of the unsafeness of the said machine. The proof is sufficiently made out by plaintiff when it is shown that said machine was defective and unsafe in such respect that, if a proper inspection of it had been made by defendant, such unsafeness and defectiveness would have been ascertained in time to prevent the injury. If the unsafeness was conspicuous, defendants will be presumed to have had knowledge of it.⁵⁹

§ 1407. Material Not an Appliance—Master in Furnishing Material Stands on Same Footing as Third Person so Doing. The court instructs the jury that the material furnished for use in the machinery was not an appliance.⁶⁰

§ 1408. Machinery Used by Master, Although Not Owned by Him. The duty of the master to furnish safe machinery is not affected by the fact that he does not own the machinery furnished. It is sufficient if it is used by such employer. The duties which an employer owes to his servants, and which he is required to perform, are to furnish suitable machinery and appliances, by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provisions for the safety of employes as will reasonably protect them against the dangers incident to their

language which made the master a guarantor of the machinery and appliances, especially as the circuit judge was careful to say, 'Provided the negligence of the master was the direct and proximate cause of the injury,' etc. This exception is overruled."

59—Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041 (1043).

60—Gallman v. Union Hardwood Mfg. Co., 65 S. C. 192, 43 S. E. 524 (525). "This is the first time the question under consideration has been presented to this court for adjudication. There is a wide distinction between 'material' and 'appliances.' The term 'appliances' refers to the machinery and all the instruments used in operating it. Bodie v. Charleston & W. C. Ry. Co., 61 S. C. 480, 39 S. E. 715. In 20 Enc. of Law (2d Ed.) 232, it is said: 'Materials include everything of which anything is made.' Webster's International Dictionary defines 'material' to be: 'The substance of matter out of

which anything is made or may be made.' While it is unquestionably the duty of the master to provide his servants with safe and suitable appliances, and to see that they are kept in proper repair, it is no part of his duty to furnish material upon which the machinery may operate. He, however, may furnish this material, in which case he is only bound to observe the rule, 'sic utere tuo ut non alienum laedas,' or to exercise reasonable care in so doing. The appliances, in contemplation of law, are always provided by the master employing the servants to operate them. But the materials out of which articles are to be made by the machinery are frequently furnished by third parties, as, for instance, a public sawmill or cotton gin. When the master furnishes the material, he stands upon the same footing as a third party so doing, and is only responsible when he fails to exercise ordinary care."

employment. The performance of these duties cannot be shifted by an employer to a servant, so as to avoid responsibility for the injury caused to another servant by his omission.⁶¹

§ 1409. Latent Defects—Master Not Liable for. (a) The court charges the jury that if they find from the evidence that the accident occurred by reason of hidden defects in the iron guy rods or iron plates, which defects were not known to defendant, and could not be known to defendant by the exercise of reasonable diligence in time to have avoided the injury, then the plaintiff cannot recover.

(b) The court charges the jury that if they believe from the evidence that the defects were latent and discovered for the first time after the accident, such defects would not make the defendant liable in this action.⁶²

§ 1410. Master Does Not Insure Absolute Safety of Appliances. Under these claims and counter-claims, as made by plaintiff, and defendant, the court charges you that the law made it the duty of the defendant, C. D., to exercise reasonable care and precaution to procure and furnish the plaintiff, R., a suitable and safe machine for him to work upon, and it also required the defendant to exercise reasonable care and caution to keep the machine in a proper state of repair. It did not require the defendant to insure the absolute safety of the plaintiff R. in working with the machine, which the defendant furnished him, but it did not impose upon the defendant the obligation to use reasonable and ordinary care, skill and diligence in keeping the machine in a safe and suitable condition for him to do his work with. The law did not require R. to inspect the machine.⁶³

§ 1411. Duty of Employer to Use Reasonable Diligence for Safety of Employee Includes Inspection and Tests at Proper Intervals of Appliances. (a) The duty imposed on the defendant company by the contract of hiring was to not subject the deceased, without his knowledge and consent, expressed or implied, to risks not assumed by him, under the contract of hiring. An employer contracts with his employee

61—Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041 (1903).

62—So. Car & Fdry. Co. v. Jennings, 137 Ala. 247, 34 So. 1002 (1903). The first charge correctly asserts the law as applicable to the case. An employer is bound to use only reasonable diligence in the maintenance of machinery and appliances used in his business, and is not chargeable with negligence on account of defects therein, the existence of which is not discoverable by the use of such diligence. L. & N. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574; L. & N. R. Co. v. Allen, 78 Ala. 494. This charge is not abstract, and though the second charge given is

on the same subject and is probably more favorable to the defendant than the one in question, neither that nor any other of the given charges asserts the principle it embodies with a fullness that can enable us to say the refusal of the first charge was non-injurious to the defendant.

63—Record v. Chickasaw C. Co., 108 Tenn. 657, 69 S. W. 334 (1902). "We think the charge of the court was correct. He did not impose upon plaintiff the duty of a close and minute inspection, and did impose on the defendant the duty of seeing that the machine was in safe condition."

to use reasonable diligence to protect him, the employe from ordinary risks, and for omission of such diligence or want of care the employer may become liable to the employe for all damages arising therefrom.

(b) The duty of a master toward a servant in his employ is to exercise reasonable care and skill to provide safe machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in a safe condition for such use, including the duty of making inspection and tests at proper intervals whilst the work progresses.⁶⁴

§ 1412. Duty of Inspection—Character of Business Should Be Considered. The duty of inspection is affirmative, and it must be continuously fulfilled and positively performed. In ascertaining whether this has been done or not, the character of the business should be considered, and anything short of this would not be ordinary care.⁶⁵

§ 1413. Defective Machinery Alone Insufficient for Recovery—Injury Must Have Proximately Resulted From Defect. In order to find for the plaintiff, therefore, in this case, gentlemen, you must be able to ascertain from the evidence that the defendants, or one of them, were negligent as charged in the complaint; and you must be able to find from the evidence that there was some defect in the machinery as charged in the complaint which was the proximate cause of the injuries the plaintiff sustained, if he sustained such injuries. If you should find that there were certain defects in this machinery, that alone would not be sufficient, unless you should find from the evidence that the injuries sustained by the plaintiff, if he did sustain any injuries, were sustained by reason of that particular defect. Some defective machinery might have been there that would not be responsible for the accident that occurred, but you must be able to fix as the cause of this accident that it resulted from some defect in that machinery.⁶⁶

§ 1414. Master Not Bound to Furnish the Safest and Best Appliances. (a) The jury are instructed that it is direct, personal, and absolute obligation of the master to provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances. The master must furnish a safe place in which his servant is to work. And the jury are further instructed that the master is liable for any injury to his servants, due to the neglect or failure of the master to provide such safe and suitable machinery and appliances for the business, or to exercise such reasonable care in furnishing such appliances, or to furnish his servants a safe place in which to work.

64—*Belleville S. Co. v. Comben*, 61 N. J. 251, 39 Atl. 641 (642).

65—*Dyas v. S. Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (976).

"This correctly states the law. 2 *Thomp. on Neg.* p. 984; *Silveira v. Iversen*, 128 Cal. 192, 60 Pac.

687; *Jager v. Cal. Bridge Co.*, 104 Cal. 546, 38 Pac. 413; *Alexander v. Central L. & M. Co.*, 104 Cal. 539, 38 Pac. 410."

66—*Young v. O'Brien*, 36 Wash. 570, 79 Pac. 211 (213).

(b) The court instructs the jury that the defendant was not bound to furnish to the plaintiff, the safest and best appliances and machinery used with which to work, but the defendant should be acquitted of fault in this respect if the appliances and machinery, which they did furnish the plaintiff, were reasonably safe and suitable. The court instructs the jury that before the plaintiff can recover from the defendant, in this case, for the loss of his hand while in said company's employ, he must overcome two presumptions: First, the presumption that the defendants did provide safe and suitable machinery, and a safe and suitable place in which to work; second, the presumption that the plaintiff assumed all the usual and ordinary hazards of the business in which he is engaged; and that unless the plaintiff does overcome the said presumptions by a preponderance of the evidence, you will find for the defendant.⁶⁷

§ 1415. **Appliances—What are in the Raising of Cants.** I further instruct you gentlemen, that in the raising of the cant in question, whatever was necessary or needful or useful in order to raise the cant in an ordinarily safe manner and consistent with the care and caution necessary to render safe and free from danger the workmen engaged in it, are instrumentalities or appliances, within the meaning of the law, whether the same be ropes, engines, platforms, or staging or servants; and it is the duty of the master or its vice principal or yard foreman having charge of the raising of this cant, to furnish all such necessary instrumentalities and appliances, whether ropes, machinery, staging or servants, and that they shall be reasonably suitable and competent.⁶⁸

§ 1416. **Duty of Master in Furnishing Mail Cranes and Engines.**

(a) The court instructs the jury that the defendant in this case was under no obligation, by contract of employment with said C. W. B., deceased, or otherwise, to furnish any particular kind of mail cranes, or to adopt the latest and most approved appliances in connection therewith, or to use in its business locomotives of any particular kind or width, and that it was only bound to exercise reasonable care to see that the mail cranes and engines used by it were reasonably safe and suitable for the purposes for which they were used, and if the jury believe from the evidence that the defendant's mail crane and engine in question were suitable for the purposes for which they were designed and used, and were reasonably safe for such use, they should return a verdict for the defendant.

(b) If you believe from the evidence that the defendant's methods, machinery, instrumentalities, and appliances, and the mail crane in question, were sufficient for the purposes for which they were used and reasonably safe when the said C. W. B. entered the defendant's

67—The above instructions given for plaintiff and defendant together state the law correctly. *Giebell v. Collins Co.*, 54 W. Va., 518, 46 S. E. 569 (573).

68—*Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 62 Pac. 896 (901), 92 Am. St. 847.

employ, and that the defendant used ordinary care to keep them and said crane sufficient for such purposes and reasonably safe, then said C. W. B. assumed the risk of danger from their use and plaintiff cannot recover in this action.⁶⁹

(c) If you believe from the evidence in this case that the mail crane when in operation was unnecessarily dangerous to employes and to C. W. B. in the performance of his duty and in the exercise of ordinary care on the defendant's locomotive, and that the said C. W. B. did not know, and could not by the exercise of ordinary care have foreseen, the dangers to be encountered from said mail crane, and that the defendant knew, or ought to have known, of its dangers, and after such knowledge, or after it might have had such knowledge by the use of ordinary care, it failed to give the plaintiff's decedent, C. W. B., warning of such danger, then your verdict must be for the plaintiff.⁷⁰

§ 1417. Liability for Defect in Weld of Swivel. If the plaintiff's injuries were caused by reason of the swivel breaking where it was welded, and neither of the defendants knew of any defect in said weld, and said defects could not be detected by an ordinary, careful inspection, then the plaintiff cannot recover in this suit and you should find for the defendants.⁷¹

§ 1418. Injury through Defect in Lever of Jackscrew. (a) If you believe from the evidence that on or about the — day of May, 18—, the plaintiff was in the employ of the defendant as a bridgeman, and that it became the duty of the plaintiff to hoist and place in position a stringer of the bridge, and for that purpose it became necessary for the plaintiff to use and he did use a jackscrew and a lever, and the defendant furnished to plaintiff said jackscrew and lever for that purpose, and that plaintiff began turning the lever of said jackscrew in order to hoist said stringer, and while doing so said lever bent and slipped out of the jackscrew, and as a direct result of said lever slipping out of the jackscrew, if it did slip out, plaintiff lost his balance, and was hurled or fell from said bridge, and was injured as alleged in his petition; and you further believe from the evidence that the lever of said jackscrew was defective, and unfit for the purpose for which it was being used, and not sufficiently tough and hard to use in hoisting the aforesaid stringer without bending,

⁶⁹—*Denver & R. G. R. Co. v. Burchard*, — Colo. —, 86 Pac. 749 (754).

"This request was refused. Nowhere in the charge of the court was the defendant given the benefit of the law as announced in such two instructions. Further, the jury was permitted to find against the defendant, although the defendant had been free of negligence in the construction and maintenance of the crane."

⁷⁰—*Denver & R. G. R. Co. v. Burchard*, *supra*.

"The court here submitted to the jury the question of whether or not the crane was unnecessarily dangerous; that is, whether it was unnecessarily near the track—that being the only cause assigned for its being dangerous in operation."

⁷¹—*Doyle & Co. v. Hawkins*, 34 Ind. App. 514, 73 N. E. 200 (202).

"A controlling proposition which it devolved upon appellee to es-

and that the defendant knew of such defect, if any, or could have known of it by the exercise of ordinary care, and that the defendant was negligent in furnishing said lever in such condition, if it was in such condition, and that, this negligence of the defendant, if any, was the direct cause of the plaintiff's injury; and you further find that the plaintiff did not know of any defect in said lever, if any defect there was, and that plaintiff was not guilty of contributory negligence, and did not assume the risk,—then I charge you that your verdict must be for the plaintiff.

(b) And if you further believe from the evidence that the lever of said jackscrew was defective, and unfit for the purpose for which it was being used, and not sufficiently tough and hard to use in hoisting the aforesaid stringer without bending, and that the defendant knew of such defect, if any, or could have known of it by the exercise of ordinary care, and that the defendant was negligent in furnishing said lever in such condition, if it was in such condition, and that this negligence of the defendant, if any, was the direct cause of the plaintiff's injury, I charge you that your verdict must be for the plaintiff.⁷²

§ 1419. **Defective Belt in Mill.** (a) In this case it was the duty of the master to furnish a belt which was reasonably safe for the use to which it was put, and if you find from the evidence in this case that the belt by which the accident occurred was a defective belt, and that the master had knowledge of that defect through the knowledge of the millwrights, or of its superintendent, B., and knew that the belt was not a safe or proper belt, then you are instructed that the master failed to discharge his duty towards the plaintiff.

(b) In this case if you find that the plaintiff was injured by the reason of a latent danger in the belt, of which he had no knowledge, and of which he could not have known by the exercise of reasonable care and caution, in the place to which he was sent, then you are instructed that if you further find that the accident occurred by

tablish was that the appellants actually knew of the defect, or would have known of it if they had made a proper use of the means of information which they possessed; and the failure to inspect being the breach of duty specifically relied upon, it also devolved upon him to show that the defective condition which produced the injury would have been discovered by such an examination as, under the law and circumstances of the case, it was their duty to make. *Pittsburg, etc., R. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *L. S. & M. S. Ry. Co. v. McCormick*, 74 Ind. 440. The appellee has not called attention to any instruction given which in

terms or substance is identical. He asserts that the fact of the defective swivel being used creates liability without other proof of notice. The authorities cited are those in which the negligent act charged is an affirmative one, and done by the master with his own hand, or by another under his order and direction, notice being therefore involved in the doing of the act. *Louisville, etc., R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; *Standard Oil Co. v. Bowker*, 141 Ind. 18, 40 N. E. 128; *Clear C. S. Co. v. Dearmin*, 160 Ind. 162, 66 N. E. 609; *Con. S. Co. v. Morgan, Adm'r*, 160 Ind. 341, 66 N. E. 696.”
72—*Galveston H. & S. A. Ry. Co.*

reason of such concealed or hidden danger, then your verdict must be for the plaintiff.⁷³

§ 1420. Injury through Unsuitable Belt on Planer Machine. (a) If the jury believe the undisputed evidence, and also that at the time the plaintiff was injured, he was in the discharge of his duties as employe of the defendant, and that defendant through his foreman negligently failed to use due care and reasonable diligence to provide the planer machine with a good, proper and suitable belt with which to operate said machine, and that he negligently provided a belt with which to operate said machine which he knew, or ought to have known was unsafe and unsuitable for the purpose for which it was furnished, and that the belt was unsafe and dangerous by reason of being fastened together with metal studs, and which studs would break or tear out of said belt on account of the weakness of the fastening, and that the belt hooks broke out of the belt and struck plaintiff, and that plaintiff's injuries resulted from said negligence, then you must find a verdict for the plaintiff and assess his damages.

(b) If the jury believe the undisputed evidence in this case and that when plaintiff was injured he was in the discharge of his duties as employe of the defendant and at the time the belt (which broke and caused the injury to plaintiff) was fastened together and put upon the machine, T. was intrusted with superintendence in this regard, and that the belt was fastened together and put on the machine while said T. was in the exercise of such superintendence, and that said T. was negligent either in not fastening the belt together by lacing or with covy hooks, or in not putting up a guard to protect the plaintiff from danger of being struck, or in not instructing the plaintiff of the dangers connected with the use of the belt, and if you further believe that the hooks broke out of the belt and struck plaintiff then under the employer's liability act of this state the plaintiff would then be entitled to a verdict at your hands under the second count of the complaint.⁷⁴

§ 1421. Spike Maul Flying off Handle. The court instructs the jury that if you find from the evidence in this case that a spike maul wedged with an iron or wooden wedge or a nail is liable, when being used, to fly off the handle, then the risk of injury by being hit by such a maul is a risk assumed by the plaintiff when he entered the employment of the defendant, and he cannot recover in this case.⁷⁵

§ 1422. Flanges of Wheels on Defendant's Cars Being Worn too Thin. If, therefore, you find from a preponderance of the evidence that the accident which caused the death of the deceased was due to any defect in any wheel or wheels of defendant's cars, by the flanges

v. Hampton, 24 Tex. Civ. App. 458, 59 S. W. 928.

73—Goldthorpe v. Clark-Nickerson L. Co., 31 Wash. 467, 71 Pac. 1091 (1094).

74—Davis v. Kornman, 141 Ala. 479, 37 So. 789 (790).

75—Deckerd v. Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982 (985).

being worn down too thin, or to any flaw or break in the flanges, and that such defect, if any existed, could have been discovered by reasonably careful inspection of the wheels, and that defendant failed to make such inspection, then your verdict should be for the plaintiffs. * * * The company is not required to guard against defects which cannot be discovered by reasonable care, but they are required to discover defects which can be disclosed by reasonably careful inspection. * * * The master is bound to use appliances which are not defective in construction; but as between him and his employes, he is not bound to use such as are of the best or most approved description. If they are such as are in general use, that is all that is required. The employer is bound to furnish machinery and appliances that are of ordinary character and of reasonable safety. Whatever is according to the general, usual, and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law.⁷⁶

§ 1423. Injury to Employe from Defective Ladder—When Employe Cannot Be Charged with Negligence. On the other hand, if you find from the evidence that any ordinarily prudent, careful man, with the knowledge of the condition of the ladder which the evidence shows R. had of it, would have gone upon and used the ladder just as the evidence shows him to have used it, then he cannot be charged with negligence.⁷⁷

§ 1424. Using Defective Tire Bender. If you believe from all the evidence that the defendant did not use ordinary care in the premises, but at the time of the accident the tire bender was in a defective condition—that is, dangerous to those working at or near it, because it would sometimes start and revolve its rollers of its own accord without being thrown into gear by any one—and that said tendency to start off by itself was known to the defendant, or in the exercise of ordinary care would have been known to it, then, and upon your so finding, the defendant is guilty of negligence. Unless you so find, you need inquire no further, for your verdict must then be for the defendant.⁷⁸

§ 1425. Servant Injured through Defective Derrick. It is a primary duty of the master to provide suitable and reasonably safe tools and machinery for the servant with which to perform the particular work in which he is engaged. If the master shall fail in the performance of this primary duty, he is liable to the servant for what-

76—*Roberts v. Port B. M. Co.*, 30 Wash. 25, 70 Pac. 111 (114).

77—*Ritt v. True T. P. Co.*, 108 Tenn. 646, 69 S. W. 324.

"It is said that this instruction should have been that if plaintiff was in the exercise of ordinary prudence and care, such as is usually exercised by ordinarily prudent and careful men similarly

situated, then he was not chargeable with negligence. We are of opinion that perhaps the language of the counsel is the better expression, but we think that of the trial judge is equivalent to it, and there was no request to charge in the language of counsel."

78—*Fries v. Bettendorf A. Co.*, 126 Iowa 138, 101 N. W. 859 (860).

ever injury he may suffer resulting alone from such failure. In the performance of this duty the master must use all reasonable care and prudence for the safety of the servant, having regard to the character of the work to be performed. Such care must always be in proportion to the danger of the employment. The servant has the right to rely upon the master for the proper performance of his duty without inquiry on his part. The choice of tools and machinery lies with the master. They must be suitable for the work, and reasonably safe. It is not necessary that they should be the latest, newest, the most improved, the safest, or the best. Neither is the use of like tools and machinery in other establishments the test of fitness. The true test is not alone that others use them, but whether they are reasonably safe for the work to be done; and not whether other persons do in fact use them, but whether they are such as reasonably careful and prudent men would use under like circumstances. Where the master has performed this primary duty, the servant assumes the ordinary risks and hazards incident to the business in which he is engaged. He is presumed to have contracted with reference to such risks and hazards, and in contemplation of the dangers, great or little, that surround his peculiar occupation. He holds himself out for such work, and is presumed to know and contemplate its ordinary risks and dangers. The distinct question is whether the defendant provided in that derrick a reasonably suitable and safe machine for hoisting and handling that frame. This is to be determined by you from the evidence in this case, under the rules of law above stated. If that derrick was reasonably suitable and safe for that work at the time of the accident, then your verdict should be for the defendant. In that case the accident did not result from the negligence of the defendant, but was the result of one of the risks which the plaintiff assumed in his employment. It would be a mere accident, without negligence for which the defendant would not be liable. The case of the plaintiff rests upon the negligence of the defendant. No recovery can be had for the plaintiff unless you are satisfied from the preponderance of the evidence that the injuries complained of resulted from the negligence of the defendant. Negligence is never presumed; it must be proved. There is practically no dispute about the law in this case. We have called your attention to the principles of law involved so that you may apply them to the facts. The issue is essentially one of fact to be determined by you from the evidence. It is for you to say whether the derrick at that time, and for that work, was a reasonably suitable and safe machine.⁷⁹

§ 1426. Injury to Gripman on Street Car through Defective Brake.

If you further believe, and find from the evidence, that defendant's starter, S., or its foreman, R., knew of said condition of said brake; if you believe and find from the evidence it was in said condition at said time a sufficient length of time before said collision to have re-

paired the same, or have had said car turned in, and that they failed to do so; and if you further believe and find from the evidence that the employes of defendant in charge of and operating said street car did not exercise ordinary care in operating the same at the time of the collision, and such failure to exercise ordinary care, and the said defective condition of said brake, if you believe from the evidence it was at said time in a defective condition, combined and jointly were the cause of the collision; and if you further find from the evidence that at said time the plaintiff was exercising reasonable and ordinary care as a gripman on the said car on which he was working—then you will find a verdict for the plaintiff.⁸⁰

§ 1427. Injury to Servant by Negligent Use of Compressed Air.

(a) If you believe from the evidence that at the time the compressed air struck C., if it did, N. was defendant's vice principal and had control over said C. and other employes, and if you believe from the evidence that said N. had the compressed air turned on and was engaged in using it in the course of his employment by defendant, and for the purpose of forwarding the business of the defendant, and that while so using it, if he did so use it, he struck said C. with said compressed air, and thereby caused the death of said C., and if you further believe from the evidence that said N. knew, or, in the exercise of ordinary care could have known, that said compressed air was likely to cause C.'s death, or do him serious bodily harm, and that it was negligence on the part of said N. to strike said C. with said compressed air, if you find he did so, and that such negligence, if any, was the direct cause of C.'s death, and if you further find from the evidence that the plaintiff, O., was the wife of said C., and that E. and F. were the children of said C., and that said plaintiffs were damaged by his death, then I charge you that your verdict must be for the plaintiffs.⁸¹

(b) If you believe from the evidence that at the time N. applied the compressed air to the person of C., deceased, that said act was not done within the scope of the general authority or employment of said N., and you further believe it was not so done in the performance of the master's business and for the accomplishment of the object for

⁸⁰—*Cole v. St. L. T. Co.*, 183 Mo. 81, 81 S. W. 1138 (1140).

"The servant assumes the risk of the danger incident to the employment, but never assumes the risk of the master's negligence. If his master furnishes him unsafe implements, and he uses them, knowing them to be unsafe, a question of contributory negligence arises, but not of assumption of the risk. *Pauck v. St. L. Dressed Beef Co.*, 159 Mo. 467, 61 S. W. 806.

"The suit is bottomed on the negligence of the master,

and the instruction in the particular now under discussion is only in effect saying that, if the master was negligent, it is no excuse that the negligence of a fellow servant of the plaintiff contributed with that of the master to cause the injury, citing *Deweese v. Mining Co.*, 54 Mo. App. 476; *id.*, 128 Mo. 423, 31 S. W. 110; *Young v. Shickle*, 103 Mo. 324, 15 S. W. 771; *Browning v. Ry. Co.*, 124 Mo. 55, 27 S. W. 644."

⁸¹—*Galveston, H. & S. A. Ry. Co. v. Currie*, — Tex. Civ. App. —, 91 S. W. 1100 (1101).

which said N. was employed by the defendant, and that said act was not so done while performing any duty with said compressed air in behalf of said defendant railway company, and that said act was an independent act of the said N., in no wise connected with any duty being performed by said N. for this defendant, and you further find that said act was so done by the said N. for the purpose of playing a prank upon said C., then you will find a verdict in favor of the defendant.⁸²

FELLOW SERVANTS.

§ 1428. Fellow Servants Defined—Contributory Negligence. (a)

The court instructs the jury that, in order to constitute servants of the same master fellow-servants, it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution; and, if the jury believe, from the evidence, that the plaintiff, M., and the man, V., who was assisting him at the time of his alleged injury were in the employ of the defendant, P., and that they were directly co-operating with each other in the particular business in hand or that their usual duties brought them into habitual association so that they might exercise an influence upon each other promotive of proper caution then the court instructs the jury as a matter of law that the said plaintiff and the said V. who was thus assisting him at the time of his alleged injuries, were fellow servants and if the jury further believe, from the evidence, that the injury received by the plaintiff was occasioned by his own carelessness and negligence, or through the carelessness and negligence of the said V., who was thus assisting him at the time and

82—Galveston, H. & S. A. Ry. Co. v. Currie, *supra*.

"The above instruction is complained of upon the ground that there was no evidence that N. knew, or in the exercise of ordinary care could have known, that compressed air was likely to cause C.'s death or do him serious bodily injury. It is true that this seemed to have been a result of the application of compressed air to a person that staggered the comprehension of the physician who testified in the case, who says he did not believe it possible for a hose of the size of the one to so overcome the sphincter muscle as to allow air to rush into the bowels of C., but he went on to say that it did. It is probably safe to say from the evidence that N. did not expect the

air to so penetrate C., as to cause his death or do him any real injury. But the act was the direct and proximate cause of C.'s death, and in such cases it does not affect the liability of the wrong doer that the consequence of his act was something unforeseen or improbable. The act was calculated or likely to do some injury and as this is the case it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. *Hill v. Winsor*, 118 Mass. 251; *Atchison, T. & S. F. Ry. v. Parry*, 67 Kan. 515, 73 Pac. 105; *El Paso & N. W. Ry. v. McComas*, 36 Tex. Civ. App. 170, 81 S. W. 761; *Gulf, C. & S. F. Ry. Co. v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. 856."

place mentioned in the declaration, then the defendant would not be liable to the plaintiff if he was otherwise without fault, and the jury should find the defendant not guilty.⁸³

(b) If the jury find from the evidence that plaintiff himself was careless or negligent at the time or place of the accident, and that such negligence directly contributed to the injury which he sustained, then plaintiff cannot recover damages in this case and the verdict should be for the defendant.

(c) The jury are further instructed that defendant is not responsible for the negligence of plaintiff's fellow servants, if the jury believe from the evidence that plaintiff's fellow servants were guilty of negligence, and that such negligence caused the accident by which plaintiff was injured. The term "fellow servants" as used in this instruction, means those who are engaged with the plaintiff in the same work, without any relation to each other as co-laborers, and without rank.⁸⁴

§ 1429. Fellow Servants—Elements Necessary to Constitute Relationship of. (a) The court instructs the jury that to constitute defendant's servants who were switching the caboose in question, fellow servants of deceased, so as to exempt the defendant from liability on account of the death of deceased from the negligent acts of defendant's said servants (provided you believe from the evidence deceased's death was caused by the negligent acts of said servants), said servants and deceased should be actually co-operating, just before and at the time of the collision which caused deceased's death, in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety.⁸⁵

83—*Pagels v. Meyer*, 193 Ill. 172 (177), 61 N. E. 1111, rev'g 88 Ill. App. 169.

"The court refused to instruct the jury as requested. This instruction stated the rule of law as to what will constitute fellow-servants in practically the same language employed by the court in a great many cases, among which are: *C. & N. W. R. R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *C. & E. I. R. R. Co. v. Geary*, 110 id. 383; *Stafford v. C. B. & Q. R. R. Co.*, 114 id. 244, 2 N. E. 185; *N. C. Rolling M. Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186; *C. & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604; *C. & A. R. R. Co. v. Hoyt*, 122 id. 369, 12 N. E. 225; *C. & E. I. R. R. Co. v. Kneirim*, 152 id. 458, 39 N. E. 324, 43 Am. St. 259."

84—*Kaminski v. Tudor I. W.*, 167 Mo. 462, 67 S. W. 221 (222).

85—*P., C. & St. L. Ry. Co. v. Bovard*, 223 Ill. 176 (184), 79 N. E. 128.

"The instruction is in accordance with the language used by this court in *C. & A. R. R. Co. v. O'Brien*, 155 Ill. 630, 40 N. E. 1023, and *N. C. Rolling M. Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186. The instruction is charged with being erroneous upon two grounds: First, because it is said to assume that the death of the deceased resulted from the negligence of appellant's servants; and second, that it omits to condition the right of recovery upon the exercise of due care on the part of the deceased. Neither of these objections is well taken. As to the first, the jury are required to believe from the evidence that the deceased's death was caused by the negligent acts of appellant's servants, and, therefore,

(b) If you believe from the evidence that W. was not intrusted by the defendant with the authority to superintend, control, command, and direct plaintiff in the performance of the work in which he was engaged at the time he was injured, then said W. and plaintiff were fellow servants, and you will return a verdict for the defendant.⁸⁶

(c) The court instructs the jury that it is not necessary, in order to constitute two employes fellow servants, that they should be personally acquainted with or know each other's names, or that they should be doing identically the same thing at the same time. The rule, exempting the master from liability, does not rest in any degree upon personal acquaintance or actual previous association between the servants, but upon the relation of their duties to each other and the respective positions, which they hold. If, therefore you believe from the evidence that, at the time the injury in question was received, the deceased, W. R., was directly co-operating with the employes in charge of the locomotive in the particular work of the defendant then in hand, in such case it is your duty to find the defendant not guilty, even though you believe from the evidence that said R. was not acquainted with said employes, so in charge of said engine.⁸⁷

§ 1430. Fellow Servants—Persons May Be as to Part of Employment, and Not as to Other Part. I charge you further, that the servant does not assume the risks of carelessness of those who undertake to discharge, under the master's directions, the master's duty towards the servant, even if such persons are also servants of the same master; nor does the servant assume risks which he neither knows nor suspects, nor had reason to look for. The risks incident to his employment which he assumes are such risks as he knows, or which by the exercise of ordinary care, he should have known of. In this connection, I charge you, that while in the discharge of his ordinary duties the man R. was a fellow servant of the deceased, yet while engaged in transmitting signals from the foreman, M., to the men operating the donkey engine, he was discharging a duty imposed by

such negligence is not assumed to have existed. As to the second objection, the instruction only purported to state the law in reference to the question of fellow-servants, and, therefore, it was unnecessary to embody in the instruction a statement in regard to the care of the deceased for his own safety. In *C. & E. Ill. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, it was said: 'It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law as applicable to particular questions, or particular parts of the case, in separate instructions.' The criti-

cism cannot be made upon this instruction that it states, if certain facts are found, the jury may render a verdict for the plaintiff, and omits certain other facts necessary to be found in order to entitle the jury to find for the plaintiff. The instruction, on the contrary, merely states a rule in regard to fellow-servants which would exempt appellant from liability."

86—*Reeves v. Galveston, H. & S. A. Ry. Co.*, — Tex. Civ. App. —, 98 S. W. 929.

87—*C. & E. I. R. R. Co. v. Kimmel*, 221 Ill. 547 (553, 554), 77 N. E. 936.

law upon the vice principal, and was therefore while so engaged, a vice principal of the defendant; and if you find from a preponderance of the evidence that R. failed to correctly transmit the signal given him by the foreman, M., and by reason of such failure the injury, if any, complained of was caused, then you must find the defendant guilty of negligence.⁸⁸

§ 1431. Who are Fellow Servants a Question of Fact for the Jury. The court instructs the jury that the question as to whether the deceased, and the servants of the defendant in charge of the train in question and spoken of by the witnesses were fellow servants so as to exempt the defendant from liability from any negligence of its servants in the management of said train, is a question of fact to be determined by the jury from the evidence in the case under the instructions of the court.⁸⁹

§ 1432. Negligence of Defendant and of Fellow Servant. (a) If the jury believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe, from the evidence, that the negligence of a fellow servant contributed to such injury. In such cases the rule of law is that contributory negligence to defeat an action must be that of the plaintiff or of some person for whose acts he is responsible.⁹⁰

88—*Sroufe v. Moran Bros. Co.*, 28 Wash. 381 (393), 68 Pac. 896 (901), 92 Am. St. 847.

"Persons working together as fellow servants may be fellow servants with regard to some part of the employment, and principal or master with regard to some particular part of the employment. *Shannon v. Cons. T. & P. Mining Co.*, 24 Wash. 130, 64 Pac. 169; *Uren v. G. T. Mining Co.*, 24 Wash. 261, 64 Pac. 174; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398."

89—*L. E. & W. R. R. Co. v. Middleton*, 142 Ill. 550 (556), 32 N. E. 453.

"We are of opinion that said instruction was clearly proper. The question whether Middleton was a fellow servant with those in charge of the colliding train was a fact for the jury, and it was the duty of the court to submit it to them, with proper instructions as to the law defining the relation. Substantially the same question was decided in *I. & St. L. R. R. Co. v. Morgenstern*, 106 Ill. 216. There the question was whether the de-

ceased and one Bray were fellow servants, and on that question we said: 'The definition of fellow servant may be a question of law, but it is always a question of fact to be determined from the evidence whether a given case falls within the definition. Whether the deceased and Bray were fellow servants depended upon a variety of facts which had to be proven before the jury. The inquiry would arise whether they were in the service of a common master; were they engaged in the same line of employment; were the existing relations between them of such a character and their duties such as to bring them often together co-operating in a particular work? These and perhaps other facts of a kindred character were matters to be proven before the jury, and from the facts thus proven, it was for the jury then to say whether two servants in the discharge of their duties were fellows.'

90—*Shetter v. C. & N. W. Ry. Co.*, 49 Wis. 509.

(b) If you believe from the evidence that on or about ———, plaintiff was in the employ of defendant in its shops at S. A., and that while so employed he was under the direction and control of one D., and that the said D. ordered the plaintiff and one R. to take up and carry a plank or piece of timber as alleged in plaintiff's petition, and that in obedience to said order the plaintiff and said R. attempted to carry the said plank or timber; and you further find from the evidence that, while plaintiff had said plank or timber upon his shoulder said R. dropped his end of said plank or timber, and injured plaintiff, as alleged in plaintiff's petition; and you further find from the evidence that said R. was physically unable to sustain or hold up his end of said plank or timber, and that defendant knew of this, or by the exercise of ordinary care could have known of it, and that it was negligence on the part of defendant to order the said R. to assist in carrying said plank or timber, if he was so ordered, and that such negligence if any, was alleged in his petition; and if you further find from the evidence that the plaintiff was not guilty of negligence and that he did not assume the risk—then and in such case you will find for the plaintiff.⁹¹

§ 1433. Fellow Servants—Rule in Colorado. The jury are instructed that the rule which obtains in the state of Colorado is that for the acts of his vice principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment, which are on a level with the acts of the fellow laborer, except such acts as are done by the vice principal against the reasonable objections of the injured servant, the master is not responsible. In other words the test of the liability is the character of the act, rather than the relative act of the servant.⁹²

§ 1434. Care Required of Master in Selection of Fellow Servants.

(a) The court instructs the jury, that no person, or corporation, is responsible for injuries to an employe, occasioned by the carelessness, negligence or unskillfulness of a fellow servant, engaged in the same line of service; provided the employer has taken proper care and caution to engage proper servants to perform the duties assigned

⁹¹—G. H. & S. A. Ry. Co. v. Sherwood, — Tex. Civ. App. —, 67 S. W. 776 (777).

"If the injury was caused by the joint result of the negligence of the appellant and the fault of a fellow servant, appellee's right to recover would be maintained; for the original negligence of appellant would still remain as the culpable and direct cause of the injury, and the intervening fault of R., which might have contributed to it, could not be regarded. Shear & R. Neg. § 188; Busw.

Pers. Inj. §§ 103, 201; Supple v. Agnew, 191 Ill. 439, 61 N. E. 392. The act of negligence pleaded by appellee is in itself of such a character that it could not possibly be the negligence of R. It was the negligence of D., who, though appellant's servant, was its vice principal, and not a fellow servant of the appellee and could not be the act of any one else."

⁹²—Carleton Min. & M. Co. v. Ryan, 29 Colo. 401, 68 Pac. 279 (281).

to them. Nor is the employer liable for injuries thus sustained, if the person injured was, while engaged as such servant, acquainted with the character of such fellow servant for capacity, prudence and skill.

(b) The rule of law is, that when a person engages in the service of another, he undertakes, as between himself and his employer, to run all the ordinary risks incident to such service; and this includes the risk of occasional carelessness, negligence or unskillfulness on the part of his fellow servants engaged in the same line of duty and service; provided, the employer has exercised reasonable care and caution to engage competent and careful persons to discharge the duties assigned to them.⁹³

§ 1435. Responsibility of Master for Incompetency of Fellow Servant. The court instructs the jury that if you believe from the evidence that G. and P. were incompetent and unfit persons to perform the duty of propelling said hand car, and that by reason thereof they pulled or jerked upon the handle bar instead of pressing down; and you further find they were negligent; and, further, that the defendant knew, or by the exercise of ordinary care could have known, of the unfitness and incompetency of said G. and P., if you find they were unfit and incompetent, and that the defendant was guilty of negligence in employing and keeping said G. and P.,—then your verdict should be for the plaintiff.⁹⁴

§ 1436. Person Charged with Ventilation of Mine Not Fellow Servant of Miner. I charge you further that the positive duty of keeping a good and sufficient ventilation in the mine being on the defendants, as you have been instructed, it matters not who or what persons performed work or assist in the work of ventilation. If you should find that it was necessary to keep chute No. 15, or any other chute, open as an airway, in order to have good and sufficient ventilation in chute 14 above the first crosscut, and that part of the duty of the loader was to keep chute 15 clear, then, in that respect, in performing that particular work, he was assisting in performing a positive duty of the defendants to the deceased, and was, as to the work, a vice principal of the defendants, and not a fellow workman of the deceased.⁹⁵

§ 1437. Negligence of Fellow Servant. (a) The jury are instructed, that the rule of law, that an action will not lie by a servant against his master or employer, for an injury sustained through the negligence or default of a fellow servant, applies only to cases where the injuries complained of occur without the fault of the employer,

93—*Smith v. Lowell Mfg. Co.*, 124 Mass. 114.

94—*Int. & G. N. R. Co. v. Martinez*, — Tex. Civ. App. —, 57 S. W. 689 (690).

95—"This is within the principle

announced in *Costa v. Pac. Coast Co.*, 26 Wash. 138, 66 Pac. 398." *Czarecki v. Seattle & S. F. Ry. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750 (752).

either in the act which caused the injury, or in the employment of the person who caused it.

(b) While it is true that a common employer is not responsible to a servant for an injury caused by the negligence of his fellow servant, engaged in the same line of employment, yet it is the duty of the employer to use all reasonable care, caution and prudence to provide safe structures, competent employes, and all appliances necessary to the safety of the employed, and to adopt all reasonable rules and regulations to avoid injuries to the employed, and, having adopted such rules, to conform to them, or be responsible for consequences resulting from a departure therefrom.⁹⁶

(c) The master does not warrant the competency of his servants to the other servants. The extent of the master's undertaking is, that he will exercise reasonable care in the selection of an employe, and if his incompetency is discovered, will dismiss him from service. The master will be liable, where the injury is imputable to his negligence, in the selection of the servant, or in retaining him after his incompetency is known.⁹⁷

(d) The court charges the jury that they cannot find a verdict against the N. Company on account of any negligence on the part of any fellow servant of plaintiff's intestate, although such negligence on the part of the fellow servants of the deceased may have caused the injury and death of B.⁹⁸

§ 1438. **Motorman of Street Car Failing to Reduce Speed at Sunken or Depressed Spot—Fellow Servant of Conductor.** If you find from the evidence that the motorman in charge of the car knew, or might have known by the exercise of ordinary care, the condition of the track at the point of the accident, and that he negligently ran his car upon the point at which the track was sunken or depressed without slowing it down and reducing the speed to one of safety, then the plaintiff is not entitled to recover, and your verdict will be for the defendant.⁹⁹

96—Chi. & N. W. Ry. Co. v. Taylor, 69 Ill. 461.

97—Columbus, C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545.

98—N. A. Ry. Co. v. Mansell, 138 Ala. 548, 36 So. 459 (462), citing Mobile & M. Ry. v. Smith, 59 Ala. 245; Smoot v. M. & M. Ry., 67 Ala. 13; M. & O. Ry. v. Thomas, 42 Ala. 672.

99—Houts v. St. L. T. Co., 108 Mo. App. 686, 84 S. W. 161 (164).

"This instruction imputed the negligence of the motorman, if he was negligent, to the conductor, for the reason they were fellow servants. Stocks v. St. L. T. Co., 106 Mo. App. 129, 79 S. W. 1176; Godfrey v. St. L. T. Co., 107 Mo. App. 193, 81 S. W. 1230; Sams v.

R. R., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475. There was also evidence that the car was running at an ordinary rate of speed when it jumped the track. Defendant, however, contends that under the evidence it was conclusively shown that the motorman was negligent, and for this reason the case should have been withdrawn from the jury. In order to authorize the court to take the case from the jury, the evidence should have been so strong that reasonable minds could come to but one conclusion, to-wit, that the car was run at a negligent and high rate of speed, and that it was this high rate of speed that caused it to jump the track. It is not con-

§ 1439. **Who are Vice Principals.** (a) You are also instructed that, when an injury results to a servant from an order improperly given or act negligently done, and the person who gives the order or does the act is in the performance of a duty the breach of which by the master in person would create a liability, and he is clothed with apparent authority in that respect, and the order given or act done is within the scope of the apparent authority, the master is responsible in damages to the injured servant, if the injured servant is in the exercise of due care and caution for his own safety. It is immaterial whether the person exercising the authority was known as a foreman or by any other title; if he is clothed with apparent authority to direct and command, and the injured servant in good faith obeys and performs, the person so exercising such authority is not as to the person injured a fellow servant in the sense that the common master is relieved of responsibility for injuries resulting from his imprudent conduct or negligent act.¹⁰⁰

(b) The court instructs the jury that where a master confers authority upon one of his employes to take charge and control of a certain class of workman in carrying on some particular branch of his business, such employe in governing and directing the movements of the men under his charge with respect to that branch of the business is the direct representative of the master, and is not a mere fellow servant; and all the commands given by him within the scope of his authority are in law the commands of the master, and if he is guilty of a negligent and wrongful exercise of his power and authority over the men under his charge, it is in law the same as though the master itself was guilty of such conduct.¹

§ 1440. **Responsibility of Master for Negligence of Vice Principal.** The court instructs the jury that if a railroad company vests one of its employes with authority of superintendence, control or command over other of its employes, or with authority to direct such employes in the performance of their duty, such employe vested with such superintendence, control or command or authority to direct, is not a fellow servant with those over whom he has such superintendence, control or command, or authority to direct, but is a vice principal; and the company would be liable for any negligence of such vice

clusively shown that the car was running at a high rate of speed or at a speed exceeding the ordinary rate, and for this reason the question of whether or not it was running at a negligent speed was one for the jury."

100—"We do not think this instrument is open to criticism." W. C. St. R. R. Co. v. Dwyer, 162 Ill. 482 (490), aff'g 57 Ill. App. 440, 44 N. E. 815.

1—Ill. Steel Co. v. Hanson, 97 Ill. App. 469 (471), aff'd 195 Ill. 106, 62 N. E. 918.

"The instruction given for plaintiff and quoted in the statement is not in our opinion erroneous for the reason claimed by appellant, viz., that it assumes the existence of facts which are in dispute. The instruction does not purport to be upon the facts of the case, but in general terms embodies simply a proposition of law, which is clearly sustained by the rulings of the Supreme Court in *Fraser & Chalmers v. Schroeder*, 163 Ill. 459 (464), 45 N. E. 288, and cases cited."

principal which might proximately produce injury to any of the employes over whom he had such superintendence, control or command, or authority to direct.²

§ 1441. **Servant Engaging in Extra Hazardous Work Different from Ordinary Employment at Command of Fellow Servant.** The court instructs the jury that where a person in the employ of another in the performance of a specific line of duty, only ordinarily hazardous, is commanded by a fellow servant, but to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, but different from the sphere of employment in which he has engaged to serve, and extra hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same the servant so directed received injuries occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured, and the jury should so find.³

§ 1442. **Superior Authority Does Not Always Destroy Relationship of Fellow Servants.** The court instructs the jury that the facts that the said H. was superior in power and authority over the said B. in the service of the said company at the time of said accident would not, of itself, destroy the relation of co-servant as between the said H. and the said B.; and if they believe from the evidence that the said H. was capable of running the said machine at the time of the accident, and that the said B. then and there knew how to perform his duties as helper upon the said machine, and was working within the scope of his employment, then they would in that case be co-servants, and, although the jury might believe the accident resulted from the negligence of the said H. under such circumstances, the plaintiff would not be entitled to recover in this case, and the jury should so find.⁴

§ 1443. **Molder as Vice Principal to Laborer.** If the jury believe, from the evidence, that the plaintiff was in the defendant's employ as a common laborer, and required, in the discharge of his duty, to assist other servants of the defendant, who were molders, as a helper, and was under the control or subject to the orders of said molders; that one of such molders, negligently ordered or directed the plaintiff to repair, adjust or put in order the stationary crane in question; that in giving such order (if the jury believe, from the evidence, he gave it), said molder was not a fellow servant with the plaintiff, as defined by the instruction given on that question; that it was a dangerous service for him to perform and that the plaintiff did not appreciate or comprehend such danger; that while the plaintiff was

2—S. A. & A. P. Ry. Co. v. Wiegers, 22 Tex. Civ. App. 344, 54 S. W. 910 (911).

3—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (649).

4—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (651).

endeavoring to carry out and execute such order, the defendant so carelessly and improperly managed and controlled the other crane in question that the plaintiff was struck and injured by the same, as charged in the declaration, and that the plaintiff was in the exercise of ordinary care for his own safety before and at the time of his injury, the defendant is liable and a verdict ought to be returned for the plaintiff.⁵

ASSUMPTION OF RISK.

§ 1444. Servant Assumes All Risks Ordinarily and Naturally Incident to Particular Service in Which He is Engaged. (a) The jury are instructed, as a matter of law, that a servant, when he enters the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service in which he engages, and if the jury believe from the evidence that the injury to the plaintiff was only the result of one of the risks ordinarily incident to the work in which plaintiff's intestate was engaged, and not otherwise, then he cannot recover in this case, and your verdict should be for the defendant.⁶

(b) It is alleged in the declaration filed in this case by the plaintiff S. that the hazards and dangers of drawing the spike in the man-

5—Leighton, etc., Steel Co. v. Snell, 217 Ill. 152 (159), 75 N. E. 462.

"It is said of this instruction that it assumes that appellee and the molder were not fellow-servants. We do not agree with this contention. The instruction is long, and as printed is divided into three clauses by semi-colons, but it begins by informing the jury that if they believe from the evidence, and then follow the various matters contained in the instruction. The writer of the instruction unnecessarily, in the second clause, repeated the expression 'if the jury believe from the evidence,' but it neither added to nor took from the instruction the force of the direction contained in the first part of the instruction, that all the matters therein following should be found from the evidence. It is not necessary that each thought or element or act pointed out or specified in the instruction shall be preceded immediately by the requirement that the jury must find it from the evidence. Where the instruction contains but a single sentence and begins with the requirement to 'find from the evidence' the matters therein, the direction to 'find from the evidence' will apply to the entire sentence. C. & A. R.

R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406."

"It is also said that the instruction omits the question whether the molder had the power or authority to direct the appellee to repair the crane. The instruction tells the jury that they must believe, from the evidence, that appellee was under the control or subject to the orders of the molder. If he was under the control and subject to the orders of the molder, and the direction was with reference to work that was in the line in which the molder was engaged or if it concerned the repairing of tools or machinery which the molder handled in the prosecution of his work, as the evidence in this case shows was true, then the molder did have authority to give the order as a vice principal and bind appellant, unless it could be said, under the evidence, as the jury were advised, that the molder and the helper were fellow-servants. We think the instruction is not subject to either of the criticisms made of it, and that while it is not artistically drawn it would be properly understood by the average mind."

6—C., B. & Q. R. R. Co. v. Camper, 199 Ill. 569, 65 N. E. 442 reversing 100 Ill. App. 21.

ner he did draw it were unknown to him; now if the jury believe from the evidence that such hazards and dangers were known to said plaintiff, or that he had had sufficient experience and knowledge of the business as would make the dangers and hazards known to an ordinarily prudent and intelligent man, then the verdict should be for the defendants.⁷

(c) The jury are instructed, that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of, and a taking of the risks of its ordinary hazards, whether from the carelessness of fellow servants in the same line of employment, or from latent defects in the machinery and appliances used in the business, or the ordinary dangers in the use of the same.

(d) If the jury believe, from the evidence, that the plaintiff (or deceased) was engaged in the employment of the defendant when he was injured, and that such injury was received while in the discharge of his duty as such employe; and if the jury further believe, from the evidence, that such injury was occasioned either by his own negligence, carelessness or want of skill, or by that of his fellow servants, engaged in the same line of duty or service, as explained in these instructions, then the jury should find for the defendant; provided, they further believe from the evidence, that the defendant was not guilty of any lack of care or prudence in selecting or retaining such fellow servants, to discharge the duties assigned to them.

(e) The jury are instructed, that where an employment is attended with danger, a servant engaging in it assumes the hazard of the ordinary perils which are incident to it; and if he receives an injury from an accident, which is an ordinary peril of the service undertaken by him, he cannot recover damages for such injury.⁸

(f) The court instructs the jury that the plaintiff, in entering the employment of the defendant, assumed all the ordinary and usual risks and hazards of service, and if the jury believe, from the evidence, that the primary cause of plaintiff's injury was the fall of the coal from the roof of the mine, and that the danger of such fall was one of the ordinary and usual risks and hazards of such service, then the jury should find the defendant not guilty.⁹

(g) If you find (from the evidence) that these defects and these dangers were known to the plaintiff, or that by the exercise of reasonable diligence on his part, he ought to have known them, at the time he went to work, and at the time he was injured, it will be your duty to find a verdict for defendant in the case.¹⁰

(h) If the jury believe (from the evidence) the employment was dangerous, and that the defendant used proper precautions by notice and instruction concerning it, the plaintiff cannot recover.¹¹

7—I. C. R. R. Co. v. Sporleder, 90 Ill. App. 590 (593), aff'd 199 Ill. 184, 65 N. E. 218.

8—T., W. & W. Rd. Co. v. Black, 88 Ill. 112.

9—Cons. Coal Co. v. Bokamp, 181

Ill. 9 (21), 54 N. E. 567, aff'g 75 Ill. App. 605.

10—Shoemaker v. Bryant L. & S. Mill Co., 27 Wash. 637, 68 Pac. 380 (383).

11—Hayes v. Bush & Denslow

§ 1445. **Risk Not Ordinarily Incident to Employment—Burden of Proof.** When the servant shows that the injury received was in consequence of a risk not ordinarily incident to the employment, growing out of the master's negligence, the burden is then upon the master to show the servant knew and understood the increased danger.¹²

§ 1446. **Assumed Risk—Circumstances to Be Considered.** (a) In this case, if you believe, from the evidence, that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which he was engaged at the time of the injury, and understood the same, and then chose to engage in the work which exposed him to such perils and danger, he cannot recover, and your verdict should be not guilty. And in determining the question whether or not the plaintiff knew, appreciated and understood the perils and dangers of the work in which plaintiff was engaged, you will consider the evidence as to plaintiff's age, as to his previous experience with the machine in question or similar machinery, and all other evidence bearing upon said issue. If, on the other hand, you find and believe, from the evidence, that the defendant company and its officers knew, or had reason to know, the peril and danger to which plaintiff was and would be exposed while in the work and employment in which he was engaged at the time of the injury and did not explain or give notice of such danger or peril to the plaintiff, and if you further find that at the time of the injury, the plaintiff was not guilty of negligence and was exercising ordinary care, and that from his youth and inexperience he failed to know, understand or appreciate, and in fact did not know, understand or appreciate the risk or danger or peril to which he was exposed in the work in which he was engaged at the time of the injury, and that in consequence he was injured, then the defendant is liable, and you should find the defendant guilty.¹³

(b) Had the plaintiff been warned to keep away from the shaft, and of its dangerous nature when running? If he was notified of the danger, did he comprehend and understand it? If so, he cannot recover. In determining whether he understood the warning, if given, you may consider the plaintiff's age at the time, his intelligence, his

Mfg. Co., 102 N. Y. 648, 5 N. E. 784 (785).

12—King v. Ford R. L. Co., 93 Mich. 172, 53 N. W. 10 (13).

"The court followed almost verbatim the rule laid down in *Swo-boda v. Ward*, 40 Mich. 423, and the instruction was correct."

13—Pressed B. Co. v. Reinneiger, 140 Ill. 334 (340), 29 N. E. 1106.

"We do not think the instruction is erroneous in assuming that the machine was a dangerous one. It assumes that the work upon which appellee was engaged was

attended with hazard and danger, but only in the sense in which any employment requiring the use of heavy machinery propelled with steam is hazardous. . . . Appellant proved that its foremen and pressmen were in the habit of warning the boys to keep out of danger. The very theory upon which both sides tried the case and asked instructions, namely, that the employe assumes 'ordinary hazards and perils' of his employment, implies that such 'hazards and perils' exist."

experience or want of experience and such like. In other words, you may consider these circumstances to enable you to ascertain and determine whether he fully understood and appreciated the danger. If such warning was given, and he understood it, and continued to work there after such knowledge, he cannot recover in this action.¹⁴

§ 1447. **Servant Does not Take the Risk of Dangers not Incident to the Business—Duty of Master—Duty of Servant.** (a) The court instructs the jury, that where a servant is injured by something not incident to his employment, but by a temporary peril, to which he is exposed by the negligent act of his employer, without any negligence on the servant's part, he is entitled to recover damages, from the employer, on account of such injury. That when a servant is employed in a business, and at a place not dangerous, and the employer negligently and carelessly creates a peril at the place where the servant is at work, and the servant is injured thereby, then the servant will be entitled to recover for such injury, if he is himself without fault contributing to such injury.¹⁵

(b) It was the duty of the plaintiff, when he accepted employment from the defendant, to exercise ordinary care for his own safety, and not knowingly to expose himself to unnecessary risks or dangers connected with his said employment. And the court instructs the jury that the plaintiff, when he accepted employment from the defendant to operate the machine known as a "joiner," assumed all the risks incident to such employment; that is, such risks as naturally arose out of, or were necessarily connected with, said employment. But he did not assume risks that were unknown to him, and which were not incident to his employment, nor such risks which the defendant could, by the exercise of ordinary care, have guarded against.

(c) The court instructs the jury that it is the duty of the defendant, the A. Company, when it employed the plaintiff, to exercise ordinary care in providing him with a reasonably safe machine or joiner; that is, one in good order, and fitted for the purpose and work for which it was intended. It was also the duty of the defendant to exercise ordinary care in keeping the same in reasonably safe condition for the use of the plaintiff while he was so engaged in operating the said machine.

(d) The court instructs the jury that if they believe from the evidence that the injury of the plaintiff complained of was caused by the failure on their part to perform its duties, as defined in instruction No. 2, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the plaintiff himself failed to perform his duty, as defined in instruction No. 1, and that for such failure on his part the accident would not have

14—"This instruction was clearly correct." *King v. Ford River L. Co.*, 93 Mich. 172, 53 N. W. 10 (13).

15—Wharton on Neg: § 549; Fair-

banks v. Haentzsche, 73 Ill. 236; *Q. M. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240.

happened; in which latter event the law is for the defendant, and the jury should so find.

(e) The court instructs the jury that if they believe from the evidence that the injury of the plaintiff complained of in his petition was not the result of any defect in the machine joiner, but was the result of a risk or danger as naturally arose or grew out of the plaintiff's employment, and was naturally attended upon said employment, then the law is for the defendant, and the jury should so find.

(f) The court instructs the jury that if the injury complained of was not the result of a risk or danger incident to said employment, but could have been prevented by the exercise of ordinary care on the part of the defendant in the performance of its duty, as defined in instruction No. 2, then the law is for the plaintiff, and the jury should so find, unless the jury shall also believe from the evidence that by the exercise of ordinary care on his part the plaintiff could have prevented said injury; in which latter event the law is for the defendant, and the jury should so find.¹⁶

§ 1448. Servant Does Not Assume Extraordinary Perils or Risks. The court instructs the jury that while it is the law that where an employment is attended with danger, the servant engaging in it assumes the measure of ordinary perils which are incident to it, this applies only to perils or risks ordinarily incident to the service and not to those which are extraordinary and which did not exist at the time the servant engaged in the master's business, and which the servant did not subsequently assume.¹⁷

§ 1449. Servant Voluntarily Assuming Duty Not Arising Under His Employment. The court instructs the jury that if you believe it was not a duty arising under plaintiff's employment for him to look after the regulating and supplying of water to the boiler of engine 44, but if you believe that he voluntarily assumed the matter of looking after and regulating such supply of water, and if you believe further that the accident in question was caused or directly contributed to by negligence on his part, either in the fact of the assumption of such matter, or in the manner of his looking after the regulating such supply of water, then you will find for the defendant.¹⁸

§ 1450. Employee Voluntarily Taking Place He Is Not Required to Take. The court instructs the jury that if an employee in the discharge of the duties in his line, voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such

16—This series of instructions approved in *Reiser v. Southern P., M. & L. Co.*, 114 Ky. 1, 69 S. W. 1085 (1086).

"We are of opinion that the instructions submitted to the jury the real issues raised by the pleadings; that is, whether appellant's injury was the result of the de-

fective condition of the joiner or negligence on the part of appellant."

17—*Wrisley v. Burke*, 106 Ill. App. 30 (31), aff'd 203 Ill. 250, 67 N. E. 818.

18—*Int. & G. N. R. Co. v. Walters*, — Tex. Civ. App. —, 80 S. W. 668 (669).

place, and which is greater than the risk attached to the place he may have taken by reason of his employment.¹⁹

§ 1451. **Servant's Knowledge of Facts Which Would Make His Own Act Dangerous.** The court instructs you that, if you believe, from the evidence, that the plaintiff knew of the removal of the dirt and debris from the dump pile at or near the place where the plaintiff fell, or by the exercise of ordinary care could have known of the removal of dirt and debris from the dump pile, and, if the jury also believe, from the evidence, that the plaintiff failed to exercise ordinary care in going out from the place where he was injured in the night time then your verdict must be for the defendant.²⁰

§ 1452. **Duty of Servant to Apprise Himself of Dangers of Machinery.** (a) If you find that the plaintiff engaged with the defendant in the duty of oiling the machinery of its sawmill without at the time fully understanding or comprehending the dangers incident to his business, yet if you find that between the time of his employment and the time he was injured he learned of these dangers or in the course of his employment ought to have known of the liability to accident by being entangled in the machinery, as he was, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the defendant.

(b) It is the duty of the plaintiff to look at the machinery about which he is employed to work, and to apprise himself of any danger afforded by the machinery itself, and which he could have discovered or ought to have discovered by a proper examination thereof, or by the use of his sight and other senses; and if he failed during the course of his employment, and while engaged in the task of oiling the machinery to apprise himself of the dangers which he ought to have seen then the plaintiff was not in the exercise of ordinary care or prudence, and it is your duty to so find. That you may consider as far as you find it applicable.²¹

§ 1453. **Duty of Servant to Look Out for Patent and Obvious Defects.** (a) The jury are instructed that where the party is of mature age, and an experienced employe, the duty does not rest upon the master to instruct and notify him of the patent and obvious positions of structures about which he may be called on to work. It is his duty to look out for them.

19—So. K. Ry. Co. v. Sage, — Tex. Civ. App. —, 80 S. W. 1038 (1909).

20—Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337 (341), aff'd 191 Ill. 340, 61 N. E. 79.

21—Guinard v. Knapp, S. & Co., 95 Wis. 482, 68 N. W. 625 (627).

"The instructions above quoted stated correct propositions of law, and were applicable to the testi-

mony in the case. The appellant was, therefore, entitled to have them given to the jury without modification. It is plainly the duty of the court, and not of the jury, to decide when a legal proposition is applicable to the evidence.

To give the jury a legal proposition, and say to them, as the court did, 'You may use this as far as you find it applicable,'

(b) The jury are instructed to find for the defendant if they find from the evidence that the car was too close to the warehouse, and that its close proximity thereto and the danger thereof was known to the plaintiff, or that the proximity of said track to said warehouse was apparent, and the danger to plaintiff open and obvious, and that the position of said track and said warehouse in reference to each other was seen by the plaintiff, before his injury, in time to have avoided the same, then you are instructed that plaintiff assumed the risk of such injury, and, if you so believe, your verdict will be for the defendant.²²

(c) It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work, where there is danger. He must inform himself. This is the law everywhere.²³

(d) The court instructs you that if there be risk or danger, and that such risk or danger is patent and obvious to the employe, no notice thereof is necessary.²⁴

§ 1454. Effect of Plaintiff's Knowledge that Window Was of Great Weight. (a) If you believe from the evidence that the said window did get out of the control of the plaintiff and fall by reason of its great weight, and that the plaintiff knew of the great weight of said window, or by the exercise of reasonable and ordinary prudence on her part would have known of the great weight of said window, then she assumed the risk and cannot recover.

(b) The court instructs the jury that if you believe from the evidence that the plaintiff had been in the employment of the defendant for several weeks and had been about and in the said premises for such time, and was familiar with the said window, and its weight, the method of raising and lowering it, the method of propping or holding it up by a stick, and the dangers, if any, are shown by the evidence, incident to raising or lowering said window, or if you believe from the evidence that such time was sufficient to have enabled a person of ordinary observation to become familiar with such condi-

comes very near being an abdication of the functions of the court. Under such an instruction the jury is given full license to decide that the proposition has no application to the case, and disregard it entirely. The charge should contain only such propositions as are to be applied to the evidence in the case. The court says to the jury, in substance: "These are the propositions of law applicable to the evidence. Take them, apply them to the case, and return your verdict." Such being

the proper functions of the court and the jury, it seems very plain that the court erred in leaving it to the jury to decide whether the instructions were applicable to the case. A similar remark was disapproved by this court in *Duthie v. Town of Washburn*, 87 Wis. 231, 58 N. W. 380."

22—*G., H. & S. A. Ry. Co. v. Morton*, 31 Tex. Civ. App. 142, 71 S. W. 770 (771).

23—*Russell C. C. Co. v. Wells*, 96 Va. 416, 31 S. E. 614 (615).

24—*Swift & Co. v. Rutkowski*,

tions, then, in that state of the proof, you are instructed that she assumed the risk incident to her undertaking in lowering the said window, and you should in that state of the proof find the defendant not guilty.

(c) The court instructs the jury that if you believe from the evidence that the plaintiff could by the exercise of ordinary care and prudence have avoided the injury, she cannot recover and you should in that state of the proof find the defendant not guilty.²⁵

§ 1455. Prior Knowledge of Condition of Ditch by Employee of Municipal Corporation. If you believe from the evidence that the plaintiff did know, or, by the exercise of ordinary care on his part, might have known, of the condition of the bank or sides of the ditch, or if you further believe from the evidence that he had as good an opportunity of knowing of the condition of the bank or sides of said ditch as the defendant, then in law he is estopped from recovering in this action, and it is your duty to find for the defendant.²⁶

§ 1456. Danger of Falling into Chute or Excavation—When Assumed. The defendant has pleaded that the plaintiff assumed the risk of being injured by the accident in question. Upon this point I charge you that if you believe from the evidence that the peril of falling into the chute or excavation referred to in the evidence was a peril incident to the employment, and was not produced by a want of ordinary care on the part of the defendant, then it is a risk assumed by the plaintiff, and he cannot recover. But if you believe from the evidence that the danger of suffering such an accident was not incident to his employment, and could have been guarded against by the exercise of ordinary care on the part of the defendant, then plaintiff did not assume the risk of such an accident, and if he was injured without fault on his part, then he is entitled to recover.²⁷

§ 1457. Carrying Glass Through Passageway Which Servant Knows to Be Obstructed. It is the law that an employee assumes all the risk of his employment. If you find from the evidence that said glass broke by reason of a defect therein, and that it was one of the risks incident to plaintiff's calling, or if you find that plaintiff knew that said passageway was obstructed, and that with such knowledge he proceeded to carry said glass through said passageway, and that said glass was broken by said obstructions, then you should find that plaintiff assumed the risk of carrying the glass the way and where he did, and your verdict should be for the defendant.²⁸

§ 1458. Knowledge of Servant as to Uncovered Electric Wires. If the plaintiff had actual knowledge that the uncovered wires were at the place where he was injured, that destroys his right of action. If

167 Ill. 156 (158), 47 N. E. 362, rev'g 67 Ill. App. 209.

25—Macon Co. Tel. Co. v. West, 116 Ill. App. 435 (438).

26—La Salle v. Kostka, 190 Ill. 130 (136), 60 N. E. 72.

27—Downey v. Gemini Min. Co., 24 Utah 431, 68 Pac. 414 (416), 91 Am. St. 798.

28—Kennard v. Grossman, — Neb. —, 89 N. W. 1025 (1027).

he ought to have known them, or been on his guard against them, the result must be the same.²⁹

§ 1459. Assumption of Risk by Employes of Street Car Company—Poles Too Near Track. (a) If from the evidence you believe the plaintiff was injured, but that his injuries resulted from conditions and risks which were the ordinary incidents of the service and work in which he was engaged, and were not due to any negligence of defendant in the matters recited in the paragraph above, then in such state of facts, if any, you will find for the defendant, as the plaintiff in entering into defendant's employment assumed all the ordinary risks of said business.

(b) You are instructed that if you believe from the evidence that the plaintiff was knocked off the car by the pole as alleged by him in his petition, and that the pole was so near the track that in the maintenance of same the receiver failed to use that degree of care that would have been used and exercised by ordinarily prudent persons under the same or similar circumstances, then you are instructed that this would not be one of the risks ordinarily incident to his employment.

(c) If from the evidence you believe the plaintiff was injured by a defective pole as alleged by plaintiff, but should you also believe that prior to the time of said accident he knew of such defect, if any, in said pole, and with such knowledge remained in the employ of the company, or if from the evidence you believe that he must have known of such defect, if any, in the pole, in the exercise of ordinary care in the performance of his own duties as conductor, then in such state of facts if any, the risk of injury from said pole would be one of the assumed risks of the employment, and plaintiff could not recover.³⁰

§ 1460. Duty of Servant as to Examination of Grip Car for Defects. (a) The jury are instructed, as a matter of law, that an employe himself must use due care and caution to avoid injury; and if he voluntarily exposes himself to any danger that he knew or by reasonable attention or the exercise of ordinary prudence might have known, he thereby assumed all risks and cannot recover for any injury resulting from his own acts.

(b) The court instructs the jury that it was the duty of the plaintiff, before starting the car, to examine those parts of the grip car which appertain to the grip and brakes, and if he failed to do so, and his failure directly contributed to the injury, he cannot recover for any injury occasioned to him because of any defect in the grip, brakes or appurtenances thereof.

(c) If the plaintiff, by the use of ordinary care, could have discovered that the wrecking crew had not properly repaired the car,

29—Indiana I. & I. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175 (180).

30—Houston El. Co. v. Robinson, — Tex. Civ. App. —, 76 S. W. 209 (210).

and if he failed to use such care, and that his failure so to do contributed directly to the injury, he cannot recover, and the burden of proving the use of such care is on the plaintiff.³¹

§ 1461. **Assumption of Risk in Grinding Planer Tool upon Emery Wheel.** If you find from the evidence that the plaintiff at the time of his injury knew that the said manner of grinding said planer tool upon said emery wheel in the way it was ground at the time of his injury was dangerous, or if he must necessarily during the course of his employment have known said fact, then and in such case the plaintiff, in attempting to so grind or sharpen said tool with such knowledge, assumed the risk of being injured thereby, and, if you so find, your verdict should be for the defendant.³²

§ 1462. **Using Defective Gas Pipe as Lever.** The court instructs the jury if they believe that the defect in the gas pipe was known to the plaintiff, and the dangers of its use in its defective condition was also known to the plaintiff, and that the knowledge of the plaintiff on the point above mentioned was equal or superior to the knowledge of the foreman on the same subjects, and you believe, from the evidence, that a reasonably careful and prudent man would not have used said gas pipe under the same or similar circumstances, then you are instructed that the plaintiff cannot recover, and they must find for the defendant, and in that case it makes no difference whether a promise to furnish a wooden lever was made or not.³³

§ 1463. **Assumption of Risk in Unloading Timbers.** If you believe from the evidence that the dangers, if any, incident to unloading the timbers under the circumstances existing at the time of his injuries, if any were received, were known to plaintiff, or so open and obvious that he must have known them, if any, at the time he attempted to unload said timber, then you are charged that plaintiff assumed the said risk, if any, and you will find for defendant.³⁴

§ 1464. **Carrying Too Heavy a Piece of Timber—Employing Insufficient Help—Assumed Risk.** (a) You are instructed that if you believe from the evidence that the foreman of defendant instructed plaintiff and three other employes to pick up and carry a piece of the lumber, and that plaintiff complained to said foreman that the same was too heavy and large for himself and the other employes to carry it with safety, and that the foreman of defendant ordered plaintiff

"The charges present the issue of the assumption of the ordinary risks incident to the work of operating cars upon the tracks of street railway companies, and as abstract propositions of law they are correct. *Int'l & G. N. Ry. Co. v. Emery*, — Tex. Civ. App. —, 40 S. W. 149; *M., K. & T. Ry. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Galveston, H. & S. A. Ry. Co. v. Pitts*, — Tex. Civ. App. —, 42 S. W. 255."

31—*W. C. St. R. R. Co. v. Dwyer*, 162 Ill. 482 (490), 44 N. E. 815, aff'g 57 Ill. App. 440.

32—*Gulf, C. & S. F. Ry. Co. v. Archambault*, — Tex. Civ. App. —, 94 S. W. 1108.

33—*I. C. R. R. Co. v. North*, 97 Ill. App. 124 (128).

34—*Bryan v. Int'l & G. N. R. Co.*, — Tex. Civ. App. —, 90 S. W. 693 (697).

and the other three employes to pick it up and carry it, and stated to plaintiff that they could carry it easily enough, that it was perfectly safe for them to carry it, or that he would stand the consequences, and that plaintiff was inexperienced and relied upon said statements of said foreman, if any, and that said piece of lumber was too heavy for said four employes to carry it with reasonable safety, and that while plaintiff and the other three employes were carrying the same, and by reason of the weight of the same being too great, one of the men "gave down" and that an extra weight was thereby thrown upon plaintiff and that by reason thereof plaintiff was injured, substantially as alleged in his petition, and that the foreman of defendant was guilty of negligence in ordering said plaintiff and the other three employes to carry said piece of lumber under the facts and circumstances of this case, or that said foreman failed to provide a sufficient number of men to carry said piece of lumber with reasonable safety, and that such failure, if any, constituted negligence, and that said negligence, if any, was the proximate cause of the injury to plaintiff then you should find your verdict for plaintiff, unless you find from the evidence that plaintiff had assumed the risk, as hereinafter set forth.

(b) If you believe from the evidence that plaintiff was an old and experienced hand in the particular business of carrying said lumber, and that the danger, if any, in carrying the same, was as equally open to the observation and knowledge of plaintiff as it was to the foreman of defendant, then plaintiff assumed the risk, and your verdict should be for defendant.

(c) In this connection you are, however, instructed that if you believe from the evidence that the plaintiff complained to the defendant that said piece of lumber was too heavy for himself and the other three employes to carry, and that the foreman of defendant stated to him that said four men could carry it easily enough or that said four men could carry it safely, or stated that he, the said foreman, would stand the consequences, then the said plaintiff was entitled to rely upon the supposed better knowledge and statements of his employer, and that said plaintiff did not assume the risk and danger incident to the carrying of said piece of lumber, unless you believe from the evidence that the danger or risk, if any, was so patent or obvious that an ordinarily prudent person would have declined to have helped to carry said piece of lumber under the facts and circumstances of this case.³⁵

§ 1465. Failure to Use Precautions Against Known Danger. (a) If the jury believe from the evidence that it was dangerous for R. to stand upon the strand or messenger cable which made a perfect circuit between any charged electrical agency in the hands of R. and the ground, and that R. knew or by the exercise of ordinary care would have known, that standing upon said messenger cable was

dangerous, and if the jury further believe from the evidence that a man of ordinary prudence under such circumstances as surrounded R., would not have stood upon said messenger strand or messenger cable while holding a telephone wire suspended over electric wires, then the jury must find the defendant not guilty.

(b) If the jury believe from the evidence that a man of ordinary prudence exercising ordinary care for his own safety under such circumstances as surrounded R. at the time of this accident would have worn and used a safety belt, and that R. did not at the time of this accident wear a safety belt, and if the jury further believe from the evidence that the death of R. would have been prevented if the deceased had worn a safety belt, then the jury must find the defendant not guilty.³⁶

(c) If you believe from the evidence that the employes of defendant in its roundhouse were in the habit of leaving the coal shovel or scoop, sometimes with the scoop of the shovel under the coal board, sometimes under the coal in front of the coal board, sometimes on top of the coal, and sometimes lying in the gangway between the engine and engine tender or tank, and that the plaintiff knew of the custom, or that, with ordinary circumspection which a prudent man would use in the performance of his particular duty, he would have known of that custom, and that at the time the plaintiff was injured in attempting to board defendant's engine in its roundhouse, as claimed by him, the said shovel was so left by some of defendant's employes in the gangway of said engine; and if you further believe that under such circumstances, in getting upon one of defendant's engines in its roundhouse at S. A., as claimed by plaintiff, for the purpose of putting oil cans in the oil box upon said engine, tank or tender, he stepped upon said shovel and was injured thereby—then in such case plaintiff assumed the danger to himself in stepping upon said shovel under such circumstances, if he did so step upon the same, and in such case you will return a verdict in favor of defendant.³⁷

36—Commonwealth E. Co. v. Rose, 114 Ill. App. 181 (184).

37—Claudius v. West End H. A. Co., — Tex. Civ. App. —, 84 S. W. 254 (256).

"The principles stated in the preceding part of the special charge upon which the part copied is premised are such as are generally applicable to the system or rules and methods adopted by the master in conducting or carrying on a complex and dangerous business or in operating intricate and dangerous machinery, and not such as are ordinarily applied in determining the master's negligence vel non in cases where the injury to the servant is caused by simply placing or leaving an obstruction or object in his way,

rendering the place his master has assigned him to work dangerous or unsafe. In the latter class of cases the servant owes no duty of inspection of defendant's premises. But it is the master's duty to exercise ordinary care to see that the premises where the servant is put to work are kept reasonably safe, and if the premises were rendered dangerous by obstacles in the way, of which the master knew, or would have known by the exercise of ordinary care, and it persisted in allowing such obstacles to be placed there, it would be its duty under such circumstances to warn its servants of the danger, unless from actual knowledge, experience or acquaintance with the

§ 1466. Servant Knowing Hazards, Cannot Recover on Ground There Was a Safer Way of Conducting Business. The court instructs the jury if they believe from the evidence that the plaintiff knew the hazards of his employment as the business was conducted and was injured while engaged therein, he cannot maintain an action against the defendant for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury.³⁸

§ 1467. Continuing Work in Dangerous Place After Notice of Defect to Master. (a) The court instructs the jury that an employe who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to remedy the defect; and in the event that the master does so promise, the servant may, while relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and the court, therefore, instructs the jury that if they believe, from the evidence in this case, that the standing upon which the plaintiff worked while in the employ of the defendant was defective, that the defendant promised to remedy the same but failed to do so within a reasonable time after such promise, and that the plaintiff continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event, the court instructs the jury that the plaintiff assumed the additional risk of the defect in the condition of the floor, and if the jury so find, they will return their verdict for the defendant.³⁹

premises the servant knew at the time of the injury, or might have known, of the presence of the object or obstacle rendering the place dangerous for him to carry on his work. *G., H. & S. A. Ry. Co. v. Brown*, 33 Tex. Civ. App. 589, 77 S. W. 833, and authority cited; *Choctaw O. & G. Ry. Co. v. McDade*, 191 U. S. 65, 24 Sup. Ct. 24, 48 L. Ed. 96; *Chicago & A. R. R. v. Howell*, 208 Ill. 155, 70 N. E. 15."

38—*Guaranty Cons. Co. v. Broeker*, 93 Ill. App. 272 (275).

"The instruction invoked the defense that if the plaintiff knew the hazard of his employment in the manner the business he was engaged in was conducted, he could not recover merely because a safer method of conducting the

business might have been adopted, the adoption of which would have prevented the injury. A defense of that kind stated generally is a good one in a proper case. See *Simmons v. Chicago & Tomah Ry. Co.*, 110 Ill. 340, where it is said (p. 347): 'If a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury.'"

39—*Ill. S. Co. v. Mann*, 170 Ill. 200 (204), 48 N. E. 417, 62 Am. St. 370, 40 L. R. A. 781.

"The jury should have been in-

(b) If the jury find from the evidence that the defendant's shipping room, at or about the elevator hole mentioned in the evidence, was dark and unlighted; and if the jury further find from the evidence, that plaintiff before his injury knew that said room was dark and unlighted, and that there was some risk or danger of falling into the elevator hole, by reason of said condition of said room, while undertaking to use the elevator in the discharge of the duties of his employment; and if the jury find from the evidence that defendant was maintaining said elevator opening in said floor without causing the same to be effectually barred or closed by railing, gate or other contrivance for the prevention of accidents therefrom; and if the jury find from the evidence that the plaintiff knew before his injury that defendant was maintaining said elevator opening without such guard or protection being closed; yet if the jury further find from the evidence that said condition of said room and elevator opening and the danger arising therefrom was not such as to threaten immediate injury to plaintiff while in defendant's service in the discharge of the duty of his employment, and was not such that a person of ordinary prudence, while exercising care and caution, would not have undertaken to have remained in defendant's service and discharge the duties of his employment,—then the fact alone that plaintiff continued in defendant's service under the circumstances will not of itself defeat this action.⁴⁰

§ 1468. Operating Dangerous Machine After Promise of Master to Supply Device for Lessening Danger. (a) The operator of a dangerous machine, who has received from his employer a promise to supply a device calculated to lessen the danger must, if he elects to operate the machine before the device is attached, operate his machine with due and proper care, considering its unprotected condition, in order that he may avoid injury. Therefore, it was the duty of the plaintiff, while he was relying upon the promise to attach the spreader or guard, if such promise was made him, to handle the machine with reasonable care, in view of the fact that the spreader or guard had not been attached; and if he did not so handle it, he forfeited the promise, and cannot now recover for his injury.⁴¹

(b) A general rule of law is that a person working with a defective or unguarded machine, and without complaint, and knowing of the dangers of the same, assumes the danger of the defect or unguarded part; but there is no longer any doubt that, where an operator of machinery has expressly promised to repair a defect, the workman does not assume the risk of an injury caused thereby, within such a period of time after the promise as would be reasonably

structed that the law was as stated in the instruction, which should have been given, and it was error to refuse it."

⁴⁰—Wendler v. People's H. F. Co., 165 Mo. 527, 65 S. W. 737 (740).

"This instruction was rendered necessary to meet the plea of contributory negligence, and it does not seem to unfairly state the case."

⁴¹—Crooker v. Pac. Lounge &

allowed for its performance; nor, indeed, is any express promise or assurance from the master necessary. It is sufficient that the workman may reasonably infer that the matter will be attended to. So you are instructed that if the plaintiff, at the time of his employment and at the time of the accident, saw the danger from the lack of the guard, and complained of the same to the foreman, and the foreman promised to put on a guard, and the plaintiff went to work, and continued at work, on the promise, and you further find that the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue at work on the saw, and that at the time of the accident the plaintiff was relying upon the foreman's promise to place on a guard, then you are instructed that the plaintiff did not assume the risk and danger of an injury resulting from the lack of a guard.⁴²

(c) The court instructs the jury that when an employer, or his superintendent having authority to remedy defects in machinery, is notified by the servant of the employer of defects in machinery that render the service, which such servant is engaged to perform, more hazardous, and such employer or superintendent thereupon expressly promises to make the needed repairs, the servant may rely on such promise, and may, if he so relies on such promise, continue in the employment a reasonable time to permit the performance of such promise without being guilty of negligence in so remaining in such employment; and if in such case during such time any injury results from such defects to the servant while he is in the exercise of ordinary care and caution for his own personal safety from the negligence of his employer in manner and form as charged, the servant may recover from the employer his damages for such injury, except when the danger is so imminent that no prudent person would undertake to perform such service under such conditions.⁴³

(d) The court instructs the jury that if you believe, from the

M. Co., 34 Wash. 191, 75 Pac. 632 (635).

"These principles of law are amply sustained by courts and elementary writers of the highest authority. See *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578."

42—*Crooker v. Pac. L. & M. Co.*, supra.

"This instruction is sustained by the principles of law announced in the former opinion and the authorities therein cited. To the same effect, see, further, *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578; *Erd-*

man v. Ill. Steel Co., 95 Wis. 6, 69 N. W. 993, 60 Am. St. 66."

43—*Taylor v. Felsing*, 164 Ill. 331 (332), 45 N. E. 161.

"This instruction states an abstract proposition of law. That form of instruction is not approved, and it is regarded much better that the court should apply rules of law to the evidence in the case, but a judgment will not be reversed for the failure to make such application. The principle of law is correctly stated in this instance, and the giving of such instruction is not error where it is not calculated to mislead the jury. (*Peoples v. McKee*, 92 Ill. 397; *Betting v. Hobbett*, 142 id. 73, 30 N. E. 1048; *C. B. & Q. R. Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380."

evidence, that the plaintiff while in the exercise of ordinary care and caution for his own personal safety was injured in consequence of the defective condition of the machinery used by the defendants, as alleged in the second count of the declaration, if the jury believe, from the evidence, that the same was so defective; and if they further believe, from the evidence, that the plaintiff repeatedly and shortly before receiving such injury called the attention of the defendant's superintendent to said defects, if any, and that said superintendent there had authority to remedy said defects, if any, and that thereupon said superintendent repeatedly, and shortly before the injury, promised said plaintiff that said defects, if any, should be remedied, and that said plaintiff, relying upon such promises remained in the employ of said defendants until the injury as aforesaid, and if the jury further believe, from the evidence, that the danger from such defective machinery, if any, was not so imminent that no prudent person would have undertaken to perform the service required of the plaintiff, then by so remaining for a reasonable time thereafter the plaintiff would not assume the risks incident to such defective machinery, if same was defective, during such reasonable time.⁴⁴

(e) The court instructs the jury that, if you believe, from the evidence in this case, that the hay-cutter was defective, as charged in the declaration, and that the plaintiff notified the defendants of such defect, and if you further believe, from the evidence, that such defect, if any, rendered the services which plaintiff was engaged to perform more dangerous and that the defendant thereupon promised the plaintiff that he, the defendant, would have said hay-cutter repaired; and if you further believe, from the evidence, that the plaintiff thereupon relied upon the said promise of the said defendant to repair said hay-cutter, and that the said plaintiff continued in his said employment a reasonable time to permit the defendant to repair said hay-cutter, in such case your verdict should be for the plaintiff, unless you further find from the evidence that the danger by reason of said defect, if any, was so great that no prudent person would have used said hay-cutter in its then condition, as shown by the evidence.⁴⁵

(f) The court instructs the jury that if they believe, from the evidence, that the plaintiff complained of the defective condition of the machinery which he was operating, and that the defendant promised to have the defects in said machinery remedied, but failed so to

44—Taylor v. Felsing, supra.

45—Donley v. Dougherty, 75 Ill. App. 379 (381), aff'd 174 Ill. 582, 51 N. E. 714.

"The Supreme Court say: 'It is now uniformly stated by text writers that where the master, upon being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the

servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if an injury results therefrom he may recover, unless the danger is so imminent that no prudent person would undertake to perform the service.' To the same effect is Swift & Co. v. Madden, 165 Ill. 47, 45 N. E. 979."

do within a reasonable time, and in consequence thereof the injuries complained of were inflicted upon the plaintiff, then the defendant is liable, and the jury should find for the plaintiff unless the jury believe that the plaintiff failed to exercise reasonable care and caution in doing the work in which he was engaged, taking into consideration the plaintiff's experience, or unless the damage was so palpable, immediate, and constant that no one but a reckless person would expose himself to it, even after receiving such promise or assurance.⁴⁶

(g) It is the law that when a servant, having a right to abandon the service, because it is dangerous, refrains from so doing in consequence of the assurance that the danger shall be removed, the duty to remove the danger is manifestly imperative; and the master is not in the exercise of ordinary care unless, or until, he makes his assurance good. Were these assurances and promises made as claimed by the plaintiff here? If the plaintiff did not notify the defendant of this defect, and if the defendant did not,—as claimed by the plaintiff,—make the promise to repair, and making such promise induced the plaintiff to continue his work there, then the plaintiff cannot recover in this case. If you find that he understood the increased risk of the gears being uncovered, the defendant cannot be held responsible, if he continued his work for any considerable time, knowing the danger, without being induced by his master to believe that a change would be made, and without making any complaint of such dangers or defects, or calls the attention of the master to them. If the servant, with full knowledge of the facts, and understanding the increased risk and danger occasioned thereby, in the absence of any promise of the master to remedy the same, remains in the master's employ, then the plaintiff voluntarily incurs such increased risk.⁴⁷

§ 1469. Continuing in Employment After Bolt Had Come off Many Times—Fellow Servant. (a) The court instructs the jury that by continuing in the employment of the defendant, after knowing that the bolt had come off 10 or 20 times, the plaintiff assented to the use of a machine liable to such an accident, and the defendant was entitled to continue to use the machine as it was, and to repair it from time to time as such accident occurred, and no negligence may be imputed to the defendant from so continuing to use the machine.⁴⁸

46—*Va. & N. C. Wheel Co. v. Harris*, — Va. —, 49 S. E. 991 (1904).

"The circumstance that the plaintiff was injured while operating the saw in the exercise of reasonable care and caution, aided by common knowledge, sufficiently indicates the presence of danger. Upon the second point, the fact that the plaintiff relied upon the master's promise to repair is plainly to be implied from a fair and reasonable interpretation of the instruction. But if it were

otherwise, the defendant could not have been prejudiced by the omission, since the allegation of the declaration and the contradicted testimony of the plaintiff is that he did rely upon the master's promise to repair."

47—*Roux v. Blodgett & Davis L. Co.*, 94 Mich. 607, 54 N. W. 492 (1892).

48—*Loughlin v. Brassil*, 187 N. Y. 128 (1901), 79 N. E. 854.

"The words 'to repair it from time to time' as such accident oc-

(b) The replacing of the nut on the screw was a detail of the work, and, if one of the defendant's employes was negligent in replacing the nut, such negligence was the negligence of a fellow servant, for which the defendant is not responsible.

(c) Before the jury can impose any liability on the defendant for failure to tighten the nut, they must find that the defendant had notice, or by reasonable care could have obtained knowledge, that the nut had become loose again after being tightened in the morning.⁴⁹

§ 1470. Defective Machinery—Continuing Work with Assurance of Superintendent that Machine Is All Right. If the machine was out of repair, and plaintiff notified the superintendent of his department of its condition, and was assured that it was all right, and on his assurance he continued to work with it, without knowing it was dangerous, and was injured as a consequence thereof, he can have recovery. The law did not require R. to inspect the machine, but did require him to see what any ordinarily careful and prudent operative would have seen of its condition.⁵⁰

§ 1471. Minors—Assumption of Risk. Infants as well as adults, assume the ordinary risks of the service in which they engage, but an

curred, are shown by the context to refer to the accident of the bolt getting out of place. Thus we have it as the law of this case that no recovery can stand against the defendant because he used a defective machine, and that his only duty in respect thereto, so far as the plaintiff was concerned, was to repair it; that is, replace the bolt from time to time as it dropped out. Under this rule, I do not see that any duty was left upon defendant in respect to the machine, except to use reasonable diligence and care in inspecting and keeping watch of it and in replacing the bolt when the nut dropped off."

49—*Laughlin v. Brassil*, supra.

"Under the law of the case as finally formulated by the trial judge, I am inclined to think that the first refusal was error; that the defendant being entitled to use the machine as against the plaintiff subject only to an obligation to repair it by replacing the nut from time to time as it became loose, such repairing and replacing was a detail of the work which might be committed to an employe whose negligence would not make the employer liable. But, without stopping to consider at length whether this is so it is quite clear that the second re-

fusal did constitute error. Having the right to use the machine, the defendant could only be required to exercise reasonable care and prudence in detecting a loosening of the nut and replacing the same, and the instruction should have been given as requested. It is suggested that this request assumes that the nut was tightened in the morning and was improper in that respect. There was no question upon the trial that the nut was tightened in the morning, not only an employe of the defendant, but the plaintiff himself, swearing to this. The request immediately preceding the one under consideration was expressly predicated upon a finding by the jury that the nut was properly tightened in the morning before the accident, and, whether the request in question was made, I have no doubt that the defendant's counsel by the words 'after being tightened in the morning,' assumed, and must have been understood as referring to a finding by the jury of that fact as a basis for the rest of the request. The idea, having been clearly incorporated in the request immediately preceding, was to be implied and understood in interpreting his following language."

50—*Record v. Chickasaw C. Co.*, 108 Tenn. 657, 69 S. W. 334 (335).

infant engaging in a hazardous employment is entitled to a warning against dangers which a person of his age and experience would not ordinarily comprehend. Therefore if you find that the plaintiff C. was warned how he might be injured by the machine, and that he was warned in such a way as would be sufficient to apprise an ordinary person of his age and experience of the danger, then he assumed the risk, and the defendant would not be liable for the injury received from causes against which he was warned.⁵¹

CONTRIBUTORY NEGLIGENCE.

§ 1472. Contributory Negligence of Servant—In General—Servant Guilty of Cannot Recover. (a) The court instructs the jury that in law the plaintiff was not without fault, if it appears from the evidence that by the exercise of any care and caution which was, under the circumstances, reasonable, practicable and available, he might have avoided the injuries charged.⁵²

(b) The court instructs the jury that although they may believe from the evidence that B. H. was not a capable man to run the machine referred to by the evidence in this cause, and did not run such machine in a capable manner at the time of the injury to B., yet if they believe from the evidence that the said B. had knowledge of the danger of said machine when in motion, and could have avoided the injury to himself by the use of ordinary care upon his part, he, the said B., would be guilty of contributory negligence, and the jury should find for the defendant.⁵³

(c) If you believe from the evidence that the plaintiff was injured while engaged in the performance of his usual duties as a servant of the defendant, I charge you that he was bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circumstances and if he was injured by failure to exercise such care, then the defendant is not liable in this action.⁵⁴

(d) It is the duty of an employe to exercise ordinary and reasonable care in the protection of himself in the performance of his work; and if he did not do so, and his want of care contributes in any degree, however slight, to any injury to himself, then he is guilty of contributory negligence, and cannot recover damages from his employer, even though the employer were negligent. If you find from a preponderance of the evidence that plaintiff, in carrying said glass the way he did, and in said passageway, did not exercise what was reasonable prudence and care under all the circumstances, and that

51—Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814.

52—Espanlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 529.

53—McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648 (651).

54—Fla. C. & P. R. Co. v. Mooney, 45 Fla. 286, 33 So. 1010 (1012).

his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant.⁵⁵

§ 1473. Contributory Negligence Defined. Contributory negligence is the want of ordinary care on the part of the party injured; that is to say, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately causes the injury.⁵⁶

§ 1474. Negligence of Servant or Fellow Servant Must Be Proximate Cause of Injury in Order to be Defense. (a) The jury are further charged that the defendant company is not an insurer of the safety of its employes, but is only bound to use ordinary care to protect them from injury; and you are further instructed that it was the duty of plaintiff, while working in the yards of defendant company, to use ordinary care to avoid injury to himself while the cars of defendant were being operated upon its tracks in said yard; and if you find from the testimony that plaintiff failed to use such care, and that such failure, if any, was negligence, and that such negligence, if any, proximately contributed to plaintiff's injury, if any, then plaintiff cannot recover although you may believe defendant's agents and employes operating said car were also guilty of negligence in causing plaintiff's injury, if any.⁵⁷

55—Kennard v. Grossman, — Neb. —, 89 N. W. 1025 (1027).

56—Galveston, H. & S. Ry. Co. v. Smith, — Tex. Civ. App. —, 93 S. W. 185 (186).

"In view of the fact that there was no evidence, whatever, in the record tending to show contributory negligence on the part of appellee, the definition of contributory negligence, if incorrect, which is not held, could not have injured appellant. A charge very similar to this has been approved by this court and the Supreme Court in the case of Galveston, H. & S. Ry. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996."

57—Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996 (997).

"The charge complained of announces a correct principle of law, which we think applicable to this case. The same element of proximate cause enters into and is essential to contributory negligence as to the negligence which is, in the absence of the defense of contributory negligence, actionable. To make want of ordinary care on the part of plaintiff a defense to a claim of damages based upon defendant's actionable negligence,

it must appear that there was such a relation between plaintiff's fault and the injury that such injury was a natural and probable result thereof, and that the accident and consequent injury to the plaintiff might naturally and reasonably have been expected under the circumstances. International & G. N. R. R. Co. v. Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922; G. C. & S. F. Ry. Co. v. Moore, 28 Tex. Civ. App. 603, 68 S. W. 561; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816. The question as to whether the negligence of the plaintiff proximately contributed to his injury is as much a question of fact for the jury as the one of negligence itself. And unless the evidence shows it, though it may be sufficient to show negligence on the part of the plaintiff, there is a complete failure of the defense of contributory negligence. 'In its legal signification, contributory negligence is such an act or omission on the part of plaintiff, amounting to the want of ordinary care, as, concurring with some act of the defendant, is a proximate cause of the injury complained of.' Galveston, H. & S.

(b) Mere negligence on the part of the deceased, or of the fellow workmen or co-laborers, will not be sufficient to prevent recovery by plaintiff for injury caused by the negligence of the defendant. You must find from the preponderance of the testimony that the negligence of the deceased or his fellow servant, if any, was not remote but was the proximate cause, or proximately contributed to the death of the deceased. Where the negligence of a fellow servant is combined with the negligence of the master, and this combined negligence causes an injury, the company is liable.⁵⁸

§ 1475. Contributory Negligence—Surrounding Facts and Circumstances in Evidence Should Be Considered. In determining the issue of plaintiff's contributory negligence, you may look to all the surrounding facts and circumstances in evidence before you, and determine therefrom whether or not the plaintiff used such care as a person of ordinary prudence would have used under the same or similar circumstances. If you believe from the evidence that in the manner of doing the work of placing said cans of oil in the oil box, or in stepping down from the said oil box, the plaintiff failed to use such care as a person of ordinary prudence would have used under the same or similar circumstances, and that such failure, if there was such failure, contributed to or caused his injuries, if any, then plaintiff cannot recover.⁵⁹

§ 1476. Contributory Negligence of Plaintiff Must Be Pleaded by Defendant—(South Carolina.) I charge you, under these pleadings, that if you believe that the master, the defendant in this case, was negligent, and if you believe that the plaintiff was also negligent,—that both were negligent—then your verdict should be not for the defendant, but for the plaintiff, for the reason that the defendant in this case has not pleaded what is known as contributory negligence.⁶⁰

§ 1477. Burden of Proof as to Contributory Negligence—Rule that it is Ordinarily on Defendant. (a) The jury are instructed that the burden of proof is on the defendant to show contributory negligence of the plaintiff, unless it appears from the plaintiff's own evidence. If it does so appear, you will find for the defendant.⁶¹

(b) The court has charged the jury that, unless the jury believe from the evidence in this case that the car upon which plaintiff was riding, by defendant's employes or employe stopped, or the speed

A. Ry. Co. v. Henning, — Tex. Civ. App. —, 39 S. W. 302.
58—Sroufe v. Moran Bros. Co., 28 Wash. 381, 68 Pac. 896 (902), 92 Am. St. 847.

"This is a correct statement of the law. Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Towns v. Railroad Co., 37 La. Ann. 630, 55 Am. Rep. 508; Ellis v. Railroad Co., 95 N. Y. 546."

59—G., H. & S. A. Ry. v.

Manns (Tex.), 84 S. W. 254 (257).

"It seems to us that this part of the charge is good law, directly applicable to the case made by the pleadings and evidence, and when taken and considered in connection with the charge as a whole, is entirely free from the objections urged against it."

60—Strickland v. Capital C. Mills, 70 S. C. 211, 49 S. E. 478.

61—Reeves v. Railway Co., — Tex. —, 98 S. W. 929.

thereof was suddenly checked, or said car was otherwise unusually jarred, then their verdict must be for the defendant. The court does not mean to charge the jury by this that, if the stopping or checking of the train, if any, was with no greater force than was usual under other circumstances than those in the case under consideration, plaintiff could not recover, but it is true that, if such stopping or checking, if any is shown by the evidence, was not greater than is usual under the same circumstances, then plaintiff could not recover.

(c) The burden of proving contributory negligence is on the defendant, and, unless the jury are reasonably satisfied from the evidence that plaintiff was guilty of negligence himself which proximately helped to bring about his own injuries, defendant fails on his pleas of contributory negligence.⁶²

(d) The court charges the jury that the burden of proving contributory negligence rests upon the defendant.⁶³

§ 1478. Voluntarily Doing Work in More Dangerous of Possible Different Ways. The jury are instructed that if they believe from the evidence that the plaintiff took hold of the rail upon which the crane ran, and that when he did so he knew that the crane at irregular intervals, ran along upon this rail, and that he could have taken hold of, or rested his hand upon the girder which supported said rail, or on the water-pipes or other parts of the girder there, instead of taking hold of said rail, and could thereby have supported himself so that he could have done the painting which he was doing, in safety, and that to take hold of said rail was a dangerous way of doing said work, and that to take hold of or rest his hand upon the girder which supported said rail, or the water-pipes or other parts of the girder there, was a safe way of doing said work, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work then the jury should find the defendant not guilty.⁶⁴

"The ground of complaint is that there is nothing in plaintiff's evidence suggesting contributory negligence. We ascertain that plaintiff's own testimony shows that the trench was wide enough to admit of the jury finding that he could have stood in the trench and worked at this tie without having to straddle it. From his own testimony, without the aid of any other, such a finding could be sustained. We understood him to testify that the trench was flush up against the adjoining ties, and narrowed toward the bottom, where it was about 14 or 15 inches clear, and ties were 9 inches wide, and were about 9 or 10 inches apart. Yet plaintiff testified that he could not get into the trench as directed by W., and the

only way he could work at the tie was by getting astride of it. The jury had the right to disbelieve this from the physical facts he himself related, and, to find from them that he was negligent, and assumed a position of danger in going about as he did. See *Texas & P. Ry. Co. v. Reed*, 88 Tex. 447, 31 S. W. 1058, for a similar charge sustained."

62—*L. & N. R. Co. v. Smith*, 129 Ala. 553, 30 So. 571 (573).

63—*M., J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395 (402).

64—*Ill. Steel Co. v. McNulty*, 105 Ill. App. 594 (600-601).

"While this instruction may be subject to some minor criticism, still under the circumstances of this case, it should have been

§ 1479. **Doing Work in Way Other Than Ordered by Master.** If the jury find from the evidence that the plaintiff was directed in removing the lumber from the kiln to go behind or in the rear of the trucks and apply pressure from behind or in the rear of the trucks in order to remove the same from the kiln and you further find that this was a safe way, and that if it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, went under the truck which was to be removed from the kiln and applied force from under and below the truck, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and you should answer the first issue "No."⁶⁵

given. The party has no right intentionally to put himself in a place of danger which he could have avoided, and in such case although he exercised every conceivable care in so doing, his injury would result from his voluntary act. *Armour v. Brazeau*, 191 Ill. 126, 60 N. E. 904; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724.

"It is a general principle applicable to cases of this kind that where an employe has the power to adopt his own methods of doing work, and he wantonly, knowing and appreciating the dangers of both, selects of the two ways the most dangerous, he does so at his peril and can not recover for any injury resulting from such relation. *Star Elev. Co. v. Carlson*, 69 Ill. App. 212; *W. R. R. Co. v. Propst*, 92 Ill. App. 485."

⁶⁵—*Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17 (18-19).

"The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim, '*Volenti non fit injuria.*' No man by his own voluntary and wrongful act can impose a liability on another, nor will he be permitted to take any advantage of his own wrong and willfulness. The doctrine that a servant is not negligent in undertaking the performance of a dangerous work for his master, unless there is obvious danger in it, is a correct principle, and is strikingly illustrated by several cases decided by this court. *Thomas v. R. & A. Air Line R. R. Co.*, 129 N. C. 392, 40 S. E. 201; *Allison v. Southern R. R.*, 129 N. C. 336, 40 S. E. 91; *Patton v. W. N. C. R. R. Co.*, 96 N. C.

455, 1 S. E. 863. A passenger who has been injured by alighting from a moving train, under the direction of the conductor, may recover for the injuries received, unless the act itself was obviously so dangerous that in its careful performance the inherent probabilities of injury were greater than those of safety. *Hinshaw v. R. & A. A. L. R. R. Co.*, 118 N. C. 1047, 24 S. E. 426. But this principle has no place in this case. Instead of the plaintiff having been commanded to do a dangerous act, it is assumed in the instruction, and there was evidence to show, that he was ordered to do the particular work assigned to him in a safe way, but elected to do it in his own way, which turned out to be a dangerous one, and which actually resulted in his injury. The law, under such circumstances, refers the injury to his own fault, and not to any wrong on the part of his employer. It must be admitted that he was the author of his own injury. If it was necessary that the method adopted by him should have been not only in disobedience of his orders, but in itself dangerous, in order to visit upon him the consequence of his refusal to observe his master's directions, it surely is not required that it should have been obviously dangerous. It is quite sufficient to bar his recovery if he knew that his method was a dangerous one and chose to do his work in that way rather than in the manner pointed out by his master. Why should the danger be obvious if he had knowledge of it? If it had appeared that obedience to his master's orders as to the manner of moving the truck was obviously dangerous, he had

§ 1480. Servant Continuing Work Without Repairing Defects After Being Warned of Danger. You are instructed that if you should find from the evidence that the injury in this case was caused by the slipping of the cogs or pinions, and that the deceased had been told of the danger if he did not fix it, and continued to run the engine after being so told, without fixing the same, your verdict should be for the defendants.⁶⁶

§ 1481. Intoxication of Servant as Contributory Negligence. (a) The court instructs the jury that if you believe from the evidence, that the said J. J., at the time of the accident, was intoxicated or in a state of intoxication; and if you believe that because of such intoxication he slipped and fell in front of or underneath one or more of the wheels of said engine; and if you believe that he was guilty of negligence in being intoxicated, or in a state of intoxication, if you find he was at said time and place; and if you believe such negligence if any, caused or contributed to cause his injury and death—then in that event you will find for the defendant; but if you find that said J. J. was intoxicated or in a state of intoxication, that would not defeat a recovery, unless you further believe that the same was negligence, and that such negligence caused or contributed to cause the injury.

(b) If you believe from the evidence that at the time of the accident J. J. was in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable, and failed, to exercise the caution and care required of him under the general instructions of the court heretofore given you, and if you further believe that by reason of such condition he was injured, then, in that event the plaintiffs cannot recover.⁶⁷

§ 1482. Minor's Rule as to Contributory Negligence—Safe Machinery and Appliances—Safe Place to Work. (a) 'Before you find against plaintiff on the ground of contributory negligence, you must believe from the evidence that the plaintiff did not use such care and caution as a person of his age and experience would have ordinarily used under the circumstances surrounding him at the time.'⁶⁸

a right to refuse to do the work, but even then he could not select another and dangerous way to do it and charge his master with the consequence thereof, and especially if the danger of the method which he adopted was known to him at the time."

66—Prescott & S. W. Ry. Co. v. Weldy, 80 Ark. 454, 97 S. W. 452.

"The testimony was conflicting as to the cause of the accident, and this instruction was applicable to the defendant's theory of the case. There was direct testimony that the accident was caused by the cogs or pinions slipping. That W. knew of this dangerous

condition, and failed to repair the defect though it was, according to the undisputed evidence, his duty so to do. The court should therefore have given the instruction, and, as it was not covered by any other instruction given by the court, we conclude that its refusal was prejudicial error for which the case must be reversed."

67—M., K. & T. Ry. Co. of Tex. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852 (854).

68—Stanley v. C., M. & St. P. Ry. Co., — Mo. App. —, 87 S. W. 112 (113).

"The court held that this instruction was faulty, in that it

(b) The jury are further instructed that the duties of the master to provide safe and suitable machinery and appliances for the business, and to furnish a safe place in which his servant is to work, are duties which the master can either perform personally, or delegate their performance to some one else; but if both the master and the person to whom such duties are delegated fail in the performance of any of said duties, and injury results to the servant by reason of said failure, the master is liable for such injury.

(c) The jury are further instructed that the right of the plaintiff, L. to recover in this action, if the jury believe from the evidence he is entitled to recover, is not affected by his having contributed to the injury complained of, if the jury believe from the evidence that he did contribute to his own injury, unless he was in fault in so doing.

(d) The jury are further instructed that in determining whether the plaintiff L., a boy sixteen years of age, was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity and experience, and although he may have been guilty of an act or acts which in an adult would have amounted to an assumption of the risk of injury and a waiver of the duty the master owes him, yet he cannot be held to have assumed any such risk or waived any such duty which one of his age, discretion and experience could not fully comprehend and appreciate.

(e) The jury are further instructed that, while it is a general rule that an employe accepts service subject to risks incidental to it, and when the appliances or means or methods of work are known to the employe he can make no claim upon the employer to change them, and if injury results therefrom, can recover no damages, yet this does not relieve the employer from the obligation which makes it his imperative duty to warn the employe of danger and instruct him how to avoid the danger, even when the danger is visible and open to observation, if through youth, inexperience, or lack of ability the employe is incompetent to understand fully and appreciate the nature and extent of the danger.⁶⁹

should have told the jury the law required of the boy 'exercise of care and prudence equal to his capacity, age, knowledge, and experience, regardless of what care and prudence boys of his age and capacity are required to exercise.' The fault in the construction under consideration, if any, is that the words 'age and experience' are used, instead of the words the court said should have been used, 'capacity, age, knowledge and experience.' The word 'experience' means 'to have practical acquaintance with,' which is equivalent to knowledge. And the word 'capacity,' in the sense in which it was used, means capacity or

skill as applied to the business in which plaintiff was engaged at the time he was injured—that is, in manipulating the handle of the car in question—which labor at most required little or no skill, only practical experience. We are not to consider that the court, in saying that certain words should be used in an instruction, was prescribing a formula for the purpose, but that language of similar import should have been used. We do not think the instruction was so faulty as to be misleading."

69—"We think said instructions were pertinent and properly given." *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569 (573).

§ 1483. **Working Near Dangerous Lumber Pile.** (a) If you believe plaintiff was injured by reason of some timber or lumber falling against or upon him, and throwing him upon the saw, and if you find that the condition in which same was piled up was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, surrounding him at the time, and if you believe that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in doing or undertaking to do the work at which he was engaged that would or should ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was following the instructions of defendant's foreman, and in such case you will find for the defendant.

(b) If you believe the plaintiff was injured by reason of some pieces of lumber or timber falling against him and throwing him upon the saw, which lumber or timber was lying or piled up to the side or back of where plaintiff was at work, and if you find that the condition and manner in which said lumber was piled up was open and obvious to plaintiff, and if you believe that plaintiff was of sufficient intelligence and understanding to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then plaintiff cannot recover anything in this case, even if defendant was at fault and negligent in allowing the lumber or timber to be piled up and remain in the manner it was at the time, and in such case you will return your verdict for the defendant.⁷⁰

§ 1484. **Raising Beam in Obviously Dangerous Way.** The court instructs the jury that if you believe from the evidence that if the plaintiff and his co-workers could have raised the beam in question in a safe way, and nevertheless adopted the method used by them on the occasion in question, and if you further believe that the method adopted by them was dangerous, and that the danger thereof was obvious to plaintiff, and that the plaintiff in adopting said method under said circumstances was guilty of negligence, and that such negligence continued down to the time of plaintiff's fall, and directly contributed thereto, then and in that case your verdict must be for the defendant.⁷¹

§ 1485. **Failure to Heed Warning of Foreman to Get Away from Falling Timber.** (a) If you find from the evidence that the foreman, A. B., prior to the accident, warned the plaintiff to get away from the place where he was, and that such warning was given loudly enough and distinctly enough to have been understood by a

70—"Both of these instructions should have been given." *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135, 69 S. W. 492 (493).

71—*Sack v. St. L. Car Co.*, — Mo. App. —, 87 S. W. 79 (83).
"This instruction correctly declared the law in respect to the defense of contributory negligence."

person of ordinary hearing at the place where the plaintiff then was, and A. B. then had reasonable grounds to believe that such warning would be heard by plaintiff, and if you further find that after giving such warning there was time enough for plaintiff to get away by exercising reasonable care and speed before the timber dropped, then your verdict may be for the defendants.

(b) The defendants were not insurers of the plaintiff against accident while in their employ. On the contrary, the plaintiff assumed all the ordinary and usual risks and hazards incident to the employment in which he was engaged. And, if you find that he was injured while at work in the employ of the defendant, still your verdict should be for the defendants, unless you further find from the evidence that such injury was caused by the negligence of the foreman, A. B., in failing (if he did fail) to warn the plaintiff that the timber was about to be dropped, in time for the prudent man of ordinary activity, placed as plaintiff then was, to remove beyond danger before it fell.⁷²

§ 1486. **Want of Ordinary Care of Both Master and Servant—Going Under Dangerous Roof in Coal Mine—Series.** (a) If the plaintiff was negligent, which contributed to his own injury, even in the slightest degree, then, in that case, he cannot recover in this action, although you may find that the defendant was negligent, and that its negligence was the proximate cause of the injury of the plaintiff. The law requires the plaintiff to use all ordinary care to avoid any injury to himself; that is, such care as an ordinarily prudent and careful man would have used under like or similar circumstances. You are to measure the care that he did use, as you shall find it from the testimony, by the standard that I have given you in charge; that is, the care that an ordinarily prudent and careful man would have used under like circumstances. In determining this question, gentlemen, you are to look to all the evidence; look to the knowledge that the plaintiff had of this particular mine; look to the knowledge that he had of the character of this roof; of what it was composed; its liability to slip, or the liability of the stone to fall. Look to that, and also look to the knowledge—as you may find it from the evidence—that he may have had as to the condition of this roof on Friday, when he left the mine. Also look to the evidence in determining what he knew of its condition on Monday, at the time he set up these posts, in determining whether an ordinarily prudent and careful man would have gone under this stone at the time of the happening of this accident. It is claimed by plaintiff that he was injured some little time after these posts had been set; that he went under this particular stone that fell, and between these posts, to get a sledge, preparatory to going home; that while stooping over to pick up this sledge, this stone fell, and he was injured thereby. You are to measure his conduct at the time of the acci-

dent with the knowledge that he possessed before that time; consider that, and look at his conduct at the time of the happening of this accident. It would not be sufficient to defeat the plaintiff in this case to show that he was negligent at a time prior to the happening of the accident, unless such negligence contributed to his own injury. Look, then, gentlemen, to all the circumstances that have been proved that bear upon this particular question. If you are not satisfied by a preponderance of the evidence that the plaintiff is guilty of negligence which contributed to his own injury,—as I have explained to you in these instructions,—and if you are satisfied that the defendant was guilty of negligence, and that such negligence was the proximate cause of his injury, then, in that case, the plaintiff will be entitled to recover. But if, upon the other hand, you are not satisfied that the defendant was guilty of negligence under the instructions I have given you, or if you are satisfied that it was, and are not satisfied that such negligence was the proximate cause of the injury which plaintiff has sustained, or if you are satisfied that it was the proximate cause of his injury, and you are satisfied by a preponderance of the evidence that the plaintiff was negligent, and that such negligence contributed to his own injury, even in the slightest degree, then, in that case, your verdict should be for the defendant.

(b) If a part of the roof of the room in which plaintiff worked was unsafe and liable to fall, and props were needed for its support and the defendant neglected to furnish the props when needed, and the plaintiff knew the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, then plaintiff cannot recover in this case.

(c) If a part of the roof of the room in which plaintiff worked was unsafe and liable to fall, and props were needed for its support, and the defendant neglected to furnish the props when needed, and the plaintiff had the means of knowing the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, then plaintiff cannot recover in this case.

(d) Under the most careful circumstances, mining coal is attended with danger, and persons engaged therein are presumed to incur the risks incident thereto, and if the plaintiff in this case knew, or had the means of knowing, that a part of the roof of the room in which he worked was unsafe and liable to fall, he cannot recover in this case.

(e) If the defendant in this case neglected to furnish props at the room in which plaintiff worked and the roof of the room was in a dangerous condition, and the plaintiff knew its condition, then plaintiff cannot recover in this case.

(f) If the plaintiff knew the dangerous condition of the room, and

continued in the service in the room, or remained therein, he cannot recover in this case.

(g) If the plaintiff knew of the unsafe or dangerous condition of the roof of the room in which he was at work, then he cannot recover in this case.

(h) If the defendant in this case neglected to furnish props at the room in which plaintiff worked, and the roof of the room was in a dangerous condition, and the plaintiff had the means of knowing that the roof was in a dangerous condition, then the plaintiff cannot recover in this case.

(i) If the defendant in this case neglected to furnish props at the room in which plaintiff worked, and the roof of the room was in a dangerous condition, and the plaintiff by the exercise of ordinary care could have discovered the dangerous condition of the roof of the room, then plaintiff cannot recover in this case.

(j) If the plaintiff, by the exercise of ordinary care, could have ascertained that the part of the roof which fell and injured him was in an unsafe condition and liable to fall, and exposed himself to the danger by going thereunder, he cannot recover in this case.

(k) If the plaintiff knew, or had reason to apprehend, that it would be risky to go under this stone, referred to in the testimony, that fell on the plaintiff, and with this apprehension and knowledge he took the risk, he cannot recover of the defendant.

(l) If the plaintiff knew, or had the means of knowing, that the stone which fell and injured plaintiff was loose and liable to fall, and went under the stone, then plaintiff cannot recover.⁷³

§ 1487. Contributory Negligence in Lowering Air Pump. If you find that the said C. R. was injured in lowering said air pump, as alleged by plaintiff, and that such injury, if any, directly resulted in his death, yet, if you further find that the deceased, C. R., failed to exercise ordinary care in looking out for his own safety in lowering said air pump, and that such failure, if any, either proximately

73—*Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. Rep. 725 (727 and 728).

"These requests were all pertinent to the case upon the facts as claimed by defendant below, and were all sound law when applied to such facts. The plaintiff below was under obligation to use ordinary care for his own safety. Whatever he knew, or ought to have known, and failed to act upon with ordinary care for his own safety, constituted such negligence on his part as would prevent a recovery. To warrant a recovery, it must appear that the injury was caused by the want of ordinary care on part of the employer, and the injury is not so caused, when

it is caused by the want of ordinary care on part of the employer, combined with want of ordinary care on the part of the employee. If it took the want of ordinary care of both the employer and employee to produce the injury, both are at fault, and there can be no recovery by either. Where both parties are negligent, and the injury is caused by such combined negligence, there can be no recovery by either party. *B. & O. R. Co. v. Wheeling, P. & C. Tr. Co.*, 32 Ohio St. 116, 147; *Railway Co. v. Elliott*, 28 Ohio St. 340; *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Timmons v. Railroad Co.*, 6 Ohio St. 105, 109."

caused or contributed to his injury, if any, then plaintiff cannot recover, and you will so find.⁷⁴

§ 1488. Using Defective Shaft of Wagon in Alighting. The court instructs the jury that if they believe from the evidence in this case that the plaintiff, A. B., at and before the time he went upon said wagon on the day of the accident in question, had personal knowledge that the shaft and step of said wagon were defective, broken and unsafe, and that the plaintiff made use of such defective shaft in attempting to alight from said wagon, knowing it to be defective, broken and unsafe at the time, then the jury should consider such fact in determining whether the plaintiff was in the exercise of due or ordinary care at the time of the injury.⁷⁵

§ 1489. Contributory Negligence in Unloading Cattle. If you find from the evidence that the plaintiff, in performing his duties in preparing the car and the chute for unloading the cattle, obtained the aid and assistance of C., who was not employed by defendant to perform the services, and who was not accustomed to do so, and stood in the way of the running board, and failed to exercise due care in the placing of the board, and that this was negligence on the part of the plaintiff, which contributed to his injuries, if any he received, you will find for the defendant. Contributory negligence must be established by a preponderance of the evidence.⁷⁶

74—Ramm v. R. R. Co., — Tex. Civ. App., — 92 S. W. 426.

"The charge is not open to the criticism that the court assumed that deceased had been guilty of negligence. The finding of negligence was clearly left to the jury when they were instructed to find whether deceased had failed to exercise ordinary care in lowering the pump, because the failure to exercise ordinary care is negligence, as the court, in a paragraph immediately following the one copied, correctly informed the jury, and also gave a definition of ordinary care. Similar charges have been approved by the Supreme Court. *St. L. S. W. Ry. Co. v. Casseday*, 92 Tex. 526, 50 S. W. 125. *The case of M., K. & T. Ry. v. Rogers*, 91 Tex. 52, 40 S. W. 946, cited by appellant, is not pertinent or applicable. In that case a requested charge made a failure to look and listen when crossing a railroad negligence, without allowing the jury to pass on whether or not it was negligence, and the court said it was properly refused, but, if it had charged the jury that if they found the party had been guilty of a failure to exercise ordinary care, which

was defined, and such failure had contributed to the injury, the Supreme Court would not have held the charge to be incorrect. The difference is apparent."

75—Wink v. Weiler, 41 Ill. App. 336 (342).

76—Galveston H. & S. A. Ry. Co. v. Mohrmann, — Tex. Civ. App., — 93 S. W. 1090 (1092).

"This charge is complained of as error. The charge submits the issue of contributory negligence in the very language pleaded by the appellant. As all the facts relied upon to constitute contributory negligence are pleaded conjunctively, if appellant deemed that there was evidence tending to prove one or more of the facts alleged—less than all—and that such proof would warrant the jury in finding the appellee guilty of contributory negligence, it should have prepared and requested a special charge, submitting such theory of contributory negligence to the jury. *G., C. & S. F. Ry. Co. v. Hill*, 95 Tex. 629, 69 S. W. 136; *Ratterree v. G., H. & S. A. Ry. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566; *I. & G. N. Ry. v. Vanlandingham*, — Tex. Civ. App., — 85 S. W. 849; *Crowder v. St. Louis S. W.*

§ 1490. **Contributory Negligence in Grinding Tool.** If you believe from the evidence that, through the negligence of the deceased, the tool deceased was grinding was caught between the rest and the wheel, thereby causing it to break, then your verdict should be for the defendant.⁷⁷

§ 1491. **Injury through Careless Use of Hammer.** The court instructs the jury that if they believe from the evidence that the only tools used by this plaintiff to perform his work were a hammer and a mandrel, and that said tools were reasonably safe and suitable tools for the plaintiff to use in the performance of his duties, but that this plaintiff used the hammer in so careless a manner as to strike the mandrel instead of the wire handle of the utensil, and thereby caused a piece of the hammer to chip off and fly up and strike him in the eye, thus causing the injury, then the plaintiff himself was negligent, and cannot recover.⁷⁸

§ 1492. **Working with Split, Frayed, Raveled or Untwisted Rope.** The jury are instructed that even if they believe from the evidence that the rope referred to in the evidence in this case was split, frayed, raveled or untwisted, and even if they believe from the evidence that the plaintiff was directed by J. H. to put said rope on the spool just before he was injured, yet the jury are further instructed that if they believe from the evidence that the plaintiff at the time he put the rope on the spool knew of the condition of the rope, and knew and appreciated the danger, and further believe that the danger was so imminent that an ordinarily prudent man would not incur it, but would disobey the order, there can be no recovery.⁷⁹

INSURANCE.

§ 1493. **Agreements Between Employers and Employees as to Insurance Against Accidents.** (a) The court instructs the jury that a contract of insurance may be entered into by and between parties not engaged in the insurance business; and, if the jury find from the evidence in this case that defendant agreed to insure the plaintiff against accidents causing injury to person, it would be binding upon it, although the defendant was not in the insurance business.

(b) The burden of proof in this case is upon the plaintiff to show by a preponderance of the evidence that the defendant engaged, for a consideration paid to it, as an insurer, to insure the plaintiff against accidents causing injury to person as stated in the complaint; and in this case, if you believe from the evidence that

Ry. Co., — Tex. Civ. App. —, 87 S. W. 166. Certainly the paragraph of the charge presented no affirmative error."

77—Skelton v. Pac. L. Co., 140 Cal. 507, 74 Pac. 13 (15).

78—"This refused instruction

was a correct statement of the law." Duerst v. St. L. Stamping Co., 163 Mo. 607, 63 S. W. 827 (831).

79—Ill. S. Co. v. Wierzbicki, 107 Ill. App. 69 (76), aff'd 206 Ill. 201, 68 N. E. 1101.

the defendant was merely acting as trustee for its employes, among whom was the plaintiff, you will find your verdict for the defendant.⁸⁰

(c) The court instructs the jury that if you find and believe from the evidence that a policy of insurance to indemnify plaintiff against loss or damage by injury received by him while in defendant's employ was procured from the A. Life Insurance Company by an arrangement between the plaintiff and defendant, each paying one-half of the premium for such insurance, and that defendant complied with its part of the contract and paid all of the premiums due from it up to the time plaintiff received his injuries, and that defendant received from said insurance company the sum of \$—— in settlement of the injuries received by him, and executed a release and receipt to such insurance company, then, in that event, plaintiff cannot recover any further sum as against the defendant. And further find that such insurance was intended by plaintiff and defendant to be in lieu of any claim of plaintiff against the defendant for any injury received by him while in defendant's employ.

(d) The court instructs the jury that if you believe and find from the evidence that a contract for indemnity insurance was procured by plaintiff, and he was entitled to receive from the insurance company for his injury indemnity for a period of fifty-two weeks at the rate of \$1 per day, and further find that he accepted the sum of \$—— in full settlement of his claim in said insurance policy, then you may take such facts into consideration in determining the extent and character of his injuries and in mitigation of damages, if any, to which you may believe he is entitled on account of injuries.⁸¹

RELEASES.

§ 1494. Release of Right of Action by Servant. If you believe from the evidence that on or about the ——, the plaintiff agreed with the defendant upon a compromise of his claim for the damages sued for in this cause for the sum of \$1 and the promise to employ him for one day as section foreman, and the further promise of the general claim agent of the defendant company to pay to the plaintiff the full time lost by him on account of his injuries, the same to be ascertained by a statement of the attending physicians; and if you believe that the plaintiff then and there accepted said promise and agreement, together with \$1, and the employment of him for one day as a section foreman in satisfaction and discharge of his original

⁸⁰—Arkadelphia L. Co. v. Posey, 74 Ark. 377 (379), 85 S. W. 1127.

⁸¹—Dover v. M. R. & B. T. Ry., — Mo. —, 73 S. W. 298 (299). "These instructions, as given by the court, fairly presented for the consideration of the jury the issue that the benefits received under the policy were in satisfaction and discharge of any claim for damages against

his employer, and also emphasized appellant's claim of partial payment by it of accruing premiums, and directed the jury that the acceptance of the sum paid by the insurance company might be taken into consideration in mitigation of damages, and were as favorable to defendant as the proof sanctioned."

cause of action on account of his injuries, and that he agreed and expected to look to and demand of the defendant the sum of the time lost by him on account of such injuries when same were ascertained by his physician, under said promise and agreement, and not to demand of defendant damages on account of his original cause of action as it stood before such promise and agreement was made—then you will find a verdict for the defendant.⁸²

82—*Gulf, C. & S. F. Ry. Co. v. Minter*, — *Tex. Civ. App.* —, 93 S. W. 516 (517).

See "Negligence, Master and Servant, Railway Companies," chapter LXXIV.

CHAPTER LXIV.

NEGLIGENCE—MASTER AND SERVANT—RAILWAY COMPANIES.

See Erroneous Instructions, same chapter head, Vol. III.

IN GENERAL.

§ 1495. Duty of railroad companies.

§ 1469. Master cannot delegate duty to furnish reasonably safe places for servants to work in.

APPLIANCES.

§ 1497. Railroad companies bound to furnish safe and appropriate appliances.

§ 1498. Employe may assume that appliances furnished by master are reasonably safe.

§ 1499. Duty of railway company to provide suitable and safe material and skillful workmanship.

ROLLING STOCK.

§ 1500. Duty of railway company to provide safe rolling stock.

§ 1501. Duty as to inspection of car received from other roads.

§ 1502. Furnishing car strong enough for the transportation of steel nails.

§ 1503. Cars must be in condition to be uncoupled with reasonable safety.

§ 1504. Not negligence for railroad to use couplings or dead-woods of unequal height.

§ 1505. Defects in coupling apparatus between caboose and locomotive.

§ 1506. Injuries through defective drawbars or drawheads.

§ 1507. Injury to brake through brake staff breaking.

§ 1508. Latent defect in brake rod.

§ 1509. Using car without hand-holds.

§ 1510. Defect in hand-hold of car—Competency of inspector.

§ 1511. Ordinarily no obligation to provide steps at end of freight cars for use of employes.

§ 1512. Injury to engineer through defective step on engine.

§ 1513. Notice by engineer to foreman of roundhouse of defect in engine.

§ 1514. Injury to fireman from side rod on engine breaking.

§ 1515. Furnishing trucks for removal of trestles from roundhouse.

TRACK AND ROAD-BED.

§ 1516. Obligation to keep roadbed and track free from obstructions.

§ 1517. Master must use ordinary care to see that they are safe.

§ 1518. Right of locomotive engineer to assume that railroad track is reasonably safe.

§ 1519. Tracks and sidings must not be in too close proximity to other structures.

§ 1520. Failure to keep track in repair as proximate cause of injury.

§ 1521. Injury to employe through insufficient ballasting of roads.

§ 1522. Side track slanting and siding.

§ 1523. Injury by protruding cross tie and hole in track.

§ 1524. Allowing timber to stick out of shed and over transfer table.

§ 1525. Allowing derrick to swing over track.

§ 1526. Negligence of master in allowing clinker to remain at side of track.

§ 1527. Wreck of train on defective bridge.

§ 1528. Law fixes no exact standard for height of bridges over railroads.

OPERATION AND MANAGEMENT OF
TRAINS AND CARS.

- § 1529. Necessity of lookout at points where employes commonly pass in discharge of their duties.
- § 1530. Injury through Act of God and concurrent negligence of defendant.
- § 1531. Injury to servant through failure to obey ordinances as to speed or ringing bell.
- § 1532. Failure of engineer or fireman to obey signals to slow up train.
- § 1533. Neglect of engineer to obey signal to stop train run at dangerous rate of speed.
- § 1534. Failure to give such a warning of approach of engine as could be heard by persons of ordinary hearing.
- § 1535. Telegraph operator injured while delivering order to engineer of train—Second train giving no signals.
- § 1536. Collision through failure of engineer to give flag signal.
- § 1537. Injury through passenger train colliding with loose car.
- § 1538. Injury to plaintiff while coupling cars or throwing wrong switch.
- § 1539. Duty to set brakes while couplings are being adjusted.
- § 1540. Using hand-car without a brake.
- § 1541. Sending hand-cars at great speed immediately after one another.
- § 1542. Kicking car upon track at a high and dangerous rate of speed.
- § 1543. Injury to person repairing track by cars being kicked back without warning.
- § 1544. Engine leaving track through brakeman locking switch to wrong track.
- § 1545. Injury to servant while removing tie from gravel deck—Orders of vice-principal.
- § 1546. Laborers working on or about gravel cars—Duty to avoid injury to.
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FELLOW SERVANTS.

- § 1554. Fellow servants defined.
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- § 1556. Fellow servants of brakeman.
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- § 1561. Employee assumes all ordinary risks.
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- § 1568. Knowledge of fireman that engine was without brake shoes.
- § 1569. Assumption of risk by fireman as to brakes on wheels.
- § 1570. Assumption of risk by switchman.
- § 1571. Risks assumed by conductor of passenger train.
- § 1572. Railway company not liable for injuries from obvious or patent defects.
- § 1573. Rule in South Carolina as to obviously defective appliances.

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| <p>§ 1574. Railroad employe need not search for latent defects.</p> <p>§ 1575. Continuing in employment with knowledge of dangerous conditions.</p> <p>§ 1576. Engineer's knowledge of defect in head-light.</p> <p>§ 1577. Assumption of risk as to defective stirrup after proper inspection.</p> <p>§ 1578. Failure of servant to discover absence of ladder, handles or steps at end of car.</p> <p>§ 1579. Servant assumes risks of usual jarring and shaking of car.</p> <p>§ 1580. Assuming risk as to defective track.</p> <p>§ 1581. Assuming risk of working on side track.</p> <p>§ 1582. Knowledge of presence of dangerous culvert or cattle-guard.</p> <p>§ 1583. Equal knowledge of master and servant as to "dodged" or low joint in track.</p> | <p>§ 1591. Voluntarily disconnecting cars while in motion.</p> <p>§ 1592. Failure to guard against danger of known custom of kicking cars while switching.</p> <p>§ 1593. Failure to have switch thrown back after entering spur track.</p> <p>§ 1594. Care due by employe for his own safety while signaling returning section.</p> <p>§ 1595. Failure to use stirrup and hand hold in boarding car.</p> <p>§ 1596. Contributory negligence of servant in failing to keep lookout for signals.</p> <p>§ 1597. Failure to heed whistle or bell.</p> <p>§ 1598. Failure to discover, approaching train.</p> <p>§ 1599. Boarding rapidly moving engine.</p> <p>§ 1600. Contributory negligence of yardmaster in boarding moving engine.</p> <p>§ 1601. Jumping from moving train at defendant's command.</p> <p>§ 1602. Conducting oneself in dangerous way on hand-car.</p> <p>§ 1603. Negligently striking mauls one against another while laying railroad track.</p> <p>§ 1604. Employe voluntarily placing himself in place of danger between engine and car.</p> <p>§ 1605. Riding on foot-board of engine — Engine colliding with other cars—Series.</p> <p>§ 1606. Employe sleeping in caboose —Another train colliding with caboose—Knowledge of custom to sleep in caboose by company.</p> <p>§ 1607. Employe riding on work train.</p> <p>§ 1608. Remaining in dangerous position in reliance on foreman.</p> |
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CONTRIBUTORY NEGLIGENCE.

See "Negligence, Master and Servant," Chapter LXIII.

IN GENERAL.

§ 1495. **Duty of Railway Companies—Towards Employees.** The jury are instructed, that it is the duty of a railway company, as employer, to use all reasonable care and foresight to provide safe structures, competent employes, and all appliances necessary to the safety of the employed, and to adopt such rules and regulations for running its trains as will avoid injury to its employes, so far as this can reasonably be done; and having adopted such rules, to use all reasonable efforts to conform to them, or the company will be responsible for consequences resulting from a departure from them.¹

¹—Chicago, etc., Rd. Co. v. Taylor, 69 Ill. 461.

§ 1496. Master Cannot Delegate Duty to Furnish Reasonably Safe Places for Servants to Work. It is the duty of a railway company not only to provide but maintain reasonably safe places for its servants to work in; and it cannot delegate this duty to another, and thereby relieve itself from responsibility. And a servant engaged in the service of a railroad company has a right to rely upon the company to furnish him with a reasonably safe place in which to work, and it is the duty of the company to maintain such place in a reasonably safe condition while the service continues.²

APPLIANCES.

§ 1497. Railroad Companies Bound to Furnish Ordinarily Safe and Appropriate Appliances. The court instructs the jury that it is the duty of railroad companies to use reasonable care in furnishing to their employes implements and appliances with which the said employes are to perform their work, and to see that such implements are ordinarily safe and appropriate ones to be used. The care which said companies are bound to use is such as an ordinarily prudent person would use in such matters.³

§ 1498. Employee May Assume That Appliances Furnished by Master Are Reasonably Safe. The court instructs the jury that it is the duty of a railway company to exercise ordinary care to furnish its servants and employes reasonably safe and suitable machinery and appliances with which to perform the duties required of them; and when a person enters the employment of a railroad company he has the right to rely upon the assumption that the machinery and appliances with which he is called upon to work are reasonably safe, and he is not required to use ordinary care to see whether this has been done or not, and he does not assume the risk arising from the failure of the railroad company to do its duty (if there is a failure) unless he knows of the failure and the attendant risk, or in the ordinary discharge of his own duty must necessarily have acquired such knowledge, or unless, by the terms or nature of his employment, it is made the duty of such person to inspect the machinery and appliances with which he is called upon to work, and he has failed to make such inspection.⁴

§ 1499. Duty of Railway Company to Provide Suitable and Safe Material and Skillful Workmanship. A railroad company is bound

2—B. & O. S. W. Ry. Co. v. Spaulding, 21 Ind. App. 323, 52 N. E. 410 (412).

"It states the law in strict harmony with what we have said in the former part of this opinion in regard to the duty of a master to provide and maintain a safe place or safe premises in which his servants are required to work."

3—Chi., R. I. & P. Ry. Co. v. Long, 32 Tex. Civ. App. 40, 74 S. W. 59 (60).

"This is sanctioned by the decisions. Galveston, H. & S. A. Ry. Co. v. Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; Int'l & G. N. Ry. Co. v. Williams, 82 Tex. 342, 18 S. W. 700."

4—Mo., K. & T. Ry. Co. of Texas

to use all reasonable care and caution to provide suitable and safe material and skillful workmanship in the construction of its road and appurtenances and to exercise reasonable care and watchfulness, to keep the same in good repair and safe condition, and if the company do not do so, and in consequence thereof an injury happens to one of its servants or employes, while in the exercise of reasonable care and caution himself, the company will be liable for the injury thus sustained.⁵

ROLLING STOCK.

§ 1500. Duty of Railway Company to Provide Safe Rolling Stock.

(a) A railroad company must use reasonable care and caution in the selection of its rolling stock, and in the employment of competent persons to manage its business, so that no unnecessary risk shall be incurred by any of its servants in the discharge of their duties; and if the company does not do so, and an injury happens to one of its servants, by reason of such neglect, the company will be liable for the injury thus sustained, provided the person injured is using reasonable care and caution to avoid the injury.

(b) It is a duty the law imposes upon railroad companies that they shall do everything that reasonably can be done to furnish safe cars to its employes, to be used by them in working on the railroad, and it is not a duty that can be delegated to its officers and agents, so as to avoid liability on the part of the company.

(c) And in this case, if the jury believe, from the evidence, that the company, through the negligence and want of reasonable care of its servants and agents, neglected and failed to furnish a safe car upon the occasion in question, but did, through negligence and want of reasonable care and caution, furnish one that was out of repair, as charged in the declaration, and that by reason of such defect the plaintiff (or the deceased), while using ordinary care, and in the discharge of his duty, was injured (or killed), then the jury should find the defendant guilty; provided, they further believe, from the evidence, that the plaintiff (or the deceased) did not know of such defect, and could not have known the same, by the use of reasonable care and caution on his part.⁶

v. Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74 (75).

"The above correctly announces the abstract principles of law pertaining to the phase of the case to which it relates made by the pleadings and the evidence. *M., K. & T. Ry. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *T. & N. O. Ry. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *T. & P. Ry. v. O'Fiel*, 78 Tex. 486, 15 S. W. 33; *San A. & A. P.*

Ry. Co. v. Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; *So. Pac. Ry. Co. v. Winton*, 27 Tex. Civ. App. 503, 66 S. W. 481; *Galveston, H. & S. A. Ry. v. Davis*, 27 Tex. Civ. App. 279, 65 S. W. 217."

5—*Brickman v. S. C. Rd. Co.*, 8 S. C. 173.

6—*Berea S. Co. v. Kraft*, 31 Ohio St. 237.

§ 1501. Duty as to Inspection of Cars Received from Other Roads.

The court instructs the jury that it is the duty of the defendant company to exercise reasonable and ordinary care to see that cars received by them from other roads are in a reasonably safe and sound condition when incorporated in its moving trains, so as not to subject its employes when handling and moving its trains, to unnecessary or unusual danger and risk. But a railway company is not an insurer of the safety of its employes while in the discharge of their duties, nor an insurer of the safety and suitability of the cars used and operated on its road by its employes, but it is held only to the use of ordinary care to see that the cars are in a reasonably safe condition and to use of such care to maintain them in such reasonably safe condition. The defendant, however, cannot be held liable, in any event, if he has exercised ordinary care in inspecting the car and keeping it in reasonably safe repair; nor would the defendant be liable if the alleged defect was hidden, and could not have been discovered by the exercise of ordinary care on the part of the defendant.⁷

§ 1502. Furnishing Car Strong Enough for the Transportation of Steel Rails—Series.

(a) The court instructs the jury that under the evidence in this cause J. M. is a minor, and that T. M. was duly appointed next friend of the said J. M. The court instructs the jury that plaintiff had a right to assume that the car furnished for his use by the defendant was reasonably safe and sufficient for the purpose of handling steel rails; and it was not incumbent on plaintiff to search for hidden defects in the said car, but it was the duty of the defendant to use reasonable care, diligence or caution to have said car in a reasonably safe condition for use. If you believe from the evidence that the car mentioned in the evidence, and in the petition, was at the time it is alleged the plaintiff was injured, in a defective condition, and not reasonably safe, and that the agents or servants of defendant whose duty it was to furnish, inspect or repair such cars, knew, or by the exercise of reasonable diligence might have known the condition of said car, then such knowledge is knowledge of defendant, and such neglect or failure to obtain such knowledge is the negligence or failure of defendant.

(b) The court instructs the jury that if you believe from the evidence that on or about the 18th day of August, 1899, J. M., the plaintiff, was in the employ of defendant, and that while in the discharge of his duties as such employe, he was without carelessness on his part, which contributed directly thereto, struck and injured by a rail falling from defendant's car because said car was weak, defective and not reasonably safe, then your verdict will be for plaintiff, if you believe the weak, defective and unsafe condition of said car was unknown to plaintiff and could not have been known

by ordinary care and caution on his part, and that said condition of said car was known to defendant, or might have been known to defendant by reasonable diligence and inspection on its part.

(c) The court instructs the jury that it is the duty of defendant to supply its employes with cars in a reasonably safe condition, and it is the duty of said defendant in constructing its cars for the use of its employes to exercise ordinary care and skill in constructing the same, and in selecting the materials with which to construct and build said cars, and in this cause, if you believe defendant failed or neglected to discharge these duties above specified, and in consequence of such neglect the car broke down and a rail on said car fell upon and injured the plaintiff while the said plaintiff was in the exercise of ordinary care, then the verdict will be for the plaintiff.

(d) The court instructs the jury, that if you believe from the evidence, that on or about the — of —, plaintiff was in the employ of defendant, and was ordered by foreman of defendant to lift and place upon a truck or push car used by defendant a number of steel rails, and while so employed, and whilst said car was being loaded and pushed over defendant's track, said car and truck gave way, broke and fell, causing a steel rail to fall from said car upon the plaintiff and injured him, then your verdict will be for the plaintiff, if you believe from the evidence that said push car gave way and fell because the same was defective and constructed of improper, unsuitable and insufficient material, and not reasonably safe for an ordinary load, and that defendant knew, or might, by the proper inspection, or by the exercise of ordinary care, have discovered and known, the condition of said car.

(e) The court instructs the jury that if you believe from the evidence that the rubble car was made of brash, brittle, weak and unsuitable material, and not reasonably safe for the purposes for which it was being used when loaded with an ordinary load, and for this cause the said car broke, then the fact (if it be a fact) that it was overloaded at the time it broke down does not absolve the defendant from liability.

(f) The jury are instructed that if you find for plaintiff you will, in assessing the damages, take into consideration the physical condition he was in before the injuries in question, the physical pain and mental anguish he has suffered occasioned by said injuries, and the physical pain and mental anguish, if any, he is likely to suffer in the future because of said injuries; and in addition to this you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood after his majority, to-wit, after he arrives at the age of twenty-one years will be impaired by said injuries; and you will return a verdict for him in such sum as you will believe to be just and reasonable, not exceeding five thousand dollars.⁸

8—*Mitchell v. Wab. R. Co.*, 97 Mo. App. 411, 76 S. W. 647 (648). "The instruction for appellant, on the other hand, in effect de-

§ 1503. **Cars Must be in Condition to be Uncoupled with Reasonable Safety.** The court instructs the jury that it was the duty of the defendant to exercise reasonable care to have and to keep its cars in proper condition, so that they could be uncoupled with reasonable safety; and plaintiff had a right to assume, unless he had information to the contrary, that defendant had performed its duty in this respect.⁹

§ 1504. **Not Negligence for Railroad to Use Couplings or Deadwoods of Unequal Height.** The court instructs the jury that it is not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or deadwoods of which were not of uniform or equal height, provided the said deadwoods or couplings were in other respects safe appliances.¹⁰

clared the law to be that, if the car was overloaded and broke down because overloaded, then respondent was guilty of contributory negligence and could not recover. In short, it was left to the jury by these instructions to say whether the car broke down from inherent weakness, or on account of the overload. Whether the car would have broken down under an ordinary load and the accident happened, is perhaps under the evidence somewhat problematic. Yet there was evidence tending to show that it was incapable of carrying an ordinary load of steel rails, and we think it was proper to submit the question to the jury."

9—*L. & N. R. Co. v. Baker*, 106 Ala. 624, 17 So. 452 (453).

"This charge given for the plaintiff states the law as declared by the statute itself and by the decisions of this court—i. e., that the employee may recover for injuries resulting from defects in the conditions of the ways, works, machinery, or plant connected with or used in the business of the employer, unless he knew of the defect, and failed in a reasonable time to give notice of it. Until he has such knowledge he has a right to presume there are no defects. Code § 2590; *G. P. Ry. Co. v. Davis*, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47; *L. & N. Ry. Co. v. Orr*, 91 Ala. 554, 8 So. 360; *L. & N. Ry. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271."

10—*Penn. Co. v. Ebaugh*, 144 Ind. 687, 43 N. E. 936 (937, 938).

"The following decisions sustain the rule that it is not negligence for a railway company to use, of its own or those of another com-

pany in regular transportation, cars constructed with uneven couplings or deadwoods. *M. C. Rd. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Ft. W., J. & S. Rd. Co. v. Gildersleeve*, 33 Mich. 133; *Hulett v. Railway Co.*, 67 Mo. 239; *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *Toledo, W. & W. Ry. Co. v. Asbury*, 84 Ill. 429; *Ind. B. & W. Rd. Co. v. Flannigan*, 77 Ill. 365; *Whitwam v. Railroad Co.*, 58 Wis. 408, 17 N. W. 124; *Kelly v. Abbot*, 63 Wis. 307, 23 N. W. 890, 53 Am. Rep. 292; *Way v. Railroad Co.*, 40 Iowa 341; *Baldwin v. Railroad Co.*, 50 Iowa 680; *St. L., I. M. & S. Ry. Co. v. Higgins*, 44 Ark. 293.

"The obligation of railway companies is to use ordinary care to supply reasonably safe appliances for coupling, and they are not required to furnish safe appliances where, from the nature of the business, safety is not possible. Nor are they required to provide the best or the most approved, or any particular design of appliances. *L. S. & M. S. Ry. Co. v. McCormick*, 74 Ind. 440; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Jenney Elec. L. & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; and cases cited above. In the first of the cases just cited it was said: 'The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery, but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger. When a master employs a servant to do a particular kind of work, with particular kind of implements and ma-

§ 1505. Defects in Coupling Apparatus Between Caboose and Locomotive. If you believe from the evidence that the coupling apparatus was out of repair as charged in the declaration and that its condition and the effect thereof on the operation of the knuckle was not discoverable by the use of ordinary care, then and in such case the plaintiff cannot under the law be held to have assumed the risk of such defect.¹¹

§ 1506. Injuries Through Defective Drawbars or Drawheads. The court instructs the jury that if you believe from the evidence that the defendant did not use reasonable care in providing cars with sound coupling appliances, but used two cars with split and slivered drawbars and drawheads, and that the plaintiff while attempting to make a coupling between the two cars, was injured by reason of a defective drawbar or drawhead attached to said cars, and further believe from the evidence that the plaintiff in attempting to make such coupling, used reasonable care and caution for his personal safety, you should find defendant guilty.¹²

§ 1507. Injury to Brake Through Brake Staff Breaking. Bearing in mind the foregoing instructions, if you believe from the evidence that the plaintiff C. was in the employ of the defendant, the M., K. & T. R. Co. of T., in the capacity of a brakeman, and that while he was engaged in performing the duties of his employment, exercising ordinary care for his own safety, trying to set a brake on one of defendant's coal cars in the city of D., the staff of said brake broke and caused the plaintiff to fall and be injured, and if you believe further from the evidence, that the said unsafe condition of said brake staff could have been discovered and remedied by the defendant before plaintiff received his injuries, if the defendant had exercised ordinary care to furnish a brake staff on said car reasonably safe for use, then, if you believe all these facts from the testimony, you will find for the plaintiff.¹³

chinery, the master does not agree that the implements and machinery are free from danger in their use; but he agrees that such implements and machinery to be used by the servant are sound, and fit for the purpose intended, so far as ordinary care and prudence can discover. As we have already seen, the question here at issue did not involve any inquiry as to an imperfection or danger in the appliances named, excepting in the lack of uniformity in height."

11—C. & A. Ry. Co. v. Walters, 120 Ill. App. 152 (158), aff'd 217 Ill. 87, 75 N. E. 441.

12—"The objection urged to this instruction is, that the evidence shows that the coupling apparatus was in excellent repair; that only the lever-rod used to raise the pin for uncoupling purposes was out

of repair. The objection is without merit. The lifting lever must be held to be a part of the coupling apparatus and the latter cannot be said to have been in good repair when the lever necessary to operate it was out of repair. The instruction as given stated the law more favorably to appellant than it was entitled to, because, as we have heretofore held, appellee did not assume the risk of operating a coupler which would not couple the caboose and locomotive without the necessity of his going between the cars."

12—I. C. R. R. Co. v. Harris, 63 Ill. App. 172 (174), aff'd 162 Ill. 200 (202), 44 N. E. 498.

13—Mo., K. & T. Ry. Co. of Tex. v. Crowder. — Tex. Civ. App. —, 55 S. W. 380 (381).

§ 1508. **Latent Defect in Brake Rod.** The court instructs the jury that even if you should find that the brake rod was improperly bolted, and that it fell and injured the plaintiff, as alleged in his petition, still, if any defect which caused it to fall was latent, and could not have been discovered by the defendant by the use of ordinary care, then your verdict should be for the defendant; or, if you find that the plaintiff was not injured as claimed by him, then you will find for defendant.¹⁴

§ 1509. **Using Car Without Hand-holds—Series.** (a) It was the duty of the defendant railway company to use ordinary care and diligence to furnish safe machinery, and cars properly equipped, and supplied with appliances reasonably necessary and proper to enable its employes to perform the duties required of them with reasonable degree of safety.

(b) It was also the duty of the plaintiff to exercise ordinary care and prudence in the performance of his duties, to avoid injury to himself.

(c) By the term "negligence," as used in this charge, is meant the doing of that which a person of ordinary care and prudence would not have done under similar circumstances, or the failure to do that which such a person would have done under like circumstances.

(d) By the term "ordinary care," as used in this charge, is meant such degree of care as a person of ordinary prudence would exercise under similar circumstances.

(e) The plaintiff when he entered the service of the defendant company as a brakeman, assumed the risks and dangers ordinarily incident to such employment, but did not assume any risks arising from the negligence of the defendant, if any there was, unless the plaintiff knew of such negligence in time to have avoided injury therefrom.

(f) Now, if you find from a preponderance of the evidence that the plaintiff, H. R. M., was in the employment of the defendant as a brakeman, as alleged in his petition and that while engaged in his duties as such brakeman in coupling cars for said defendant, he was injured as alleged in his petition; and you further find from the evidence that the stationary car which plaintiff was endeavoring to couple at said time was not provided with a hand-hold or grab-iron on the end thereof, and that the defendant knew, or by the exercise of ordinary care and diligence could have known, that said car was not so equipped with the hand-hold, if you find it was not prior to said accident, and that a hand-hold in the end of said car was a necessary appliance to said car, to enable brakemen to perform their duties in coupling said car with safety, and that such hand-hold was

14—G., H. & S. A. Ry. Co. v. "We cannot see anything in this Buch, 27 Tex. Civ. App. 283, 65 of which the appellant can complain." S. W. 681 (684).

such an appliance as defendant company rested under an obligation to provide in the discharge of its general duty to use ordinary care to furnish reasonably safe appliances in coupling cars, as heretofore explained to you in this charge, and that the failure of defendant company to provide said stationary car with such hand-hold, if you find there was such failure, amounted to negligence on the part of said company, as that term has been hereinbefore defined in this charge, and that such negligence, if any, caused plaintiff to receive the injuries complained of in his petition or any of them—then you will find a verdict for the plaintiff, unless you further find that plaintiff was himself guilty of negligence which contributed to his injuries, as will be hereinafter explained.

(g) You are further instructed that if you find from the evidence that plaintiff was himself guilty of negligence in the manner in which he attempted to make said coupling, which contributed to his injuries, then he cannot recover, even though you should find the defendant company was negligent in using said car without hand-holds, if it did so use it.

(h) Now, if you find from the evidence that said stationary car was without a hand-hold, and that the defendant company was guilty of negligence in using said car in such condition, if you find it did so use it, but you further find that plaintiff knew or ascertained that said car was not supplied with a hand-hold in the end thereof in time to have avoided the injuries received by him, if any, by the exercise of ordinary care on his part, then he cannot recover; and, if you so find, you will return a verdict for the defendant.

(i) You are further instructed that if you find from the evidence that the plaintiff, at the time he attempted to make the coupling in which he was injured, if he was injured, went between the cars with his face turned towards the moving car, and attempted to make the coupling in that position, and that this was more dangerous than to couple cars with the face turned towards the stationary car, and that such act, if any, on plaintiff's part, was negligence, as that term has been heretofore explained, and that same contributed to plaintiff's injuries, then in that event plaintiff would be chargeable with contributory negligence, and could not recover; and, if you find the facts to be as above set out, you will return a verdict for the defendant, even though you should find the defendant was guilty of negligence in failing to provide handholds on the end of said stationary car, if it did so fail.

(j) You are further instructed that unless you find from the evidence that the hand-hold was not on the end of the stationary car at the time of the accident, and that the absence of the hand-hold was negligence on the part of defendant, and was the proximate cause of plaintiff's injuries, you will return a verdict for the defendant.

(k) Unless you find from a preponderance of the evidence that

the stationary car plaintiff was endeavoring to couple at the time of the accident was not provided with a hand-hold or grab-iron in the end thereof, and unless you find that the defendant company was guilty of negligence in using such car in such condition, if you find it did so, you will return a verdict for the defendant company; or if you find the plaintiff was guilty of contributory negligence, as heretofore defined, you will return a verdict for defendant company.

(l) If you find a verdict for the plaintiff under the foregoing instructions, you will find in such sum as will reasonably and fairly compensate him for the mental and physical pain he suffered, if any, as the result of such injuries, and also the reasonable value of his services for the time lost by reason thereof, if any, and also for his diminished capacity to labor and earn money in the future, if any.

(m) The evidence admitted before you as to the statements claimed to have been made by the witness F. to the witness C. as to the hand-hold, or absence thereof, on the stationary car, was only admitted for the purpose of affecting the credibility of the witness F., and not as evidence of the facts stated by said F. to said C., if he made any such statement, and if you will only consider such testimony for the purpose for which it was admitted, and none other.

(n) The burden of proof is on the plaintiff to show by a preponderance of the evidence the facts which will entitle him to recover.

(o) In the defenses of contributory negligence on part of the plaintiff, the burden of proof is on the defendant to establish the same by a like preponderance of the evidence.

(p) The jury are the exclusive judges of the credibility of the witnesses, the facts proven, and the weight to be given the testimony, but must receive the law from the court, and be governed thereby.¹⁵

§ 1510. Defect in Handhold of Car—Competency of Inspector.

(a) You are charged, at the instance of the defendant, that a railway company does not insure the safety of the tools and appliances which it furnishes to its servant for his use. The law requires that it use ordinary care and caution to provide its servant with tools and appliances reasonably safe for the doing of the work for which he is employed. So, in this case, although you may believe from the evidence that the handhold on the car was defective, yet if you believe from the evidence that defendant exercised ordinary care and caution to discover such defects—that is to say, that it used that care and caution which an ordinarily prudent person would have used under similar circumstances—then it will be your duty to return a verdict for defendant; and this, though you may believe that the plaintiff was injured by reason of the handhold on the car being defective.¹⁶

15—Mo., K. & T. Ry. Co. of Tex-
as v. Milam, 20 Tex. Civ. App.
688, 50 S. W. 417 (418).

16—St. L. S. W. Ry. Co. of Texas
v. Corrigan, — Tex. Civ. App. —,
81 S. W. 554 (555).

(b) If you believe from the evidence that plaintiff, while in the discharge of the duties of his employment was upon a box car in use by defendant, and attempted to descend from said car, and in such attempt, that he took hold of a handhold on the top of said car, provided for the purpose; and if you believe that while holding to such handhold, it pulled loose from the car and caused plaintiff to be thrown to the ground and injured as alleged; and if you find from the evidence that the wood to which said handhold was fastened by screws had become, and was, rotten or decayed, so that it would not, and did not hold said screws, and that defendant knew of such condition (if defective), or by the exercise of ordinary care, it ought to have known of the same; and if you believe that on account of such rotten and decayed condition of said wood (if any) said handhold was caused to and did pull loose from said car; and that the furnishing by defendant for plaintiff's use such defective handhold (if the same was defective as aforesaid) was negligence, and that such negligence (if any) was the proximate cause of the plaintiff's injuries (if any) you will find for the plaintiff unless you find for the defendant under other issues submitted to you.¹⁷

§ 1511. Ordinarily no Obligation to Provide Steps at End of Freight Cars for Use of Employes. The jury are instructed, as a matter of law, that the defendant was under no obligation to provide steps at the end of its freight cars for the use of employes whose business it was to uncouple cars, provided the jury believe, from the evidence, that the use of freight cars without such steps did not

"This proposition is unquestionably the law and applicable to the case. *G. C. & S. F. Ry. Co. v. Smith*, 87 Tex. 348, 28 S. W. 520; *G. H. & S. A. Ry. Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. 894; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 124, 67 S. W. 133. The master is not required to exercise more than ordinary care to select and furnish his servant suitable instrumentalities and resources to accomplish the work the servant is put to."

17—*Mo., K. & T. Ry. Co. of Texas v. Box*, — Tex. Civ. App. —, 93 S. W. 134 (136).

"The objections urged to this charge are contained in four propositions propounded under appellant's first assignment of error, the substance of all of which is as follows: Said charge is upon the weight of the evidence, and does not present for the determination of the jury: (1) Whether or not the handhold was defective; (2) whether it was pulled off by the plaintiff in descending from the car in the course of his duties; (3) said charge assumes that if

said handhold pulled off, it was defective, and also assumes that it pulled off because defective, as a result of its use by the plaintiff in the course of the duties of his employment; (4) that the charge assumes that if the handhold pulled off, it did so solely because of the rotten and decayed condition of the wood to which it was fastened and thereby ignored the testimony tending to show that the handhold may have been pried off by some instrument and was, when inspected shortly before the accident and started to the place of the accident, securely fastened; (5) that said charge is erroneous, because plaintiff's right to recover is not made to depend upon its having been pulled off as a result of plaintiff's use of it while descending from the car in the discharge of his duties, and, as framed, was calculated to impress the jury with the idea that the court was of the opinion said handhold was defective. We think none of the objections should be sustained."

render the work of uncoupling by such employes unreasonably dangerous and unsafe.¹⁸

§ 1512. Injury to Engineer Through Defective Step on Engine. If you believe from the evidence that on or about the ——— day of ———, 19—, the plaintiff, C, was in the employ of the defendant in the capacity of a locomotive engineer, and that on said date he was in the performance of his duty upon an engine running westward toward the city of S, and that, when said engine reached the station of S, it became plaintiff's duty to alight from said engine, and that, in order to do so, it was his duty to use one of the steps upon said engine, and that said step was provided by the defendant for the purpose of alighting from the engine; and if you further believe from the evidence that, as plaintiff stepped upon said step, the step and stem upon which it was fixed came off and gave way and caused plaintiff to fall, and that thereby he sustained any of the injuries alleged in his petition; if you further believe from the evidence that the said step and stem upon which it was fixed was loose, defective, and insecurely fastened, and that, by reason thereof, the said step and stem thereof came off with the plaintiff and caused him to fall, if you find it did come off and cause him to fall; and if you further believe from the evidence that the defendant knew, or by the exercise of ordinary care would have known, that said step and the stem thereof was in a loose, defective, and insecure condition, if you find it was in such condition; and that it was negligence on the part of the defendant to permit said step and the stem thereof to be in such condition; and that such negligence, if any, directly caused plaintiff's injuries, if any; and you further believe from the evidence that the plaintiff was not guilty of contributory negligence and did not assume the risk, then I charge you that your verdict must be for the plaintiff.¹⁹

§ 1513. Notice by Engineer to Foreman of Roundhouse of Defect in Engine. (a) The court instructs the jury that you will next inquire whether the defendant knew of the defective condition of said locomotive engine long enough before the time of the accident to have repaired the same, and negligently used and required its servants to

18—C., B. & Q. R. Co. v. Warner, 123 Ill. 38 (48), 14 N. E. 206.

19—Galveston, H. & S. A. Ry. Co. v. Cherry, — Tex. Civ. App. —, 98 S. W. 898; St. L. & S. F. Ry. Co. v. Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783 (785).

"The criticism is that the words, 'and you further believe from the evidence that plaintiff was not guilty of contributory negligence and did not assume the risk, then I charge you that your verdict must be for plaintiff,' placed a burden on defendant more onerous than was required of it; that

the charge should have read: 'Was not guilty of contributory negligence or did not assume the risk, because defendant was entitled to a verdict on either one of such findings.' The charge in our opinion was not subject to be understood as appellant contends. The impression it conveyed was that plaintiff could recover unless the jury believed that he was both not guilty of contributory negligence and did not assume the risk. Under the charge they had to find both in order to find for plaintiff."

use it on the day of said accident in such defective condition. And in this connection you are instructed that notice thereof to the foreman of defendant's machine shop at L., Ky., if given by the engineer ——— on the evening before the accident, was notice to the defendant, and would charge the defendant with knowledge of its defective condition.

(b) If the engineer in charge of the locomotive on which the cylinder cock on one of its engines was broken off, and the opening plugged up, took said locomotive into the roundhouse or machine shop of the defendant at L., and notified the foreman in charge of said shop of said defect, and if you find that repairs of such defects were not then made at such shop, then you will find defendant had notice of said defects.²⁰

§ 1514. Injury to Fireman from Side Rod on Engine Breaking. If you believe from the evidence that on or about ———, that plaintiff was in the employ of defendant as a fireman on one of its engines, and that while so employed the side rod of said engine broke, and injured plaintiff, as alleged in his petition; and if you further believe from the evidence that the side rod was old, defective and unfit for service, as alleged in plaintiff's petition, and that the metal of the side rod was weak and defective; and if you further believe from the evidence that it was negligence on the part of defendant to allow said side rod to be in such condition as you find it was, and that such negligence, if any, was the direct and proximate cause of said side rod breaking, and the plaintiff's injuries, if any; and if you believe from the evidence that the plaintiff did not assume the risk, then you will find for plaintiff.²¹

²⁰—*Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246 (248).

"It was proven that the engineer did give such notice, and we think the instructions form a correct statement of the law in relation thereto. Because the foreman of the roundhouse or machine shop at Louisville was in some respects the fellow servant of appellee, it does not follow that he was so in all respects. In *Indiana Car Co. v. Parker*, 100 Ind. 181, the court says: 'The duty of the employer to provide safe machinery and appliances is a continuing one.' Thompson (2 Neg. 984) says: 'But the master does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. It is a duty to be affirmatively and positively fulfilled and performed. He must supervise, examine and test his machines as

often as custom and experience require.' . . . Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age or wear out by use.' The master's duty is a continuing one. When, also, he appoints some other person to perform the duties which are thus owed primarily from himself, then the appointee represents the master; and though in the performance of such duties the appointee may be and is a servant to the master, yet in these respects, that is, as performing the duties of the master, he is not a co-employee. Beach, *Contrib. Neg.* paras. 349, 356, and notes; *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Nall v. R. R. Co.*, 129 Ind. 260, 28 N. E. 183, 611."

²¹—*G. H. & S. A. Ry. Co. v. Parvin*, 27 Tex. Civ. App. 60, 64 S. W. 1008.

§ 1515. Furnishing Trucks for Removal of Trestles from Roundhouse. The court instructs the jury that it was the duty of the defendant company to use ordinary care to furnish trucks to be used by the plaintiff in removing trestles from the roundhouse, reasonably sufficient and safe for the purpose, and to use the same care to keep the same repaired and in a reasonably safe and sound condition, and if it failed to use such care, such failure would be negligence; and if plaintiff was injured as alleged, and if such negligence of the defendant company was the proximate cause thereof, then plaintiff could recover.²²

TRACK AND ROADBED.

§ 1516. Obligation to Keep Roadbed and Track Free From Obstructions. It is the duty of railroad corporations to furnish reasonably safe appliances for the performance of the work required to be performed by their employes, and furnish a reasonably safe place for the performance of such work as they are required to perform, and this obligation extends to the keeping of their roadbed and track free from obstructions that may be dangerous to the persons of such employes in the performance of their duties on such train, so far as the exercise of reasonable care on the part of such railroad corporation can secure such safety.²³

§ 1517. Master Must Use Ordinary Care to See That They Are Safe. (a) You are instructed that the plaintiff, B. K., while employed by the defendant, unless he knew to the contrary, had the right to rely upon the assumption that the defendant would use and exercise ordinary care in the operation of its track. It was plaintiff's duty to use his senses, and take note of and observe whatever was open and patent to common observation, and to use ordinary care to protect himself from injury; and, if you believe from the evidence that the plaintiff could have seen the obstruction on the track in time to have prevented injury to himself, by the exercise of ordinary

22—*Gulf, C. & S. F. Ry. Co. v. Davis*, 35 Tex. Civ. App. 285, 80 S. W. 253 (254).

"The charge is an absolutely correct proposition. If appellee knew of the defect in the truck, the proximate cause of the injury was his negligence; and the jury could not, under subsequent charges, have found that the injury was the proximate result of the negligence of appellant."

23—*Terre H. & I. Ry. Co. v. Williams, Adm.*, 69 Ill. App. 392 (397), *aff'd* 172 Ill. 379, 50 N. E. 116, 64 Am. St. 44.

"As we understand it, the criti-

cism is that the instruction should have been modified so as to present the qualification that knowledge of the conditions would bar a recovery.

"The general proposition announced is not objected to, but the argument is, that in view of the evidence, the suggested modification was necessary. We think not. There is no objection to such a statement of the general rule—leaving it to the defendant to ask for a statement of any exceptions, limitations or qualifications that might be deemed relevant in view of the proof."

care on his part, then your verdict should be in favor of the defendant.²⁴

(b) The company should have used all reasonable precaution and ordinary care to secure the safety of its employes by keeping a sufficient force at command, and of sufficient capacity, to keep its roadway reasonably safe for the passage of its trains and the employes in charge thereof. It cannot, for want of watchfulness, expose its employes to unreasonable risk and escape liability, but the duty imposed is that of ordinary care. The ordinary care required must be measured by the danger of the service and proportioned by it.²⁵

§ 1518. Right of Locomotive Engineer to Assume that Railroad Track is Reasonably Safe. The court instructs the jury that it is the duty of a railroad company to exercise ordinary care to keep and maintain its railway track in such condition that it will be reasonably safe to operate its trains thereon in the ordinary and usual carrying on of its business as a railway corporation; and a locomotive engineer employed by a railroad company has the right to rely upon the assumption that the railway track is kept and maintained by the company in a reasonably safe condition; and he may rely upon said assumption unless he knows of a defect in the railway track, or unless in the discharge of his duty he must necessarily have acquired such knowledge.²⁶

§ 1519. Tracks and Sidings Must not be in Too Close Proximity to Other Structures. The court instructs the jury that it is the duty of a railway company to use ordinary care to see that its tracks and sidings are not in such close proximity to other structures as to

24—Texas & N. O. R. Co. v. Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073 (1077).

"It was the duty of the defendant to exercise ordinary care to furnish a safe track for the plaintiff to travel over to and from his work, and the plaintiff had the right to assume that it would do so. The plaintiff assumed the risks of which he had knowledge, or by the exercise of ordinary care could have discovered, but he was under no obligation to look out for the master's negligence. San Antonio & A. P. Ry. Co. v. Brookling, — Tex. Civ. App. —, 51 S. W. 539; Bonnet v. Ry. Co., 89 Tex. 76, 33 S. W. 334; Smith v. Ry. Co., — Tex. Civ. App. —, 65 S. W. 85; I. & C. N. Ry. Co. v. Bearden, 31 Tex. Civ. App. 58, 71 S. W. 559."

25—Denver & R. G. R. Co. v. Warring, — Colo. —, 86 Pac. 305 (312).

"This is objectionable, it is claimed, because it advised the jury, in effect, that the sole and

principal end and aim of the operation of a railroad is the safety of its employes. The instruction in our opinion, is not erroneous. It is the duty of the railroad company to use all reasonable precaution to secure the safety of its employes, and to keep a sufficient force at command to keep its roadway reasonably safe for the passage of its trains and the employes in charge thereof, and this was what the court advised the jury."

26—Southern K. Ry. Co. of Tex. v. Sage, — Tex. Civ. App. —, 80 S. W. 1033 (1039).

"We are of the opinion that the charge complained of is a correct statement of a well established principle of law applicable to the facts of this case. See Missouri, K. & T. Ry. Co. v. Hoskins, 79 S. W. 369, 9 Tex. Ct. Rep. 648, and authorities there cited. The only care or diligence which could be required of appellee was imposed upon him in other paragraphs of the court's charge."

unnecessarily endanger its servants and employes who may be engaged in the discharge of their duties upon trains or cars passing along such tracks or sidings.²⁷

§ 1520. Failure to Keep Track in Repair as Proximate Cause of Injury. The court instructs the jury that if the evidence shows that the injury to plaintiff was received by him in the reversing of the engine; that the reversing of his engine at that particular time was rendered necessary or prudent by the fact that part of the train was leaving the track; and that the train, or part of it, was leaving the track on account of the negligence of defendant in keeping the track in repair—this showing would trace the cause of the injury directly to the negligence of defendant. But unless this train of connection is shown by the evidence, as above stated, it will not be shown that the negligence of defendant was the proximate cause of the injury; and if there is a failure on this point, the plaintiff cannot recover, even though the defendant may have been negligent in the maintaining of its track.²⁸

§ 1521. Injury to Employe Through Insufficient Ballasting of Road. The court instructs the jury that if they shall believe from the evidence that the switch or siding in defendant's yard where the plaintiff was injured was insufficiently ballasted, and that by reason thereof it was dangerous to the employes of defendant necessarily using the same in coupling cars, and that because of the insufficient ballasting the plaintiff received the injuries of which he complains, and that the plaintiff did not know of the insufficient ballasting, and did not have an equal opportunity with the employes of the defendant who were charged with the duty of looking after its tracks to know of its condition, and, further, that the defendant, or its agents or employes who are charged with the duty of looking after its tracks, knew or might have known of its insufficient and dangerous condition by the exercise of ordinary care, if such was its condition, then the law is for the plaintiff, and the jury should so find, provided that they shall further believe from the evidence that the plaintiff did not contribute to cause his injuries by negligence upon his part, but for which he would not have been injured.²⁹

§ 1522. Sidetrack Slanting and Sidling. The court instructs the jury that if you believe, from the evidence, that the plaintiff while

27—Galveston, H. & S. A. Ry. Co. v. Morton, 31 Tex. Civ. App. 142, 71 S. W. 770 (771).

28—Knapp v. Sioux C. & P. Ry. Co., 71 Iowa 41, 32 N. W. 18 (21), 54 Am. Rep. 1.

"This instruction is in harmony with the doctrine recognized by this court in the opinion in this case when it was here before. 65 Iowa 91, 21 N. W. 198. Counsel insist that the question involving the proximate cause of the injury

sustained by plaintiff should have been left for determination by the jury, and, in support of this position, declare that the cause when here before was reversed for the reason that the court did not submit the question to the jury. The question is clearly one of law, and is so recognized in our prior decision in this case."

29—Louisville & N. R. Co. v. Ross, 21 Ky. L. 1826, 56 S. W. 14.

"It is well settled that the mas-

in the employ of the defendant as freight brakeman, and in the discharge of his duties as such brakeman, attempted to couple two freight cars on the defendant's road, and in so doing used that care and caution for his own safety that the ordinary careful man would have exercised, and if you believe, from the evidence, that the sidetrack where the cars were slanting and sidling and as a result thereof not a reasonably safe place to work, then and in such case, if you believe from the evidence that the plaintiff was injured, as charged in the declaration as a result thereof, and that the unsafe condition

ter owes it to his servant to furnish him a reasonably safe place in which to work. This duty is not only one at the beginning of the business or employment, but remains throughout the service. If the machinery or place is reasonably safe at the beginning, the obligation is not discharged, but the master must use ordinary care to keep the appliances and place reasonably safe. It is known by all men, by common experience and observation, that railroad tracks, as well as machinery, need attention and repair, and this duty is on the master. The servant, presumably knowing of this duty of the master, may reasonably expect its discharge, and he may act with the expectation that the master has performed his duty. However, when the servant becomes aware that there exist defects, he then assumes the risk of those defects, if he remains in the service, unless the master assumes the risk by a promise to repair. If the defects be not known to the servant injured thereby, yet, if he has opportunities to discover the defect equal with the servant whose duty it is to repair or look after such, then the servant injured cannot complain that it was not discovered and remedied. This is true, because he could have made the discovery, and should have done so, as readily and as soon as the servant charged with the duty to repair. We are of opinion that to have given the instruction asked for by appellant would have required of appellee to have assumed the duty imposed on the master; i. e., to exercise ordinary care to discover a defect in the place where appellee worked. This duty rests on appellant. In the case of Louisville & N. R. R. Co. v.

Foley, 94 Ky. 220, 21 S. W. 866, this court said: "The lower court therefore properly instructed that if the injury was caused by improper or defective appliances furnished plaintiff by defendant with which to perform the duties required of him, and defendant knew or might have known of their condition and character by use of ordinary care, and plaintiff did not know thereof, the law was for him, and the jury should so find. . . . The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for use of employes, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employe by reason of defective machinery and appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, the rule would not amount to much, as either an incentive to the employer to do his duty, or protection to the employe against personal injury. The limit of injury in such cases as this is whether, as a matter of fact, the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective.' If appellee had the same or an equal opportunity as appellant to discover the defect, it was his duty, by the instruction given, so to do; and, if he failed in this, he could not recover. As the duty to furnish reasonably safe appliances, machinery, and place to work is a continuing duty on the master, it seems to us that the instruction given by the court correctly states the law of the case."

of the track, if you believe from the evidence, it was so unsafe, was caused by the defendant not exercising reasonable care to provide a reasonably safe track, it will be your duty to find for the plaintiff.³⁰

§ 1523. Injury by Protruding Cross-Tie and Hole in Track. (a) The court instructs the jury that the plaintiff sues the defendant to recover damages for alleged injuries to him, while an employe on the railway of defendant caused by stepping upon the end of a protruding cross-tie, and into a hole upon defendant's tracks, which projecting cross-tie and hole were permitted upon said track and roadbed by reason of the negligence of the defendant, upon and in which plaintiff stepped while carrying an iron rail for defendant, by reason of which plaintiff was injured, and that such injury was without the fault, negligence or want of care of the plaintiff.³¹

(b) If the jury believe from the evidence that the defendant, in constructing and keeping its roadbed and premises where plaintiff was engaged in work, permitted one of its cross-ties to project above the ground, and a hole to exist beside its track, and that in permitting this it failed to exercise ordinary care; and if you further believe that the plaintiff, while in the performance of his duty, and while in the exercise of ordinary care stepped upon said cross-tie and into said hole, and was thereby injured, you will find for the plaintiff.

(c) If the place where plaintiff was at work was reasonably safe for the doing of the work for which plaintiff was engaged; or if you believe from the evidence that there was a tie in the track which stuck up above the other ties in the yard, and there was a hole by the side of the track, and that such protruding tie and hole made the place not reasonably safe for the particular kind of work then being done there, and that defendant used ordinary care to make and keep said premises reasonably safe; * * * or if you believe from the evidence that the sticking up of the tie and the hole in the track, if such you find to be the fact, were open and patent to common observation, and could have been seen and known by plaintiff—then you will find for the defendant.³²

§ 1524. Allowing Timber to Stick Out of Shed and Over Transfer Table. The court instructs the jury that if you believe from the evidence that plaintiff and his gang were negligent in leaving the timber sticking out of the shed, and over the tracks of the transfer table, and thereby caused or directly contributed, plaintiff's injury, then the plaintiff cannot recover. The court instructs the jury that if you believe from the evidence that the plaintiff himself was guilty of negligence which directly contributed to cause his injury, the plaintiff cannot recover.³³

30—Malott v. Hood, 201 Ill. 202, 66 N. E. 247, aff'g 99 Ill. App. 360.

31—Sherman S. & S. Ry. Co. v. Bell, — Tex Civ. App. —, 58 S. W. 147 (149).

32—Ibid.

33—Gayle v. Mo. C. & F. Co., 177 Mo. 427, 76 S. W. 987 (995).

§ 1525. **Allowing Derrick to Swing Over Track.** The court instructs the jury that it was the duty of the defendant in this case to keep its roadbed and track in a reasonably safe condition for the passage of its train along and over the same, and to keep the same clear of obstructions thereon, or in close and dangerous proximity thereto; and if the jury believe from the evidence in this case that there was standing, near the plaintiff's railroad and track at the point where it is alleged in the declaration that the accident herein occurred, a derrick with an arm or boom attached thereto, and that said arm or boom of said derrick was of sufficient length to swing over the roadbed or track of the defendant, and thereby endanger the passage of trains along and over said track at said point, then it was the duty of the defendant to either cause said derrick and arm or boom attached thereto to be removed, or to see that the same was kept securely fastened in such a way and manner as not to obstruct the passage of trains along said track at said point. And this duty devolved upon the defendant although said derrick may not have been upon the right of way of defendant, nor upon lands under its immediate control.³⁴

§ 1526. **Negligence of Master In Allowing Clinker to Remain at Side of Track.** If you further find and believe from the evidence that defendant in permitting said clinker to be and remain on its said premises at such time and place, if you find it did permit the same, was an act of negligence, and if you further find and believe from the evidence that such negligence, if any there was, proximately caused plaintiff's injuries, then you will find for the plaintiff, unless you find for the defendant under other instructions hereinafter given you.³⁵

§ 1527. **Wreck of Train on Defective Bridge.** (a) The court instructs the jury that, before the plaintiff can recover in this action, he must prove to the reasonable satisfaction of the jury, by the greater weight of the evidence in the cause, that his injuries are due to the negligent conduct of the defendant, its agents or servants, and that, had it not been for such negligence in constructing or maintaining the bridge in question, he would not have been injured; and, if he has failed to so prove, your verdict will be for the defendant. And you are further instructed that the defendant was not bound to furnish its employes any particular kind or style of bridge over

34—*McCreery's Adm'x v. O. R. R. Co.*, 43 W. Va. 110, 27 S. E. 327 (328).

35—*Mo., K. & T. Ry. Co. v. Keefe*, — Tex. —, 84 S. W. 679 (682).

"It is contended that there is no evidence to authorize the giving of this charge. It is argued that the word 'permit,' used in this charge, imports knowledge, and that there

was no evidence that appellant had knowledge that the clinker which caused the injury was in its yards. When the charge is construed as a whole, the jury could not have been misled by the use of the word 'permit.' The evidence fairly raised the issue embraced in the charge, and the court did not err in submitting the same."

R. B., or other streams its railroad crosses; that defendant has discharged its full duty to plaintiff when it has constructed and maintained a bridge over R. B. such as is in ordinary use by itself and other railroads, and reasonably safe to carry trains over it under ordinary conditions and circumstances; that defendant was not bound to anticipate unprecedented, extraordinary or unusual rainfalls, or to build such a bridge as would resist or stand against such; and if the jury believe that the bridge over R. B., as constructed and maintained, was reasonably safe for the purpose for which it was built in times of usual and ordinary rainfall, then plaintiff cannot recover.

(b) The court instructs the jury that the defendant is not bound to furnish any particular kind or style of bridge over R. B. to the plaintiff, and it is in no sense an insurer of his safety; that all the law requires of the defendant toward its employes is that it shall furnish a bridge over its streams that is reasonably safe for carrying trains over them under ordinary conditions.

(c) The court instructs the jury that if they believe, from the evidence, that plaintiff was in defendant's employ as conductor of the east-bound passenger train on the ——— day of ———, ———, and that said train was wrecked by the falling of defendant's bridge across R. B., and plaintiff was thereby injured, and the said wreck was caused by reason of the defective condition of said bridge in any of the particulars hereinafter mentioned, and that said bridge was a pile bridge, and on account of the character of the stream and the country drained, it (said bridge) was not reasonably safe at that place, or that the piling that supported said bridge had become rotten, unsound or defective, or that there was not sufficient earth around some of said piling, and that from any or all of said causes said bridge, on said ——— day of ———, ———, was not reasonably safe for the passage of defendant's said train over the same, and that defendant knew of the defective and unsafe condition of said bridge, or by the exercise of reasonable care and diligence could have ascertained the same before the arrival of the train, upon which plaintiff was conductor, at said bridge, then the verdict must be for the plaintiff.

(d) The jury are instructed that, while the defendant was not bound to provide against the effects of a storm which it could not reasonably anticipate, yet if they believe, from the evidence, that the bridge over R. B. was not reasonably safe on account of its being a pile bridge, or because some of the piling had become rotten and decayed, or because there was not sufficient earth or dirt around said piling, and that the fall of the bridge was caused by its defective condition in any of the particulars aforesaid, and not by reason of the extraordinary force of the storm, then the fact that the bridge fell during said storm will not prevent a recovery in this case.³⁶

§ 1528. Law Fixes no Exact Standard for Height of Bridges Over Railroads. (a) The court instructs the jury that the defendant company, under the laws of Illinois, is not required to build its bridges of such height that brakemen can stand on them (on the cars) and pass through and under them with safety. The law fixes no exact height or standard, but only requires that such bridges shall be of such height that the employes can perform their duties with reasonable safety to themselves.³⁷

(b) The court instructs you that it was the duty of the defendant, in the construction and maintenance of the overhead portion of the bridge, where decedent, A. B., was injured, to construct and maintain it of sufficient height that the brakemen on the freight cars could pass under said overhead portion while engaged in the discharge of their duties, with reasonable safety to their person while standing or walking on top of the freight cars; and if they believe from the evidence that the bridge where decedent was injured was not so constructed and maintained as to the height thereof, and that by reason thereof decedent was injured, and that the injury caused his death, you must find for plaintiff, unless you believe from the evidence that decedent was not in the discharge of his duty as brakeman at the time he was struck, or that he knew the overhead portion of said bridge was insufficient in height to enable him to pass under it safely while standing or walking on the top of a freight car upon which he was at the time he was struck, and that he recklessly, and with indifference to the consequences, and not in the discharge of his duty, exposed himself to the danger of being struck by the bridge, in which later state of case you will find for the defendant; or, if you believe from the evidence that the injury was not the cause of decedent's death, you will find for the defendant.³⁸

OPERATION AND MANAGEMENT OF TRAINS AND CARS.

§ 1529. Necessity of Look-out at Points Where Employes Commonly Pass in Discharge of Their Duties. The court instructs the jury that it is the duty of a railway company's servants, who operate its engines along a portion of its track that is commonly used by its employes, or over and about which its employes commonly pass in the discharge of their duties, to exercise "ordinary care" in keeping a look-out to discover the presence of such employes on or in close proximity to the track at such point, and to use all the means in their power, consistent with safety of the engine and its operatives, to stop the engine to prevent a collision with or injury to such employes.³⁹

37—Cleveland, C., C. & St. L. Ry. Adm'r, 23 Ky. Law. 1929, 65 S. W. Co. v. Walter, Adm'r, 147 Ill. 60 453 (456).
(64), 35 N. E. 529.

39—Mo., K. & T. Ry. Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852 (853).

§ 1530. **Injury Through Act of God and Concurrent Negligence of Defendant.** If you believe from the evidence that the plaintiff L., while in defendant's employ, and while in the performance of his duties, was injured by a collision between a passenger train, and a loose car on the main line of defendant's railway, and that the said loose car escaped from the side track at M. City by reason of an unusual and unprecedented windstorm, and that defendant was not guilty of negligence under the charges herein given you proximately causing the escape of said car and said collision and plaintiff's injuries, then you will find for the defendant. If however you believe from the evidence that the plaintiff, while in defendant's employ, and in the performance of his duty was injured by a collision between a passenger train and a loose car on the main line of defendant's railway, and that such car was blown out of the side track at M. City by an unusual or unprecedented windstorm, and that such unusual or unprecedented windstorm was a proximate cause of the collision and of plaintiff's injuries; and if you further believe from the evidence that the brakes on the said car while in the side track were not set and the wheels were not blocked and that the failure to have the said brakes set or the wheels blocked, if you believe there was such failure, was negligence on the part of the defendant; and if you further believe from the evidence that such negligence of the defendant, if any, and such unusual or unprecedented windstorm were concurring causes of the said collision and of plaintiff's injuries, and together were the direct and proximate cause of the collision and of plaintiff's injuries—then defendant would be liable, and you would find your verdict for the plaintiff.⁴⁰

§ 1531. **Injury to Servant Through Failure to Obey Ordinances as to Speed or Ringing Bell.** If you believe from the evidence that plaintiff was an employe of the defendant ——— Company, as alleged in his petition, and that when en route from his residence to the tinshop of the ——— Company in the city of D. for the purpose of having his torch repaired, at a point at or near the place where N. street and the railroad tracks cross M. avenue in the said city of D. plaintiff started to cross one of said tracks, and was struck and injured by the tender of an engine then and there being operated and run along and over said track; and if you believe from the evi-

40—Galveston, H. & S. A. Ry. Co. v. Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389 (391).

"Its clear import is that if the windstorm and appellant's negligence in leaving the cars unsecured were concurrent causes, and together were the direct and proximate cause of plaintiff's injury, the railroad would be liable therefor. This we understand to be the law. Galveston, H. & S. A. Ry. Co. v. Sweeney, 14 Tex. Civ. App.

216, 36 S. W. 800; Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; St. L. & S. F. Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789. If appellant was negligent in leaving the box cars upon the side track without having brakes set or the wheels blocked, and they were blown out on the main track by a storm, such negligence was necessarily the proximate cause of the collision and appellee's injury."

dence that the employe or employes in charge of the engine at the time did or omitted to do any one or more of the following acts or things as charged in the plaintiff's petition, namely, if at the time they were running said engine at a greater rate of speed than six miles an hour, or if they failed to ring the bell on said engine as required by said ordinance of said city of D., or if they did not keep such lookout to discover persons on the track at said point as an ordinarily prudent person would have done under like circumstances, or if they did not give such signals or warning on approaching the place of the accident as an ordinarily prudent person would have given under similar circumstances; and if you further so believe that such acts or omissions which you find have been so done or omitted by such employes were the proximate cause of the plaintiff's injuries, and that such employes were guilty of negligence as negligence has been hereinbefore defined in doing or omitting to do any of the said acts or things which you find to have caused plaintiff's injuries; and if you find that plaintiff was not himself guilty of contributory negligence proximately causing or contributing to cause his injuries—then you will return a verdict for plaintiff.⁴¹

§ 1532. Failure of Engineer or Fireman to Obey Signals to Slow Up Train. (a) The court instructs the jury that if they shall believe from the evidence that the plaintiff gave the signal to hold up the engine to a very low rate of speed, and also gave the signal to stop the train, upon the occasion mentioned in the petition, and the fireman or engineer of the train failed to observe and obey the said signals, and that the failure to observe or obey was, under all the facts and circumstances in evidence, gross negligence, and by reason thereof the plaintiff received the injury of which he complains, and that the plaintiff did not, by negligence upon his part, contribute to cause his injury, but for which he would not have been injured, the law is for the plaintiff, and they should so find.⁴²

(b) But if the plaintiff did not give the said signals, or if he did give them, and the engineer or fireman did not fail to observe or obey them, or if they did so fail, yet if the failure was not, under all the facts and circumstances admitted in evidence, gross negligence, the law is for the defendant, and they should so find.

(c) Or if the plaintiff, by negligence upon his part, contributed to cause his injury, and he would not have been injured but for his contributory negligence, if any there was, the law is for the defendant.⁴³

§ 1533. Neglect of Engineer to Obey Signal to Stop Train Run at Dangerous Rate of Speed. If you find from the evidence that the deceased, D, while in the employ of the defendant as a brakeman upon one of its trains, and while using ordinary care in discharging

41—Mo., K. & T. Ry. Co. v. Owens, — Tex. Civ. App. —, 75 S. W. 578 (581). 42—Southern Ry. v. Clifford, 23 Ky. L. 111, 62 S. W. 514.

43—Ibid.

the duty assigned to him, was, on or about the date alleged in plaintiff's petition, engaged with other servants of defendant in placing cars upon the defendant's coal chute at H S, and while so engaged the deceased was riding upon the farthest car from the engine; and if you believe from the evidence that the engineer or person in charge of defendant's engine ran said engine and cars upon said coal chute at an unusually rapid and dangerous rate of speed; or if you find that the deceased and others of defendant's employes, in time to have avoided the accident, gave a signal or signals to the engineer or person in charge of said engine to discontinue the unusually rapid and dangerous rate of speed (if you find that such speed was unusually rapid and dangerous), and to immediately stop said train, and that the signals so given (if given) were the usual and customary signals for that purpose in use by the defendant; and if you believe the defendant or person in charge of its engine was guilty of negligence, as that term is above defined, in regard either to the rate of speed at which the cars were run, the engineer's failure to obey signals (if he did fail), or the unfamiliarity of the engineer with said coal chutes (if you believe that he was unfamiliar) in the manner and form alleged by plaintiffs, and if, by reason of the negligence of the defendant or said engineer in any one or all of the respects above mentioned, you find that the car upon which deceased was riding was pushed against the bumping post, and broke said post down, and said car was thereby thrown off said coal chute, and deceased, D, thereby killed; and if you believe the negligence of the defendant or of said engineer, in the manner and form above submitted, caused the death of said deceased; and if you further find that the deceased was the son of plaintiffs, M and J; and if you believe that plaintiffs had a reasonable expectation, then and in the future, of receiving pecuniary benefits from said D, had he not been killed—then you will find for the plaintiffs, unless you find for the defendant under other issues submitted to you.⁴⁴

§ 1534. **Failure to Give Such a Warning of Approach of Engine as Could Be Heard by Person of Ordinary Hearing.** The jury are instructed that if the defendant undertook through its employes to

44—Mo., K. & T. Ry. Co. v. O'Connor, — Tex. Civ. App. —, 78 S. W. 374 (376).

"Thus it will be seen that the jury was distinctly told, in effect—negligence having been defined—that before they would be warranted in returning a verdict for the plaintiffs, they must believe from the evidence that the engineer in charge of defendant's engine failed to use ordinary care in respect to the rate of speed at which the cars were run, or that he failed to obey signals which involved the stopping of the train, and failed to use such care in

regard thereto. In no event, under the charge, was the jury authorized to find for plaintiffs unless they believed the death of appellee's son was the result of defendant's negligence. The charge is not subject to the objection that it made it the absolute duty of appellant's engineer to have discontinued the speed of the train, and to have stopped the same. It only imposed ordinary care to observe the signals and stop the train, and this, under the circumstances, was certainly as favorable as appellant had the right to ask."

give any warning of the approach of the engine and cars into the shed room, it was its duty to give such warning as might have been heard by a person of ordinary hearing, considering the distance between the person giving the warning and the plaintiff at the time; and although the jury may believe that the defendant upon the approach of the engine, gave warning thereof, yet if they believe that it was not such warning as could have been heard by a person of ordinary hearing, at the distance where plaintiff was working, then such warning does not avail defendant anything in this suit.⁴⁵

§ 1535. Telegraph Operator Injured While Delivering Order to Engineer of Train—Second Train Giving No Signals. If the jury believe from the evidence that the plaintiff, who was in the employ of the defendant as a telegraph operator at the U station, was directed by the train dispatcher of the defendant to leave his office and go out and deliver to the officers of train No. 244, going east, a clearance order, then you are charged that the defendant company owed the plaintiff the duty to exercise ordinary care to prevent injury to him while so engaged in the performance of such duty, if any; and if the jury further believe from the evidence that the plaintiff, in obedience to said order, if he was so ordered, without negligence on his part, left his office to hand to the engineer of the train No. 244 said clearance order, and that he, after having done so, as he was backing in the direction of the depot, train No. 243 came in from the east, without sounding the whistle or giving warning of its approach, and did strike and run over the plaintiff, and inflict on him the injuries which terminated in the loss of his leg; and the jury further find that the defendant was negligent in so operating its said train, and that said negligence, if you find it was negligence, was the proximate cause of the plaintiff's injuries, then you should find for the plaintiff.⁴⁶

§ 1536. Collision Through Failure of Engineer to Give Flag Signal. If the jury believe that, under the rules of the defendant, it was the duty of the engineer to give a flag signal by blowing five short blasts of the whistle when the train stopped, or as soon as he knew the train was going to stop; and if you further believe that he failed to give the flag signal at the time when, under the rules of the defendant, he was required to give it; and if you believe he was guilty of negligence in failing to give such signal, if he failed; * * * and if you believe the negligence, if any, of the engineer in failing to give the signal, if he failed, was the proximate cause of the collision, you should find for the plaintiff.⁴⁷

§ 1537. Injury Through Passenger Train Colliding With Loose Car. If you believe from the evidence that the plaintiff, I. O. L., was

45—Miss. C.-O. M. Co. v. Ellis, v. Jenkins, 29 Tex. Civ. App. 440, 72 Miss. 191, 17 So. 214 (215). 69 S. W. 233.

46—Galveston, H. & S. A. Ry. Co. 47—Mo., K. & T. Ry. Co. v. Bo-

in the defendant's employ as a fireman on one of its passenger trains, and that while he was so employed, he was injured by a collision between such passenger train and a loose car on the main line of defendant's railway, as alleged in plaintiff's petition; and if you further believe from the evidence that the said car escaped from a side track at M. City and run down upon the main line, and that the said car, while in the said side track, did not have the brakes set or the wheels blocked, and that this caused its escape from said side track; and if you further believe from the evidence that the defendant negligently permitted said car to be and remain upon said side track without having the brakes set or the wheels blocked, and that the failure to have the brakes set or the wheels blocked, if you believe there was such failure, was negligence on the part of the defendant, and that such negligence, if any, was the proximate cause of the collision and the plaintiff's injuries, then you will find your verdict for the plaintiff.⁴⁸

§ 1538. Injury to Plaintiff While Coupling Cars by Throwing Wrong Switch. The jury are instructed that if they believe and find from the evidence that on ———, the plaintiff was attempting to couple a certain stationary freight car to a certain moving car backing toward the same, for the defendant railroad company, and his right hand and wrist were caught between the corners of said cars and injured, and that the said injury was caused by the negligence and carelessness of the switch tender in throwing the switch for track No. 17 instead of No. 18, thus causing the corners of the car at which plaintiff was standing, to collide and come together with force and violence, and that the plaintiff, at the time, was in the exercise of ordinary care himself, then your verdict must be for the plaintiff.⁴⁹

§ 1539. Duty to Set Brakes While Couplings Are Being Adjusted. If the jury believe from the evidence that plaintiff, while in the employment of defendant, in the exercise of his duties under such employment, was engaged in inspecting a train of defendant at T., Texas, on the ——— day of ———, ———, and securing and adjusting the couplings and coupling attachments thereof, and if you believe that the defendant, in the exercise of ordinary care for the safety of plaintiff and its other employes engaged in work of the same nature,

die, 32 Tex. Civ. App. 168, 74 S. W. 100 (101).

48—G., H. & S. A. Ry. Co. v. Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389 (390).

49—Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410 (417).

"The defendant urges that this instruction was erroneous in that it assumes that throwing the switch for track 17 was a negligent and careless act. We do not think the instruction is obnoxious

to this criticism. We think it plainly required the jury to find that the injury was caused by the negligence and carelessness of the switch tender. An instruction in all respects similar to this was sustained in *Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932. See also, *Geary v. Ry. Co.*, 138 Mo. 251, 39 S. W. 774, 60 Am. St. 555; *State v. Grayor*, 89 Mo. 605, 1 S. W. 365; *O'Connell v. Ry. Co.*, 106 Mo. 482, 17 S. W. 494."

should have set or caused to be set the brakes on each and every car thereof before attaching any other car thereto while making up said train, and that defendant failed to set said brakes or have the same set in this manner, and by reason of such failure plaintiff was injured, and if you further believe from the evidence that it was usual and customary to set said brakes in making up defendant's passenger trains at said time and place, and you further believe defendant was guilty of negligence in not setting said brakes, as negligence is hereinbefore explained to you, and you further believe from the evidence that plaintiff was exercising such care for his own safety as a man of ordinary prudence would have exercised under like circumstances, then in either of these events you will find for the plaintiff, unless you should find for the defendant under succeeding instructions.⁵⁰

§ 1540. Using Hand-car Without a Brake. If you should believe from the evidence that the plaintiff's superior officer directed him to use the hand-car without a brake, then you are further instructed that, unless the danger of using said hand-car in that condition was so apparent that an ordinarily prudent man would not have used the same under the same or similar circumstances, the plaintiff would not be guilty of contributory negligence in that respect.⁵¹

§ 1541. Sending Hand-cars at Great Speed Immediately After One Another. (a) If the jury believe from the evidence that B. S. was section boss and J. J. was one of the hands in the employ of B. S., and that said B. S. had control of the running of the two hand-cars spoken of by the witnesses, and that while crossing the bridge over the C. river, in accordance with his orders at a great rate of speed, and that said hand-cars were running about 15 or 20 feet apart, and that, just after the two cars had crossed the iron part of the bridge, he gave the signal to the hands on the front cars to check up, without first giving warning to those on the rear car; and if they further believe from the evidence that, at the time said B. S. gave a signal to those on the front car, W. put his foot on the brake and checked it up; and if they further believe from the evidence that the checking up of the front car caused G. to put his foot on the brake of the second car, and that the handle of the lever was jerked out of J.

50—St. L. S. W. Ry. Co. of Tex. as v. Rea, — Tex. Civ. App. —, 84 S. W. 428 (430); Mo., K. & T. Ry. Co. v. Avery, — Tex. Civ. App. —, 64 S. W. 935 (936).

51—Texas & N. O. R. Co. v. Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073 (1076).

"The rule stated in a note in 43 L. R. A. 755 commends itself as correct. It is thus stated: 'But by almost all courts it is held that the fact of the servant's having been directly ordered to do the

act which caused the injury introduces into the situation a differentiating circumstance which will render his contributory negligence a question for the jury in nearly every conceivable state of the evidence. It does not follow that because the servant could justify a disobedience of the order he is guilty of negligence in obeying it.' The question therefore seems to have been properly submitted to the jury."

J.'s hands by the putting on of the brake by G., and that said rear car ran into the front car and threw J. J. to the ground and killed him, then the jury must find for the plaintiff.

(b) If the jury believe from the evidence that at the time J. J. was killed, he was in the employ of the A. M. R. Company, and that B. S. was the foreman or section boss, and that the deceased was on a hand-car at the time of the accident; and if they further believe that said hand-cars were operated under the direction of said B. S., and that B. S. told the deceased and the other hands to go over the C. river as fast as they could, and that in compliance with said orders the hands started across the bridge at a great rate of speed, and that they were running about 15 or 20 feet apart, and that just after they passed the iron part of the bridge, the said B. S. waved his hand to those on the front car to slow up, and that J. W. at once placed his foot on the brake of the front car, and checked it up; and if they further believe that L. B. as soon as J. W. put his foot on the brake waved to the hindmost car to check up, and that G. at once placed his foot on the brake; and if they further believe that the placing of G.'s foot on the brake suddenly checked the speed of the car, jerked the handle of the lever out of J. J.'s hands; and if they further believe that before he could recover and get hold of the handle the hindmost car ran into the front car and threw J. J. off, and he was killed, then the plaintiff is entitled to damages.⁵²

§ 1542. Kicking Car Upon Track at a High and Dangerous Rate of Speed. If you find from the evidence that on or about the ——— day of ———, ———, the plaintiff, while in the employ of the defendant company, was engaged in the performance of his duty in the work of watering a train of passenger coaches, and that, while he was stooping over a water hydrant in the performance of his duty, he was struck by a moving coal car on the track of defendant known as Davis No. 2, and that he was thereby injured as alleged in his petition, and you further find that said car was kicked and propelled upon said track at a high and dangerous rate of speed under the circumstances, and that there was no warning nor notice given to plaintiff of the approach of said car, and that, in so kicking and propelling said car at said time and place, if you find it was so kicked and propelled, defendant company was guilty of negligence, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any; and if you further find that plaintiff was not guilty of any negligence which either caused or contributed to his injury, if any, and that plaintiff's injuries, if any, did not result from the risks ordinarily incident to his employment, then you will find for plaintiff.⁵³

⁵²—Jones v. Ala. M. R. Co., 107 Ala. 400, 18 So. 30 (32).

⁵³—Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 396 (1897).

§ 1543. Injury to Person Repairing Track By Cars Being Kicked Back Without Warning. If you find from the evidence that plaintiff was in the employ of defendant at the time of the injury complained of, and was employed in repairing defendant's track at the point where the accident occurred; that while so employed his attention was necessarily engaged by reason of the nature of the duties he was then engaged in; that while so engaged in performing such duties a train was approaching him on said track, and that it was near to him when discovered for the first time by him; that in the emergency and hurry to get out of the way of such train so approaching, plaintiff stepped back from said track, and near to the track lying next thereto, and running parallel therewith across the street crossing at C avenue; that while so standing cars had been cut loose from an engine on defendant's track, and were being kicked back with such force that they were running on said parallel track at a rate of speed exceeding six miles per hour; that no one was stationed on or near the end of said cars nearest to and approaching plaintiff, in order to check speed and warn persons on said track of their approach; that plaintiff did not, in the exercise of ordinary care and diligence, discover the approach of said cars in time to avoid injury to himself; that plaintiff was not guilty of any negligence which directly contributed to his injury, then plaintiff will be entitled to recover, and you should find for plaintiff. If you fail to so find, then plaintiff will not be entitled to recover, and you should find for defendant.⁵⁴

§ 1544. Engine Leaving Track Through Brakeman Locking Switch to Wrong Track. If you believe from the evidence that a brakeman of the defendant was under a duty to set the north switch, as it was called in the evidence, so as to make the main track secure for the passage of the engine that Mr. B. was driving, and he failed to use ordinary care in discharging his duty, and so did not set the switch and lock it to the main track, but set it and locked it to the side track, so as to cause the engine to leave the rail at that point, you ought to find that the defendant was negligent in that regard.⁵⁵

⁵⁴—*Tobey v. B., C. R. & N. Ry. Co.*, 94 Iowa 256, 62 N. W. 761 (763), 33 L. R. A. 496.

"Generally, the question of negligence is for the jury, but this is not always so. The rule is, if, from the undisputed facts, but one conclusion can reasonably be drawn, then the question is one of law; but if, under the facts, different minds might reasonably reach a different conclusion, it is a question of fact for the jury. *Milne v. Walker*, 59 Iowa 186, 13 N. W. 101; *Whitsett v. Ry. Co.*, 67

Iowa 150, 25 N. W. 104; *Mathews v. Cedar Rapids*, 80 Iowa 463, 45 N. W. 894; *Schmidt v. Ry. Co.*, 75 Iowa 609, 39 N. W. 916. It must be remembered that in this case no evidence was offered by the defendant; that there is no dispute as to the facts of the case, nor, as it seems to us, any room for controversy as to the conclusions which must be drawn from them. We think the instruction was correct."

⁵⁵—*Western & A. R. Co. v. Bussey*, 95 Ga. 534, 23 S. E. 207 (211),

§ 1545. **Injury to Servant While Removing Tie From Gravel Deck—Orders of Vice Principal.** If from a preponderance of the evidence you believe that W. was intrusted by the defendant with the power to superintend, direct, control, and manage plaintiff while in the performance of his work, and that in virtue of such power the said W ordered and directed the plaintiff, while the plaintiff was engaged in removing a tie from a gravel deck to get down into a trench and to lift the tie off the guard rail, and that such order of direction, if such there was, was given in such a way and under such circumstances as to reasonably justify plaintiff in believing, and that he did believe, that said W, by the exercise of ordinary care, could and would hold the other end of the tie under the rail of the track, so that it would not slide out or turn over and injure him, and if you further believe that said W, by the exercise of ordinary care, could have held the other end of said tie under the rail of the track, so that it would not slide out or turn over and injure plaintiff, and that, acting in obedience to such direction and belief, that the plaintiff took a position astride of said tie and began lifting the same as directed by said W, and that, while doing so, the said W failed to hold the other end of said tie to prevent the tie from sliding out from under the rail, and that it was negligence on the part of said W to fail to hold the end of said tie, and that such negligence, if any, directly caused plaintiff's injuries, if any, and that the plaintiff has been thereby damaged, you will return a verdict for the plaintiff, unless you further find that plaintiff was guilty of contributory negligence, or that he assumed the risk, or that plaintiff and said W were fellow servants.⁵⁶

56—Reeves v. Ry. Co., — Tex. —, 98 S. W. 929.

"The charge is attacked (1) because, if W. was a vice-principal, and if plaintiff was injured in obeying his order, with the assurance that W. would assist and protect him, he was not chargeable with contributory negligence or assumption of risk as a matter of law, and the reference to the issues of contributory negligence and assumed risk was unauthorized, and was calculated to confuse and mislead the jury; and (2) because the charge was contradictory in this: That, after instructing the jury to find for plaintiff on the theory of vice-principal, it told them not to do so if they found them to be fellow servants. This latter criticism is not sound. No jury of common intelligence would be supposed, after finding in favor of plaintiff on the fellow servant issue, to find to the contrary on the same issue. In other

words, if, under the first portion of the paragraph, they concluded from the evidence that W. had superintendence, direction, and control of plaintiff, they could not have been confused nor misled by the reference to the same issue in the concluding part of the paragraph, particularly when the court, in the course of its charges, defined a fellow servant to be one who did not have superintendence, control, and direction of the plaintiff. The first objection proceeds upon the idea that, if the act is done in obedience to the master's direction, it eliminates entirely the defense of contributory negligence or assumed risk. This is not true in all cases. *Jones v. G., H. & S. A. Ry. Co.*, 11 Tex. Civ. App. 39, 31 S. W. 706; *Ry. Co. v. Sanchez*, — Tex. Civ. App. —, 65 S. W. 894; *Haywood v. Ry. Co.*, — Tex. Civ. App. —, 85 S. W. 434. The facts of this case demonstrate the inapplicability of such rule. Plaintiff testi-

§ 1546. **Laborers Working on or About Gravel Cars—Duty to Avoid Injury to.** It was the duty, under the law, of those in charge of the engine, in carrying it and pushing the cars down B street to connect with the gravel cars, to use that degree of care, and to take that measure of precaution, by looking out or giving signals, or otherwise, to avoid injury to the laborers on or about the gravel cars, that ordinarily prudent persons in like position as they occupied, and having like knowledge of the usual or existing conditions that they had, would have used, the measure and extent of their duty being in proportion to what they knew, or by the exercise of ordinary care could have known; and, if they failed to use such degree of care, such failure was negligence, in law.⁵⁷

§ 1547. **Duty of Section Foreman Toward Servant While Unloading Push Car.** It was the duty of the foreman to exercise ordinary care for the safety of the plaintiff while working under him in unloading the push car; and if you find from the evidence that the section foreman knew the danger to the plaintiff by reason of the near approach of the train, and that he failed to notify him of such danger, and that such action on his part was negligence, as hereinbefore defined, then the defendant would be liable, if such negligence caused the injury complained of, unless you further find that the plaintiff knew himself of such danger, or by the use of ordinary care could have known.⁵⁸

RULES AND REGULATIONS.

§ 1548. **Duty to Make Proper Rules for Safety of Servant.** (a) That it is the duty of a railway company to make all reasonable and proper regulations for the safety of its employes. And this being an affirmative fact, it devolves upon the company to show an observance of the duty when sued by a servant for an injury received when in its service, and negligence is shown.⁵⁹

fied that W. did not order him to get astride the tie, but ordered him to get into the trench and lift it. He testified, further, that he could not lift it without straddling it; there being hardly room in the trench for him to stand in it. As we shall show in another connection, the jury could have found from the testimony (and from his own testimony) that it was not necessary to straddle the tie in order to execute the order, as there was clearly room for such defense as contributory negligence or assumed risk."

57—Texas & N. O. R. Co. v. McDonald, — Tex. Civ. App. —, 85 S. W. 493 (495).

58—Int'l & G. N. R. Co. v. Tisdale, — Tex. Civ. App. —, 87 S. W. 1063 (1065).

"In our opinion, the above instruction is a proper and correct statement of the duty, under the law, of a section foreman under the circumstances alleged and proven in this case; and, if appellant desired a specific definition of 'ordinary care' given to the jury it should have requested same. Texas & P. Ry. Co. v. Lewis, — Tex. Civ. App. —, 26 S. W. 873; Stephens v. H. & St. J. Ry. Co., 96 Mo. 207, 9 S. W. 591; Ry. Co. v. Carter, — Tex. Civ. App. —, 73 S. W. 50."

59—Shearm. & Red. on Neg. § 93.

(b) The court instructs the jury that the defendant railroad company had the right to establish and enforce reasonable rules and regulations for the government of its employes in the management and operation of its trains.⁶⁰

§ 1549. **Railroad Not Liable For Injury Through Disregard of Its Plain Instructions.** (a) A railroad company is not liable for an injury which happens to an employe in consequence of a disregard of its plain instructions, if known to the person injured, although other employes also disregard the same instructions.

(b) If the jury believe, from the evidence, that the defendant, before the injury in question, had adopted a rule for the conduct of its employes requiring them, etc., and that the plaintiff had knowledge of such rule, but neglected to avail himself of its provisions, and in consequence of such neglect sustained the injury complained of, then he cannot hold the defendant liable therefor.

(c) The defendant had the right to make such rules and regulations for the conduct of its servants and agents, while engaged in its service, as in its judgment was reasonable and proper, or would conduce to the safety and comfort of its employes; and all servants, while engaged in such service, with a knowledge of such rules and regulations, are bound to act in conformity therewith; and if injuries are sustained by them, while acting in violation thereof, no recovery can be had of the defendant therefor if such violation was the cause of, or materially contributed to, such injury. Whether, before the injury complained of, the defendant in this case had adopted a rule requiring, etc., and whether the plaintiff had knowledge of such rule, and whether he was violating such rule when he was injured, and whether, if he was so violating it, such violation contributed to the injury, are questions of fact, to be determined by the jury from the evidence.⁶¹

§ 1550. **Disobeying Rules as to Coupling Cars.** The railroad company's rules provide that, before exposing himself to danger, it was the duty of the plaintiff to examine the condition of all machinery, tools, cars, engine or track that he was required to use in the performance of his duties, and to satisfy himself, so far as he reasonably could, that they were in safe working order, and that it was the plaintiff's right and duty to take sufficient time to make such examination, and to refuse to obey any order which would expose him to danger; that the rules provide that entering between cars and engines in motion to couple or uncouple them should never be done, except under favorable conditions, such as low rate of speed, absence of frogs, switches, guard rails, etc., and where good footing could be obtained, and then only when necessary. If the evidence shows that

60—De Witt's Adm'r v. Louisville & N. R. Co., 29 Ky. L. 1161, 96 S. W. 1123. 61—Wolsey v. Railroad Co., 33 Ohio St. 227.

the plaintiff did not obey this rule, then the verdict should be for the defendant.⁶²

§ 1551. Rule Against Coupling Cars in Motion May be Waived.

(a) I charge you that a rule forbidding railway employes going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself, is a reasonable requirement, but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done, and in the performance of which said rule is violated.

(b) I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine or in motion has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling.

(c) If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links except with a stick, was adopted by defendant railway company when a method of coupling cars prevailed by the use of a pin and link, and if the jury find that the said method of coupling cars has been superseded by a method whereby no pins need be set, or pins and links need be used, then it is for the jury to say whether or not said rule was at the time of the injury complained of in force, and whether or not plaintiff was then bound by the same.⁶³

§ 1552. Authority to Remove Ashes and Fire no Authority to Move Engines. The fact that A. B. was employed by the defendant to remove ashes and fire from its engines does not tend to prove that he was employed to move engines, or that he had any implied or apparent authority to move them.⁶⁴

§ 1553. Failure of Engineer to Report Defects at End of Run as Required by Company. You are further charged that, if you find from the testimony that it was the duty of the plaintiff, under the rules and customs governing plaintiff in the discharge of his duty as an engineer in defendant's service, to look over and inspect his engine and make report at the end of the run, in writing, of all defects in and about the engine, and you further find that plaintiff failed to perform said duty, if any, and that had he performed such duty he would have discovered the defect, if any, in the fastening of said step, and you further find in failing to

⁶²—Jarvis v. Flint & P. M. R. Co., 105 Iowa 46, 74 N. W. 751 Co., 128 Mich. 61, 87 N. W. 136 (753).
(139).

⁶³—Carson v. So. Ry. Co., 68 S. C. 55, 46 S. E. 524 (535).
C. 55, 46 S. E. 524 (535).
“We think that this or something of a similar character should have been given.”

⁶⁴—Morbey v. C. & N. W. Ry.

discover said defect, if any, in the fastening of said step, should you find that he did fail to discover it, plaintiff was guilty of negligence, and such negligence if any, either proximately caused or contributed to his injury, if any, then plaintiff cannot recover, and you will so find.⁶⁵

FELLOW SERVANTS.

§ 1554. **Fellow Servants Defined.** (a) That when the employment of a person working for a railroad company is in a different department of labor from other servants, and when he is not associated with such other servants in the performance of their respective duties, but is wholly separated and disconnected from them, in the performance of his duties, then the railroad company is liable for the negligence of such other servant, if proven, and if it results in injury to the person so employed, without his fault.⁶⁶

(b) The court instructs the jury that to constitute defendant's servants, who were switching the caboose in question, fellow servants of B, deceased, so as to exempt the defendant from liability on account of the death of deceased from the negligent acts of defendant's said servants (provided you believe from the evidence deceased's death was caused by the negligent acts of said servants), said servants and deceased should be actually co-operating, just before, and at the time of, the collision which caused deceased's death, in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety.⁶⁷

(c) The law is that an employer is not liable to an employe for injuries received by such employe by reason of the negligent act or default of a fellow servant.

(d) And two employes of a common employer are fellow servants to each other when they are engaged in a common duty in the same line of employment, or when their relations to each other are such as to enable them to have an oversight over each other promotive of due care and caution.⁶⁸

(e) And in this case, if you believe, from the evidence, that there was a common duty imposed by the defendant upon both the engineer and fireman on arriving at the end of their run, or before starting out again, or both, to inspect and report defects, then even if you

65—Galveston, H. & S. A. Ry. Co. v. Cherry, — Tex. Civ. App. —, 98 S. W. 898.

66—Schroeder v. Rd. Co., 47 Iowa 375; Lombard v. Rd. Co., 47 Iowa 494.

67—Pittsburg, C. C. & St. L. Ry. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128.

"This instruction is in accordance with the language used by this court in C. & A. R. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023, 28 L. R. A. 568, and North C. Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186."

68—See note 69.

believe, from the evidence, the engineers, or either of them, was or were negligent either in making the inspections or inspection, or in reporting any defect or defects as ascertained by such inspection or inspections, yet if you believe, from the evidence, they were fellow servants of plaintiff, such negligence, if any, was that of a fellow servant or fellow servants of the plaintiff, for which the defendant is not liable.⁶⁹

§ 1555. **Negligence of the Company in Employing Servant.** The jury are instructed, as a matter of law, that if a servant of a railroad company, while himself using reasonable care and caution, to avoid injury, be injured through the incompetency and unskillfulness of a fellow servant, or in consequence of defects in the machinery or track, and the jury believe, from the evidence, that the company was guilty of a want of ordinary care and attention in the employment, or in the retention of such fellow servant, or in the construction or repair of its machinery or track, the company will be liable in damages, which result from such negligence, if any such damage is proved.⁷⁰

§ 1556. **Fellow Servants of Brakeman.** (a) If the jury believe, from the evidence, that at the time of the accident complained of, the plaintiff was in the employ of the defendant, as brakeman on one of its freight trains, and that while so employed, and in the line of his duty, he received an injury, resulting from a defective brake on one of defendant's cars, and that there were other persons in the employ of the company, whose duty it was to examine the cars and see that the brakes were in good repair and safe condition, then the court instructs the jury, as a matter of law, that the plaintiff and such other persons were not fellow servants engaged in the same grade or line of service, within the meaning of the law.⁷¹

(b) If the jury believe, from the evidence, that, at the time of the accident in question, the plaintiff was in the employ of the defendant company as a brakeman on one of its trains, and that while so employed he received an injury which was occasioned by the ties on the track, at the point where the accident occurred, being rotten and unfit for use, and that the failure to replace such ties with sound ones resulted from the negligence of the road master and section men having charge of that part of the road, and that the

69—C. & A. R. R. Co. v. Merriam, 95 Ill. App. 628 (632).

"In the above case, there was some evidence tending to show that, in addition to the legal duty imposed upon the engineer and fireman to report defects in the engine discovered by them in their ordinary duties, they had assumed the further duty of examining for such defects as might appear by such inspection as they were competent to make, and in view of this

phase of the case, we are of the opinion the court erred in refusing to give to the jury the above instruction requested by appellant."

70—Haurathy v. N. C. Rd. Co., 46 Mo. 280; Harkins v. Standard, etc., 122 Mass. 400; Hunting, etc., Rd. Co. v. Decker, 84 Penn. St. 419.

71—Long v. P. Rd. Co., 65 Mo. 225; Nashville Rd. Co. v. Jones, 9 Heisk. 27.

plaintiff was himself guilty of no negligence contributing to the injury, then the plaintiff has a right to recover.⁷²

§ 1557. **Fellow Servants of Fireman.** If the jury believe, from the evidence, that at the time of the accident in question, the plaintiff was in the employ of the defendant as fireman on one of its locomotives, and that while so employed, and in the line of his duty, he received an injury, resulting from the negligence or want of ordinary care and skill of the engineer in charge of the same locomotive, then the court instructs the jury, as a matter of law, that the plaintiff and engineer were fellow servants, engaged in the same grade or line of service, within the meaning of the law, and the defendant, if otherwise without fault, would not be liable for such injury.⁷³

§ 1558. **Fellow Servants of Mechanic on Railroad.** If the jury believe, from the evidence, that at the time of the accident in question the plaintiff was in the employ of the defendant corporation as a mechanic engaged in the repairs of its cars, and that, while so employed and in the line of his duty, he received an injury, resulting from the negligence or want of ordinary care and skill of an engineer, in charge of a locomotive engaged in switching cars, then the court instructs the jury, as a matter of law, that the said plaintiff and the said engineer were not fellow servants engaged in the same grade or line of service, and the plaintiff is entitled to recover in this suit, provided the jury further believe, from the evidence, that the plaintiff, at the time of the injury, was exercising reasonable care and caution to avoid such injury.⁷⁴

§ 1559. **Section Boss as Vice-Principal.** (a) The court instructs the jury that if you believe from the evidence that the plaintiff was a section hand, and M. was a track foreman or section boss in the employment of defendant company, and was a vice principal of the plaintiff, and the duties of the plaintiff and M. are as set out in the printed rules introduced in evidence, and that M. ordered his hand car put on the track by plaintiff and others, and ordered plaintiff and others to go on said car towards Old Fort—said M. knowing there was a past-due train liable to come along the track, meeting them—and the said M., without informing plaintiff of the danger, met the train at a point where it could not be seen by those on the hand car until it was within 510 feet of them, and would reach the point where the hand car was in from nine to ten seconds, and said M. had not sent out a flagman or taken other precaution to protect the plaintiff, this would be negligence on the part of defendant, and the plaintiff would not be guilty of negligence in riding on said hand car.

72—Houston, etc., Rd. Co. v. Ragsdale v. Memphis, etc., Rd. Dunham, 49 Tex. 181. Co., 59 Tenn. 426.

73—Valtez v. O. & M. Rd. Co., 85 Ill. 500; Lehigh Valley Co. v. Jones, 89 Penn. St. 432; Besel v. N. Y. etc., Rd. Co., 70 N. Y. 171; 74—Pittsburg, etc., Rd. Co. v. Powers, 74 Ill. 341; contra, Sullivan v. Toledo, etc., Rd. Co., 58 Ind. 26.

(b) It was his duty to listen and look, and, in case danger was reasonably to be apprehended from a belated train or otherwise, to send a flagman in front of the hand car to notify the engineer on the train, so that the train might be stopped or slowed up, or by bell or whistle give notice of its approach, in order that the hand-car crew might save themselves from danger. If you find that there was negligence on the part of the track foreman in his duties, as just defined to you, and find that he was the defendant's agent, as I have described the agency to you, and plaintiff's superior, and further find that the injury occurred, if it did occur, in the performance of the duties conferred on the agent, and that M. negligently ordered plaintiff to go on the track to remove the car, and that the injury was the result of the negligence of M., then you will answer the first issue "Yes."⁷⁵

§ 1560. Injuries while Operating Hand Car with Fellow Servants. If the jury find from the evidence in this case that the injury to the plaintiff at the time and place in question was caused solely by any want of care on the part of the plaintiff in connection with the other servants of the defendant then and there engaged with plaintiff in operating the hand car on the railroad of defendant, and that the injuries here sued for were the result of such want of care on the part of the plaintiff and of his fellow servants, at said time and place, then they are instructed that the plaintiff cannot recover in this action, and your verdict must be for the defendant.⁷⁶

75—Allison v. So. Ry. Co., 129 N. C. 336, 40 S. E. 91.

"There was evidence on the part of the plaintiff going to show that the plaintiff and others were at the time of the plaintiff's injury under the control and management of a man by the name of M., and that he was the section master or track foreman of the defendant company, and that he hired and discharged hands without consultation or advice from anybody; that a day's labor on the part of M.'s employes began in the morning when they put the car on the track, and ended after the car was put in the tool house; that when the day's work was over, and M. and the hands upon the hand car were returning to their homes, they met suddenly a freight train that was known to be late by both M. and the plaintiff, and at a distance of about 100 yards off before it was seen,—the view of the approaching train being obstructed by a curve in the shape of an S; that no signals or precaution had been taken by M. to discover the approach of the belated train, as was required by the rules of the company. The rules and regulations of the com-

pany in respect to track foremen were introduced, and from them it appeared that the track foreman had charge of the track, laborers and road watchmen employed upon that section; that a constant lookout should be kept for trains; and that, when there was not a clear view of the track far enough to ensure absolute safety, flagmen must be sent out with danger signals to protect them. There was also evidence on the part of the plaintiff tending to show that the whole party jumped from the hand car when they saw the rapidly approaching train about a hundred yards off, and were in places of safety, but at the sudden and peremptory command of M. the plaintiff attempted to go back and lift the hand car from the track, and in so doing was struck by the engine and badly hurt. Upon that testimony, we can see no error in the instructions of his honor which have been complained of. The defendant's agent was negligent, whether he informed the plaintiff, or did not inform him, of the danger of a collision."

76—Rice v. W. Ry. Co., 101 Mo. App. 459, 74 S. W. 428 (429).

ASSUMPTION OF RISK.

§ 1561. **Employee Assumes all Ordinary Risks.** The jury are instructed, that where a person enters into the service of a railroad company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness, and that of his fellow servants, who are engaged in the same line of duty, provided the company has taken reasonable care and precaution to engage competent servants to discharge the duties assigned to them.⁷⁷

§ 1562. **What is a "Risk Ordinarily Incident to His Employment?"**

(a) You are instructed that the plaintiff while in the employ of the defendant assumed as a matter of law all of the risks of injury that were ordinarily incident to the employment in which he was engaged; and if you believe from the evidence that his injuries, if any he received, grew out of a risk that was ordinarily incident to his employment, then your verdict should be for the defendant. But you are further instructed in this connection that by the use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of an act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on the part of a railroad company or its employes, this is not a risk ordinarily incident to the employment.⁷⁸

(b) One who enters the service of a railroad company assumes the risks ordinarily incident to the work, but he does not assume any risk arising by reason of the company's negligence, unless he knows it.⁷⁹

"The court modified the instruction by omitting the words 'or of both' as drafted by defendant, and substituting 'and' in lieu of the disjunctive 'or;' thus declining to instruct that defendant was entitled to the verdict if the injuries suffered were the result of such want of care on the part of plaintiff or his fellow servants, or of both, and properly instructing them that such injuries, to preclude recovery, must have been the result of such want of care on the part of the plaintiff and of his fellow servants, as in the original form the defendant would have been relieved of liability for negligence of its own servants not participated in by plaintiff."

77—T., W. & W. Rd. Co. v. Durkin, 78 Ill. 395.

78—Texas & N. O. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79 (80).

"It correctly defines 'risks incident to the employment' assumed by one entering the service of a railroad company, and in doing so correctly informed the jury that a risk arising from the negligence of the master or his servants is 'not ordinarily incident to the employment;' but it is not said that such risk when known to the employe is not assumed as counsel for plaintiff in error seem to think. In another paragraph of the charge, the court instructed the jury at the request of the railroad company, that 'the employe is deemed in law to have assumed . . . such risks as he knows of, or would, in the exercise of ordinary care in the discharge of his own duties have known of.' The subject was well covered in the charge given."

79—San A. & A. P. Ry. Co. v.

§ 1563. **Servant Must Report Defects to Master.** (a) It is the duty of the servants of the company to use all reasonable care and diligence to see that the machinery used by them in the performance of their duties, is in fit condition for use, and report the defects, if any, to the company, and if they do not do so, it will be negligence on their part.⁸⁰

(b) The jury are instructed that although machinery furnished by a railroad company, for the use of its employes, may be unsafe, yet if an employe, knowing the character of the machinery, continues to use it, he is bound to exercise care and caution, reasonably commensurate with the apparent danger, and if he fails to do so, and is injured, his negligence will preclude a recovery against the company, on account of such injury.⁸¹

§ 1564. **Servant Having Knowledge of Defects.** (a) The jury are further instructed, as a matter of law, that an employe of a railroad company cannot recover from the company for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, or from the dangerous condition of the track, after he has knowledge of such defect or dangerous condition, and continues his work without objection.⁸²

(b) The jury are instructed, as a matter of law, that it is the duty of one in the employ of a railroad company, to see that the machinery which he uses is in repair, so far as this can be done by the exercise of such care and prudence as would be exercised by a prudent and careful man engaged in the same business; and when such machinery is found to be out of repair, to report the fact to the company; and if he does not do so, it is negligence on his part, and the company will not be liable for any injury sustained by him, occasioned by such machinery being out of repair.⁸³

(c) The jury are instructed, that if a servant discovers that machinery, used in the line of his employment, is out of order, and dangerous to himself, and he does not stop using the same, and give notice thereof to his employer or his agents, and wait until it is put in proper condition, but continues to use it, and is injured by

Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561 (562).

"This is substantially the rule announced in *M., K. & T. Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508, in this language: 'He (the servant) does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his duty must necessarily have acquired that knowledge.' Knowledge, therefore, of the master's negligence, and of the danger arising therefrom, is the foundation of assumed risk;

and the paragraph stated the rule generally, but not incorrectly."

80—*C. & N. W. Rd. Co. v. Jackson*, 55 Ill. 492; *Lumley v. Caswell*, 47 Iowa 159.

81—*Toledo, W. & W. Rd. Co. v. Ashbury*, 84 Ill. 429.

82—*C. & A. Rd. Co. v. Munroe*, 85 Ill. 25; *Fort Wayne, etc., Rd. Co. v. Gildersleeve*, 33 Mich. 133; *Johnson v. Western, etc., Rd. Co.*, 55 Ga. 133; *Way v. Ill. Cent. Rd. Co.*, 40 Iowa 341; *Swoboda v. Ward*, 40 Mich. 420.

83—*Toledo, W. & W. Rd. Co. v. Eddy*, 72 Ill. 138; *Cent. Rd. Co. v. Kenney*, 58 Ga. 485.

reason of its being in such unsafe condition, then the employer will not be liable for the injury, if he is otherwise without fault.⁸⁴

§ 1565. **Locomotive Engineer Assumes All Risks Incident to Prosecution of Employment in Usual and Ordinary Way.** (a) When plaintiff entered the service of defendant as a locomotive engineer, he assumed all the risks which are incident to the prosecution of that employment in the usual and ordinary way, and under the circumstances usually surrounding the running of a locomotive engine in the operation of a railway; and he cannot recover for any injury which may have come to him in the usual and ordinary prosecution of that business. But the plaintiff, when he entered such employment, had a right to assume that defendant would use all reasonable care in the keeping of its road and appliances in good order and repair; and if any injury came to him by reason of any negligence of the defendant or its employes, other than his own negligence, this would not be a risk which he assumed as one incident to his employment.⁸⁵

§ 1566. **Risks Assumed by Locomotive Engineer.** One who enters the employment of a railway company as a locomotive engineer assumes all the risks that are ordinarily incident to the business, but he may presume that the company will furnish him with a reasonably safe track over which to operate its locomotives and trains, and he does not assume any risks that may be brought about by reason of the company's negligence, unless he knew of such.⁸⁶

§ 1567. **Assuming Risk of Working with Engineer on First Trip.** If you believe from the evidence that the engineer, S., was on his first run on the route when the accident occurred, and was unacquainted

84—Richardson v. Cooper, 88 Ill. 270.

85—Knapp v. Sioux C. & P. Ry. Co., 71 Iowa 41, 32 N. W. 18 (21).

"This instruction is correct."

86—Texas & P. Ry. Co. v. McClane, 24 Tex. Civ. App. 321, 62 S. W. 565.

"It was the duty of appellant to use ordinary care in keeping its roadbed in a reasonably safe condition, and the trainmen were authorized to assume that appellant had exercised such care and diligence, and that the track was in a reasonably safe condition. Taylor B. & H. R. Ry. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918. . . . Deceased was authorized to assume that the track was in a reasonably safe condition, and he could not be held to have assumed the risks arising from the condition of the track unless he was chargeable with knowledge of such condition. Gal., H. & S. A. Ry. Co. v. Slinkard, 17 Tex. Civ. App. 585, 44-S. W. 35; Bookrum v.

Ry. Co., — Tex. Civ. App. —, 57 S. W. 919; Bonnet v. Gal., H. & S. A. Ry. Co., 89 Tex. 72, 33 S. W. 334; Texas & N. O. R. R. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971; Mo., K. & T. Ry. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508. In the last-named case it is said: 'We understand the law to be that when the servant enters the employment of the master he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his duties, must necessarily have acquired the knowledge.'"

with the same, and that in consequence of his lack of acquaintance with the road the plaintiff was injured, but if you further believe that when plaintiff commenced the run or trip he knew that the engineer was on his first run and was unacquainted with the road, then the plaintiff assumed the risks and dangers attending his working with said engineer with the knowledge that he was on his first run and unacquainted with the road, and you should find for the defendant.⁸⁷

§ 1568. Knowledge of Fireman that Engine was Without Brake Shoes. The court instructs the jury that a man cannot shut his eyes and say he does not want to see anything which a reasonable man could not help but see if he keeps his eyes open. Now, if for that reason—that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that plaintiff did for six hours, from H to B, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours (without hunting for it), then the court will tell you that he had knowledge of, and ought to have known it, and he is chargeable with it as if he had known it.⁸⁸

§ 1569. Assumption of Risk by Fireman as to Brakes on Wheels. You will go inside and try to put yourselves only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman—that is, whether he could easily see them by just keeping his eyes open.⁸⁹

§ 1570. Assumption of Risk by Switchman. (a) It is the duty of the railway company to use ordinary care in the operation of its trains and cars, so that its employes shall be reasonably safe in the discharge of their duties.

(b) If you believe from the evidence that under defendant's method of conducting the switching it was the duty of switchmen to watch out for the cuts, and determine the number of cars in them, then you are instructed that the plaintiff assumed the risk in doing switching in this way, and it was the duty of himself to look out for the cuts, and determine the number of cars in them; and, if he was injured by a risk thus assumed, you will return a verdict for defendant.

(c) The jury are further instructed that the plaintiff, in entering upon the employment of a switchman with the defendant company, assumed the risks and dangers ordinarily incident to such employ-

⁸⁷—Galveston, H. & S. A. Ry. loway, 191 U. S. 334 (337), 24 S. Ct. Co. v. Gibson, — Tex Civ. App. 102.

—, 54 S. W. 779 (780).

⁸⁹—C., O., etc., R. R. Co. v. Hol-

⁸⁸—C., O., etc., R. R. Co. v. Hol-

loway, *supra*.

ment, but did not assume any risks arising from the negligence of defendant, if any you find there was.

(d) If you believe from the evidence that plaintiff's injuries, if any, were caused by one or more of the risks or dangers which were ordinarily incident to his employment as a switchman, or if from the evidence, you believe that plaintiff's injuries, if any, were the results of an accident—that is, that they were not caused by any negligence of said ——— or of plaintiff—then, in either of these events, you will find for the defendant.⁹⁰

(e) The court instructs the jury that when the plaintiff's intestate, D——, entered the service of the defendant railway company as a brakeman on its mixed train mentioned in the pleadings, he assumed all the ordinary risks and hazards of that employment or occupation; and, if they shall believe from the evidence that said D's injuries complained of were the direct and natural result of some or more of said risks or hazards, they must find for the defendant.⁹¹

(f) The court instructs the jury that when plaintiff entered the employ of the defendant he assumed all the ordinary risks of the employment and it was his duty to exercise reasonable care and diligence in protecting himself from injuries; and if the jury believe from the evidence in the case that plaintiff was an experienced railroad switchman and he could, by the exercise of reasonable care and diligence, have ascertained, in time to avoid the accident, that the car that was approaching him from the east was on track No. 17 and the stationary car was on track No. 18 so that the corners of the two cars would come together, then he is not entitled to recover, and it is your duty as jurors to find a verdict for the defendant. By "reasonable care and diligence" is meant such care and diligence as an ordinarily prudent and careful man would usually exercise under the same or similar circumstances.

(g) The court instructs the jury that if you believe from the evidence in the case that the number of men employed in switching at the time that the accident occurred were sufficient to handle the cars with safety, by the exercise of reasonable care, then the plaintiff is not entitled to recover on account of any insufficiency in the number of men employed in that work.

(h) The court instructs the jury that the plaintiff has been a witness in his own behalf in this case, and the jury are the sole judges of his credibility. All statements made by him, if any, which are against his own interest, must be taken as true, but his statements in his own favor are only to be given such credit as the jury, under all the facts and circumstances in evidence, deem them entitled to.

(i) The court instructs the jury that if the physical facts, as

90—The above instructions approved in *Mo., K. & T. Ry. Co. of Texas v. Schilling*, 32 Tex. Civ. App. 417, 75 S. W. 64 (65).

91—*De Witts' Adm'r v. Louisville*

& N. R. Co., 29 Ky. L. 1161, 96 S. W. 1123.

"This instruction is approved because it gives the jury a fair, substantial, and correct view of

shown by the evidence in this case, are in conflict with the statements of any witness, who has testified in this case, then it is your duty to take into consideration what is shown by the physical facts and to disregard the statements of witnesses in conflict with such physical facts, if any.

(j) The court instructs the jury that in passing on this case you should take into consideration the facts and circumstances developed by the evidence in the case, and in arriving at a verdict you should be governed alone by the evidence and the instructions of the court, which are given for your guidance, and should not suffer yourselves to be in any way influenced by the fact that the plaintiff is an individual and the defendant a railroad company.⁹²

(k) If you should believe from the evidence that the plaintiff suffered the injuries complained of, and has sustained the damages resulting therefrom, as complained of in his petition, but should find from the evidence that the injuries sustained were on account of the ordinary risks incident to his employment as a brakeman; or should you find that the defect in the brake, if there was any defect in the brake, was plain to the plaintiff at or before the time he attempted to use same, and the danger, if any, of such use, was at said time known to him, and you should find that in such use of such brake the plaintiff was guilty of negligence—you will find a verdict in either event for the defendant.⁹³

§ 1571. Risks Assumed by Conductor of Passenger Train. The jury are instructed that the risks assumed by the plaintiff in accepting employment from defendant as conductor of its passenger train were only such as were incident to said employment and did not include any risks arising from negligence upon defendant's part (if there was such negligence) in failing to use reasonable care and diligence to see that its tracks and bridges were in a reasonably safe condition.⁹⁴

§ 1572. Railway Company not Liable for Injuries from Obvious or Patent Defects. (a) The jury are instructed that a railway company is not liable to its employes for injuries resulting from obvious or patent defects in tools or appliances with which they are furnished to discharge their duties—that is, defects which are as open to the observation of the employes as to the company—and in such case the employe assumes the risks incident to the use of said defective tools or appliances.⁹⁵

(b) The court instructs the jury, although you may believe, from the evidence, that the plaintiff's intestate, A. B., was not employed to do the work he was engaged in at the time of his injury, yet if

the law as to the question involved."

92—These five instructions approved in *Phippin v. Mo. Pac. R. Co.*, 198 Mo. 321, 93 S. W. 410 (413).

93—*Tex. Cent. R. Co. v. Powell*,

—*Tex. Civ. App.* —. 86 S. W. 21 (23).

94—*Copeland v. Wabash R. Co.*, 175 Mo. 650, 75 S. W. 106 (108).

95—*Moore v. Mo., K. & T. Ry. Co. of Texas*, 30 *Tex. Civ. App.* 266, 69 S. W. 997 (999).

the jury further believe, from the evidence, that he was engaged in said work without objection, and that the risks and dangers thereof, if it had any, were open and plain to his sight and understanding, then he occupies in this case the same position he would have occupied if he had been originally employed to do this work; and if he was injured while employed by reason of such open and plain risk, his injury was the result of risks which were assumed by him, and plaintiff is not entitled to recover in this action, and your verdict should be in favor of the defendant.

(c) The court instructs you that, if a servant of full age and ordinary intelligence, upon being required by his employer to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same knowing and understanding their dangerous character, he assumes the risk of the new duties which are equally open and apparent to him as to his employer.⁹⁶

§ 1573. Rule in South Carolina as to Obviously Defective Appliances. (a) I charge you that the risk which a railway employe assumes when he enters the employ of a railway company does not extend to such risks as he is exposed by reason of defective machinery or appliances.

(b) I charge you that contributory negligence on the part of the servant, by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina, under the Constitution of 1895.⁹⁷

§ 1574. Railroad Employe Need not Search for Latent Defects. Railroad employes are presumed to understand the nature and hazard of the employment when they engage in the service, and they assume all ordinary risks and obvious perils incident thereto. Such risks are presumably within the employe's contract of service. This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty by supplying machinery free from latent defects which expose the employe to extraordinary and hidden perils. While the employer may expect that an employe will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery, yet the latter is not bound to search for defects, or inspect the appliances furnished him, to see whether or

96—C., R. I. & P. Ry. Co. v. Kinnare, 91 Ill. App. 508 (513), aff'd 190 Ill. 9, 60 N. E. 57.

97—Carson v. So. Ry. Co., 68 S. C. 55, 46 S. E. 525 (535).

"We do not see that the judge's charge was improper. He charged the law of this state. He did not use language which made the master a guarantor of the machinery and appliances, especially as the

circuit judge was careful to say: 'Provided, the negligence of the master was the direct and proximate cause of the injury,' etc. The servant does not assume the risks of the master, and as we have seen it, it is the master's duty to furnish safe machinery and appliances, and keep the same in proper repair."

not there are latent imperfections in and about them which render their use more hazardous. These are duties of the master, and, unless the defects are such as to be obvious to anyone giving attention to the duties of the occasion, the employe has a right to assume that the employer had performed his duty in respect to implements and machinery furnished.⁹⁸

§ 1575. Continuing in Employment with Knowledge of Dangerous Conditions. (a) The jury are further instructed, as a matter of law, that an employe of a railroad company cannot recover for an injury suffered in the course of the business about which he is employed from defective machinery used therein, or from dangerous condition of the track, or improper manner of running and operating of a train, after he has knowledge of such dangerous conditions and continues his work without objection; and in this case, if you believe from the evidence that Brakeman C. knew that there was no turntable at W., that the engine must back up on return trips, and that there was no regular headlight upon the engine in question, and that there was no pilot upon the tender of such engine, and that he continued in such employment with knowledge of such conditions, without objection, and if the injuries in question resulted from any of said conditions, plaintiff cannot recover on those issues, and your verdict should be for the defendant.⁹⁹

(b) The court instructs the jury that if an employe, knowing that a machine is unsafe, works upon it, consents to work upon it, has preknowledge, understands its condition, understands that it is in an unsafe condition, and knowingly continues to work with it, he assumes the risks that are liable to follow. If he does that without finding any fault, he assumes them the more, and he also assumes

98—Wab. W. Ry. Co. v. Morgan, 122 Ind. 430, 32 N. E. 85, 31 N. E. 661.

"The employer is bound to make reasonable inspection of the appliances furnished the employes to discover latent defects, and a neglect to make such an inspection is a culpable breach of duty. N. P. R. R. Co. v. Herbert, 116 U. S. 642, 6 S. Ct. 590; Matchett v. Cinn. & W. Ry. Co., 132 Ind. 334, 31 N. E. 792; Ohio & M. R. R. Co. v. Percy, 128 Ind. 197, 27 N. E. 479; C. H. & D. R. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287. This duty to inspect implies, of course, that the employer will not subject the employe to concealed defects which an inspection conducted with ordinary care would have revealed. Obvious defects, open to ordinarily careful observation, are perils of the service, but latent defects, or defects not discoverable by the exercise

of ordinary care, are not perils incident to the service, and hence are not assumed by the employe. Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210, and cases cited; O. & M. R. R. Co. v. Percy, supra; Matchett v. Railway Co., supra. It was therefore not error to direct the jury that the employer's duty was to furnish appliances free from latent defects, nor was it error to direct them that the duty to search for such defects did not rest upon the employe.

"See also authorities cited in this opinion on the degree of care required of employes."

99—C., B. & Q. R. R. Co. v. Camper, 199 Ill. 569, 65 N. E. 448, rev'g 100 Ill. App. 21.

"We are of the opinion that the defendant was entitled to have this instruction given to the jury, and that it was prejudicial error to refuse it."

them even if he does find fault, unless as a result of his finding fault, some promise is made to him by his employer to repair or correct, and there is a failure to do it within the time promised, or within a reasonable time.¹⁰⁰

§ 1576. Engineer's Knowledge of Defect in Headlight. If you believe that the headlight of the engine upon which the plaintiff was employed at the time of the alleged accident was defective, or so defective that it gave an insufficient light, and that the plaintiff knew the same before or at the time of his starting upon his run from A, and that the night was dark and stormy, and that the plaintiff knew, or, in the ordinary discharge of his duty, must necessarily have acquired the knowledge that it was dangerous to run his engine with the headlight in such a condition, then he must be held to have assumed the risk and danger of running the engine with such headlight, and, if he was injured under such circumstances in consequence of the headlight being defective, and independently of any other act of negligence, or negligent omission on the part of the defendant, your verdict should be for the defendant.¹

§ 1577. Assumption of Risk as to Defective Stirrup After Proper Inspection. You are further charged that if you find from the testimony that the defendant's inspectors, previous to said accident, inspected said car to which said stirrup was fastened, and you further find that said inspectors inspected said car in the usual and customary manner; and you further find that in making said inspection of said car said inspectors used ordinary care and diligence to ascertain whether said stirrup was reasonably safe for the purposes for which it was being used, and failed to discover that said stirrup was not securely fastened, if you find it was insecurely fastened—then I charge you that the accident which it is claimed caused A's death, was one of the risks ordinarily incident to his employment, and your verdict must be for the defendant.²

100—Breig v. C. & W. M. Ry. Co., 98 Mich. 222, 57 N. W. 118.

"This is, in the abstract, a correct statement of law. Sjogren v. Hall, 53 Mich. 274, 18 N. W. 812; Prentiss v. Mfg. Co., 63 Mich. 478, 30 N. W. 109; Kean v. Rolling Mills, 66 Mich. 277, 33 N. W. 395; Melzer v. Car Co., 76 Mich. 94, 42 N. W. 1078."

1—Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, — Tex. Civ. App. —, 91 S. W. 355 (357).

2—Galveston, H. & S. A. Ry. Co. v. Davis, 27 Tex. Civ. App. 279, 65 S. W. 217 (218).

"Its correctness is sustained by an unbroken line of authorities. Galveston, H. & S. A. Ry. Co. v. Nass, — Tex. Civ. App. —, 57 S.

W. 912; Int'l & G. N. Ry. Co. v. Hawes, — Tex. Civ. App. —, 54 S. W. 325; Mo., K. & T. Rd. Co. v. Crowder, — Tex. Civ. App. —, 55 S. W. 380; Houston & T. C. Rd. Co. v. Milam, — Tex. Civ. App. —, 58 S. W. 735; Texas Cent. Rd. Co. v. Fox, — Tex. Civ. App. —, 59 S. W. 49; De La Vergne Refrig. Machine Co. v. Stahl, — Tex. Civ. App. —, 60 S. W. 319; Jones v. Shaw, 16 Tex. Civ. App. 296, 41 S. W. 690; San Antonio Edison Co. v. Dixon, 17 Tex. Civ. App. 320, 42 S. W. 1009; Gulf C. & S. F. Ry. Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; Gal., H. & S. A. Ry. Co. v. Templeton, 87 Tex. 42, 28 S. W. 1066; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063;

§ 1578. Failure of Servant to Discover Absence of Ladder, Handles or Steps at End of Car. The jury are instructed as a matter of law that a servant, when he enters into the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service; and the master or employer impliedly agrees that he will not subject his servants, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the servant is to be engaged. The master's obligation is not to supply the servant with absolutely safe machinery or with any particular kind of machinery, but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger. Hence, in this case, unless the jury find from the evidence, that the absence of a ladder or steps and handles from the end of the car in question subjected the plaintiff to extraordinary or unreasonable danger, the plaintiff cannot recover. And if the jury find, from the evidence, that the plaintiff might, by the exercise of ordinary care, have discovered the absence of a ladder, or steps, or handles from the end of the car in question and so averted the accident, the verdict should be not guilty.³

§ 1579. Servant Assumes Risks of Usual Jarring and Shaking of Car. Although the jury may believe from the evidence that said car was suddenly stopped, and that the speed of said car was suddenly checked, and that said car was otherwise jarred at the time plaintiff was injured, yet they must find for the defendant unless they further believe from the evidence that said stopping of said car, or the sudden checking of said car, caused an unusual shaking or jarring of said car.⁴

§ 1580. Assuming Risk as to Defective Track. (a) The court instructs the jury that every person in entering upon the employment of another assumes all the usual risks of that employment. If such employe is set to work upon a defective track and continues in that employment after having had an opportunity to observe and know the condition of the track, then he assumes the risks of working upon such track, and for any accident occurring through the condition of said track he can not recover damages.⁵

Texas & P. Ry. Co. v. O'Fiel, 78 Tex. 486, 15 S. W. 33; Shear & R. Neg. (5th ed.) par. 194a. The last authority shows that the master is chargeable with constructive notice of whatever, by the use of ordinary care and diligence, he might have discovered; hence, the use of the word 'diligence' was not, as is contended by appellant, improper."

3—C. B. & Q. R. R. Co. v. Warner, 123 Ill. 38 (48), 14 N. E. 206.

4—L. & N. R. Co. v. Smith, 129 Ala. 553, 30 So. 571 (574).

"If the jerking and jarring was such as was customary and usual, and not an unusual jerking or jarring, then the incident risk was one that was assumed by the plaintiff in his said employment. We are of the opinion that the charge was proper, and should have been given as requested. B. M. R. R. Co. v. Wilmer, 97 Ala. 165, 11 So. 886; H. A. & B. R. Co. v. Miller, 120 Ala. 543, 24 So. 955."

5—C. & G. T. Ry. Co. v. Kin-nare, 76 Ill. App. 394 (399).

"This instruction was modified by

(b) The court instructs the jury that it is the duty of a railroad company to keep and maintain its tracks in a reasonably safe condition for the running of its trains thereon, and that its employes have the right to rely upon the assumption that it does so, and they are not required to exercise ordinary care to see if the company has done so, and they do not assume the risk arising from the failure of the company to do so, unless they know of the failure, or unless, in the discharge of their duties, must necessarily have acquired the knowledge.⁶

§ 1581. **Assuming Risk of Working on Side-track.** The jury are instructed that the plaintiff, in undertaking to work for the P. company, and thereafter to work on a side-track of such company, assumed all the risk of injury whilst working in that capacity, which existed when the business was carried on in the usual and ordinary way and with reasonable care.⁷

§ 1582. **Knowledge of Presence of Dangerous Culvert or Cattle-guard.** You are instructed that while it was the duty of defendant to provide a reasonably safe roadbed and structure, yet it was also A's duty to be mindful of the known dangers of his work; and if you believe from the evidence that he knew the culvert or cattle-

adding the words 'and know' after the word 'observe.' The court say: 'It is not enough to prevent the servant's recovery that he observes a condition existing, but he must know, or by the exercise of ordinary care should know, the attendant danger of such condition.' *Cons. Coal Co. v. Haenni*, 146 Ill. 614-25, 35 N. E. 162; *Ill. Steel Co. v. Schymanowski*, 162 Ill. 447-59, 44 N. E. 876."

6—*So. K. Ry. Co. of Texas v. Sage*, — Tex. Civ. App. —, 80 S. W. 1038 (1040).

"We know of no principle of law that would impose upon a servant the duty of exercising care to discover defects in the premises or appliances furnished him by the master. The charge is not incorrect in this respect. Nor is it erroneous as giving undue prominence to the requirement that the railroad company must keep its track in a reasonably safe condition for the running of its trains. It is not every repetition that amounts to undue prominence. *Lumsden v. C., R. I. & T. Ry. Co.*, 73 S. W. 428, 7 Tex. Ct. Rep. 170."

7—*Penn. Co. v. Backes*, 133 Ill. 255 (261), 24 N. E. 563.

"If a servant knowing the hazards of his employment as the business is conducted is injured while engaged therein, he cannot

maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury (*Simmons v. C. & T. Ry. Co.*, 110 Ill. 347; see also *Stafford v. C., B. & Q. Ry. Co.*, 114 Ill. 244, 2 N. E. 185; and *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100, 5 N. E. 92), but in this case the relation of master and servant did not exist between the plaintiff and the railway company. And we are inclined to hold that the exemption of the master growing out of the relation of master and servant and the servant's contract to assume the ordinary risks incident to the business does not apply. But, even if the relation of master and servant existed between appellee and appellant, the appellant was required in switching its cars to do so, not in a reckless manner, but with due regard to the safety of those who might be engaged in unloading cars on the switch or side-track. *N. C. Rolling Mill Co. v. Johnson*, 114 Ill. 59, 2 N. E. 185. The ruling in this case was approved in *C. & N. W. Ry. Co. v. Goebel*, 119 Ill. 516, 10 N. E. 369. Under the rule as established in these cases, the appellant was required to use reasonable care to avoid injury."

guard, in its then condition, was there, or by the exercise of ordinary observation might have known it, then he was bound to guard against it; and if, with such knowledge, he was injured in consequence of such culvert, the defendant can not be held liable in this case, and your verdict should be not guilty.⁸

§ 1583. Equal Knowledge of Master and Servant as to "Dodged" or Low Joint in Track. (a) If the jury shall find from the evidence that there was a defect in the defendant's track, in regard to a "dodged joint" or a low joint, and shall further find that such defect was the proximate cause of the plaintiff's injury, yet, if the jury shall further find that both plaintiff and defendant had equal knowledge of the existence of said defect, then plaintiff cannot recover.

(b) If the jury shall find from the evidence that the proximate cause of the plaintiff's injury was a "dodged joint" or a low joint in defendant's track, and that plaintiff had knowledge of the existence of such defect, or, in the course of his employment, should have known of the existence of the same, the plaintiff cannot recover of defendant damages for such injury.⁹

CONTRIBUTORY NEGLIGENCE.

§ 1584. Failure of Engineer to Exercise Ordinary Care in Operating Engine. It was the duty of the plaintiff, S., to exercise the care that an ordinarily prudent person would take under the same or similar circumstances in operating his engine while running over defendant's track, and if he failed to exercise such care at the time he was injured, he was guilty of contributory negligence, and therefore, if at the time of the wrecking of the train and the injury to him, he was not exercising such care, and his injuries resulted from such want of the exercise of ordinary care, he cannot recover in this case.¹⁰

§ 1585. Contributory Negligence of Plaintiff in Wetting Deck and Apron of Engine. You are charged that if you find from the testimony that prior to the time plaintiff claims he slipped and fell upon said apron he wet the deck of said engine and said apron, and that by reason thereof said apron became slippery, if you find it was slip-

8—P., D. & E. Ry. Co. v. Puckett, 52 Ill. App. 222 (225, 226).

"The question whether the cattle-guard was 'properly constructed,' so far as the evidence referred to it, mainly depended on whether it was necessarily or properly where it was. It was not so much a question of proper construction as of proper location. Perhaps it was not necessarily there. Perhaps it should or might as well have been further on.

"But, be this as it may, if de-

ceased knew it was there, it must be presumed, in the absence of objection on his part, that he assumed the extra hazard arising therefrom. Mo. Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Wharton on Negligence, sec. 206; Stafford v. C., B. & Q. R. R., 114 Ill. 244, 2 N. E. 185."

9—Wilkie v. R. & C. F. R. Co., 127 N. C. 203, 37 S. E. 204 (205).

10—So. K. Ry. Co. v. Sage, — Tex. Civ. App. —, 80 S. W. 1038 (1040).

pery, and caused plaintiff to fall, and you further find that in wetting said deck and apron, at said time, if you find it was so wet, plaintiff was guilty of negligence, and that such negligence, if any, directly caused or contributed to his injury, if any or if you find that the plaintiff failed to exercise ordinary care in stepping upon said apron, and that such failure, if any, proximately caused or contributed to his injury, if any, then your verdict must be for the defendant.¹¹

§ 1586. Failure of Engineer to Keep Proper Lookout to Avoid Collision. If you believe from the evidence that the plaintiff failed to keep a proper lookout as he ran his train into K. and that such failure, if any, proximately caused or contributed to cause the collision and plaintiff's injuries, you will find for the defendant.¹²

§ 1587. Failure to Check Train Run at Dangerous Speed When in Servant's Power to do So. If you believe from the evidence that the plaintiff, just before the accident occurred, knew that the train was being run in violation of the rules of the company, and at a dangerous rate of speed, and that he sat with his hand upon the lever of the air brakes, with full power to check the speed of the train, or to stop it, before the accident happened; and if you further believe from the evidence that the accident resulted from the running of the train at a dangerous rate of speed, and in violation of the rules of the company; and you further believe from the evidence that a person of ordinary prudence occupying the position by the plaintiff in this case under the circumstances would have applied the air brakes, and reduced the speed of the train, or stopped it; and you further believe from the evidence that the plaintiff could have checked or stopped the train in time to have prevented the accident, and did not do so—then the court instructs you that he was guilty of contributory negligence, cannot recover herein, and you will return your verdict for the defendant.¹³

11—Galveston, H. & S. A. Ry. Co. v. Udalle, — Tex. Civ. App. —, 91 S. W. 330 (333).

"It will be noticed how strikingly similar the language of the charge is to the language of the plea, and yet appellant claims that the court erred in presenting its defense to the jury, because it led the jury to believe that although appellee may have fallen on account of the apron being wet, and not on account of its defects, that the jury must find for him unless he was guilty of contributory negligence. Although it was alleged that appellee was guilty of contributory negligence in wetting the apron, it is contended in the brief that it was not contributory negligence to wet the apron, because it was his duty to wet it. Clearly the charge as given was

correct, and if appellant desired the other phase of the case as to the wet apron presented to the jury it should have asked for it."

12—Int'l & G. N. R. R. Co. v. Brice, — Tex. —, 97 S. W. 461.

"The charge correctly stated the law, and should have been given. B.'s duty to keep a lookout while approaching the station did not depend upon his knowledge of whether or not there was a train standing at that station. A want of knowledge of the fact would create a greater necessity for his keeping a lookout in anticipation that a train might be there, and that a collision might occur in approaching the station."

13—Int'l & G. N. R. Co. v. Cochran, — Tex. Civ. App. —, 71 S. W. 41 (42).

§ 1588. **Bleeding Reservoir of Car on Bridge Unnecessarily.** The jury are instructed that if they shall believe from the evidence in this case that A. was in charge of train No. —, on the — day of —, that it was unnecessary for him to bleed the reservoir of car No. 9,202 while standing on the bridge at F., and that he could have waited until bridge was crossed by said car, and then have bled it in safety, he is not entitled to recover in this case, and they must find for the defendant.¹⁴

§ 1589. **Shifting Cars by "Kicking" Them Back not Negligence Per Se.** If in the performance of his duties M. had no instructions to pursue a particular method, and two or more methods were open to him he cannot be said to have been negligent if he in good faith adopted that method which was more hazardous than another, if the one adopted be one which reasonable and prudent persons would adopt under like circumstances.

Shifting cars by means of the kicking back process is not necessarily at all times an act of negligence per se, even though there may be a safer method of shifting them.¹⁵

§ 1590. **Contributory Negligence of Employee in Coupling Cars.** You are charged that if you believe from the evidence in this case that the plaintiff, in attempting to make the coupling at the time he was injured, was negligent, and negligently failed to use ordinary care as herein defined, and attempted to make said coupling without knowing the engineer had received his signal and had acted upon the same by stopping the cars, and that in his doing so he was negligent as herein described, and that in doing so he failed to exercise ordinary care for his own safety, and that such negligence was the proximate cause of his injury, then and in that event you will find for the defendant.¹⁶

§ 1591. **Voluntarily Disconnecting Cars While in Motion.** You are further instructed that if you believe from the evidence the de-

14—Norfolk & W. Ry. Co. v. Mann, 99 Va. 180, 37 S. E. 849 (850).

"That instruction, we think, should have been given. It states the law plainly and concisely, and there is evidence tending to prove the facts upon which it is based."

15—Florida C. & P. R. Co. v. Mooney, 45 Fla. 286, 33 So. 1010 (1011).

16—So. Const. Co. v. Hinkle, — Tex. Civ. App. —, 89 S. W. 309 (310).

"In the eleventh paragraph of his charge they were instructed as follows: 'You are further instructed that if you believe from the evidence that at the time plaintiff attempted to make said coupling of said cars he went in between said cars as one approached from the rear without

watching said cars, so as to avoid injury, and that in so doing his failure to watch and look out was negligence as herein charged, and was a failure to exercise ordinary care as herein charged, and that such negligence was the proximate cause of the injury, then you will find for the defendant.' These charges, in our opinion, are in all essential particulars substantially the same as those requested by appellant and refused. They more nearly conform to appellant's special plea of contributory negligence than the special charges. They satisfy the demands of the rule above stated, and are at least as favorable to appellant, we think, as it was entitled to ask."

ceased, ———, was employed by defendant company as railway brakeman upon a freight train, and that he, at the time of his injury and immediately prior thereto, had charge of the switching of the cars and the mode and manner in which they should be connected and disconnected, and that he could have chosen a safe way of disconnecting cars by doing so while they were stationary, but instead thereof he voluntarily chose to disconnect the cars while in motion, then if that was a dangerous method and so known to him, and he was injured in consequence thereof, there can be no recovery in this case, and your verdict should be not guilty.¹⁷

§ 1592. Failure to Guard Against Danger of Known Custom of Kicking Cars While Switching. The court instructs the jury that if from the evidence you believe that a programme had been arranged between H. and the other employes of defendant in the switch crew for the switching of the car, and that under said programme the said H. knew that at or about the time he went to uncouple the car the train would be put in backward motion and started backwards for the purpose of giving the end car a kick, that it might roll into the side track, and that such was the usual and customary method at the G. yards of doing the work, and that said H. knew of such fact, if any, and knew when he went to do the work that said car would be kicked in said manner without signal or notice to him, and that, notwithstanding such knowledge on the part of H., he put himself in a position to be struck by the backward movement of the train, if any, if you so find the facts, you will return your verdict for defendant, as in such state of facts he would have assumed the risk of such backward movement.¹⁸

§ 1593. Failure to Have Switch Thrown Back After Entering Spur Track. If you believe from the evidence that plaintiff was guilty of negligence in failing to cause the switch to be thrown back for the main line after entering the spur track with his engine, or if you believe that rule 104a was in force at the time of plaintiff's injury and intended by the company to be observed by plaintiff, and that by his failing to have the switch closed after entering the spur track

17—Peoria, D. & E. Ry. Co. v. Puckett, 52 Ill. App. 222 (226, 227). "We are clearly of opinion the principle stated in these instructions was correct and that it was applicable to the facts before the jury."

18—Gulf, C. & S. F. Ry. Co. v. Hill, 95 Tex. 629, 69 S. W. 136 (138, 140).

"The charge of the court stated a correct proposition of law, and nothing appears which indicates that the jury was probably misled by it. Sabine & E. T. Ry. Co. v. Wood, 69 Tex. 679, 7 S. W. 372; Texas & P. Ry. Co. v. Brown, 78

Texas 397, 14 S. W. 1034. The case of Texas & N. O. Ry. Co. v. Conroy, 83 Tex. 214, 18 S. W. 609, seems to be in conflict with the two cases cited; but the report of the case is so meager, and the opinion of the court so indefinite, that we are unable to determine upon what ground the decision is based. We do not believe that it was the intention to overrule the cases before cited. However that may be, we are satisfied with the rule announced in S. & E. T. Ry. Co. v. Wood and T. & P. Ry. Co. v. Brown."

with his engine in obedience to the requirements of said rule, he was guilty of negligence—you will find a verdict for defendant.¹⁹

§ 1594. Care Due by Employee for His Own Safety While Signaling Returning Section. If you believe from the evidence that the deceased had taken his station on the railway track for the purpose of signalling the returning section, it was his duty to exercise for his own safety such care and prudence as men of ordinary prudence would exercise for their own safety under like circumstances. If you further believe from the evidence that deceased, while occupying this place on the track, failed in any respect to exercise that degree of care and prudence, and that the killing would not have occurred if he had done so, then you will find for the defendant.²⁰

§ 1595. Failure to Use Stirrup and Hand-hold in Boarding Car. The jury are instructed that if there was a stirrup and a hand-hold on the car, provided for the purpose of enabling the employees of the

19—Missouri, K. & T. Ry. Co. of Texas v. Parrott, — Tex. —, 92 S. W. 795.

20—L. & N. R. Co. v. Shumaker's Admx., 112 Ky. 431, 67 S. W. 829 (830).

"The annotator of the American Decisions in his notes to Freer v. Cameron, 55 Am. Dec. 606, says: 'Scarcely any theme in the whole range of legal science has been more fruitful in adjudications than the subject of contributory negligence, but the multiplicity of decisions on this point has not by any means cleared it of difficulties. On the contrary, it has in some respects seemed to 'darken counsel' by the introduction of a great variety of metaphysical refinements and subtle distinctions. Mr. Thompson declares himself convinced after a study of the adjudications of both the English and American courts, that the whole subject of contributory negligence remains in a state of great confusion and uncertainty.' Mr. Thompson, in his recent Commentaries on the Law of Negligence (vol. 1, § 23) says: 'In most situations and employments the standard of care which the law imposes upon persons, to the end of avoiding injury to themselves or others is designated by the descriptive words 'ordinary care' or sometimes by the words 'ordinary or reasonable care,' 'ordinary care' and 'reasonable care' have been regarded as meaning substantially the same thing. Sometimes again we meet with such expression as

'due care' though it has been held that this expression in a request for an instruction, is properly changed to 'ordinary care' or 'reasonable care.' Moreover it is to be kept in mind that the standard of ordinary care is not the standard of the law under all circumstances, but that where human life is the subject of a bailment, so to speak, as in the case of carriers of passengers, the law, at least for the purpose of instructing a jury, lays down a more exact standard. But, as we shall see further on, ordinary care is a care proportioned to the risks of the business or of the particular situation. It is such care as prudent men are accustomed to use under the same circumstances, and, if the danger is great, it may rise to the grade of a very exact and unremitting attention. With the exceptions elsewhere noted, the standard of care by which to determine whether actionable negligence has been committed is the standard which ordinarily prudent men are accustomed to exercise under the same circumstances. What a reasonably prudent man would ordinarily do under a given state of fact is as near an approximate to the true standard as can be well expressed in words.' It places both parties on an equal footing as to the rule to be applied in ascertaining whether there has been negligence. The instruction given by the court presents fully this view of the law."

defendant to get on the said coal car, and the plaintiff knew that the stirrup and hand-hold were on the coal car, or, in the exercise of ordinary care and diligence, would have known it, then it was his duty to have boarded the car by the use of the stirrup and the hand-hold; and if, under such facts, he failed to do so, he cannot recover in this action.²¹

§ 1596. Contributory Negligence of Servant in Failing to Keep Lookout for Signals. I charge you, gentlemen of the jury, that it was the duty of the plaintiff, in riding the car, to have kept a lookout for any and all signals that might have been given by the employe of the defendant.²²

§ 1597. Failure to Heed Whistle or Bell. If, however, you find from the testimony that the engineer in charge of said engine warned plaintiff of the approach of said train, by the blowing of the whistle or the ringing of the bell, in time for plaintiff, by the use of ordinary care to have left the track and avoided the accident and injury,

21—*Light v. Chi. M. & St. P. Ry. Co.*, 93 Ia. 726, 61 N. W. 380 (381).

22—*L. & N. R. Co. v. Smith*, 129 Ala. 553, 30 So. 571 (573).

"The complaint charges negligence in the control and superintendence exercised over the car from which the plaintiff is alleged to have been thrown or caused to fall, and in his evidence plaintiff shows that this control or superintendence was exercised by means of signals given by the foreman in charge of the train crew to the engineer and switchman; and that it was the foreman's duty to give such signals, and the duty of other members of the crew, including plaintiff, to direct the movement of the engine and cars in obedience to such signals. The evidence further shows without conflict that it was the duty of the switchman to keep on the lookout for all signals given by the foreman. The appellee thus recognized and established, by his pleading and evidence, the office and import of such signals, and bases charges of negligence upon the manner in which the duty of signaling was performed. It needs no argument to show the justice of the proposition that, if it be the duty of one employe to control the action of engine and cars, and the actions of other employes in charge thereof, by means of signals, it is also the duty of such other employes in charge thereof, not only to obey such signals as they may see given, but also to keep on a lookout for all signals

that may be given by such employe whose duty it is to make them. The duty to give signals implies a corresponding duty to see and obey the same, and the performance of said latter duty with due and ordinary care necessarily implies the further duty of being on the watch for all such signals. A failure in such latter duty would tend to show contributory negligence upon the part of the plaintiff, such as was charged under the fourth plea in answer to the complaint. We do not mean to say that a failure to see any signal that might be given would necessarily imply negligence,—such, for instance, as signals made where it is possible for one to see them, or made at such a time when, in the proper performance of the duties of his position, the attention of an employe is necessarily directed elsewhere; but such reasons as these do not conflict with the general duty to keep a proper lookout for all signals that may be given by one whose duty it is to give them on the part of another whose duty it is to receive them. Under the evidence this charge was proper, and should have been given, leaving it to the jury to say whether or not the plaintiff had been guilty of contributory negligence in failing to observe or be governed by the signal of the foreman, K., for the stopping of the train, which the engineer and fireman testify was given to said K."

. . . then plaintiff cannot recover on the first count in his petition.²³

§ 1598. **Failure to Discover Approaching Train.** The court instructs the jury that if, from the evidence, you believe that prior to the time when the collision complained of occurred plaintiff had time, by the exercise of ordinary care and diligence, by the use of his senses of sight and hearing, to discover the approach of the passenger train towards the push car, but failed to look and listen, or either, and such failure on his part was negligence, then you will return a verdict for defendant.²⁴

§ 1599. **Boarding Rapidly Moving Engine.** If you believe from the evidence that an ordinarily prudent person, situated as the plaintiff was at the time of and just prior to the accident for which he sues in this case, would not have attempted to board said engine, on account of the rate of speed at which it was moving, but would, as the uncontradicted evidence shows he had the right to do, have signaled the same to slow down before he attempted to board it, and that such attempt, if any, to board said engine while moving through the yards, on account of the rate of speed at which it was moving, was negligence on his part, and that but for such negligence on his part said accident would not have occurred, then you will return your verdict for defendant.²⁵

§ 1600. **Contributory Negligence of Yardmaster in Boarding Moving Engine.** (a) If the jury shall find that the plaintiff was acting in the course of his duties as yardmaster in attempting to get on said engine, and that, therefore, it was the duty of defendant to exercise care, as aforesaid, to see that engines thus admitted to its yards were in a reasonably safe condition for the use of its employes, the jury will then inquire: First, Was there a bolt projected above the surface of said foot-board on said engine in such a manner as to be calculated to cause persons who stepped on said board while the engine was in motion to fall, and did the projection of this bolt render such foot-board unsafe for persons to get on while the engine was moving? Second, Did the defendant company fail to exercise such care as a prudent person should exercise under the surrounding circumstances to see that said engine foot-board was in a reasonably safe condition before permitting it to come into the yards of defendant: Third, Was the condition of the bolt in question the proximate cause of plaintiff's fall?

(b) If you fail to find an affirmative answer to any one of the foregoing questions, you will return a verdict for the defendant.

23—Intl. & G. N. R. Co. v. Villareal, — Tex. —, 82 S. W. 1063.

"The charge is not open to the objection that it assumed any fact."

24—Intl. & G. N. R. Co. v. Tis-

dale, 36 Tex. Civ. App. 174, 81 S. W. 347 (349).

"We are of opinion that the court should have given this special instruction."

25—Houston & T. C. R. Co. v.

If you shall find in the affirmative on each of the foregoing questions, then you will inquire further whether the plaintiff was guilty of negligence in attempting to get on said engine in the manner in which he did, while it was moving at rate of speed shown by the testimony, and, if he was negligent in this particular, whether such negligence contributed proximately to his injury; and if you shall find that he was guilty of negligence which contributed to his injury, you will return a verdict for the defendant, notwithstanding you may have also found that the defendant was guilty of negligence which also contributed proximately to plaintiff's injury.²⁶

§ 1601. Jumping from Moving Train at Defendant's Command. If you believe from the evidence that the plaintiff, A. B., was in the employ of the defendant on the date alleged in his petition, and that while being carried to his work by the defendant, and under its direction, if he was under its direction, he was injured by jumping from the car on which he was riding, while said car was in motion, as alleged by him, and striking his knee against a cross-tie, as stated in his petition, and if you believe that defendant ordered and commanded plaintiff to jump, and if you believe that said command, if any was given, was imperative, and left no time for calculation and deliberation, and if you believe that plaintiff believed that he could safely obey said order by taking proper care, and if you believe said plaintiff jumped pursuant to said command, if any, and if you believe that at said time said train was going at a rate of speed that made it dangerous to jump therefrom, and if you believe that plaintiff was inexperienced in jumping off of moving trains, and ignorant of the danger, if any, arising therefrom, and if you believe that it was no part of his ordinary duty to do so, and was extrahazardous, and that defendant knew of his said ignorance and inexperience, if he was, and it did know it, and if you believe that defendant knew, or could have known, by the exercise of ordinary care, of the danger, if any, from so jumping and that defendant nevertheless, if it did, gave said order under said circumstances, and that in consequence of said order, if any, plaintiff, in the exercise of ordinary care, jumped as alleged in his petition, and was injured as therein charged, and if you further believe that the giving of said order was, if it was given, under all the facts and circumstances, negligence on the part of the defendant, and that such negligence, if any, was the direct cause of plaintiff's injuries, if any, and that plaintiff did not by his own negligence contribute to his injuries, or assume the danger or risk, then your verdict should be for the plaintiff.²⁷

§ 1602. Conducting Oneself in Dangerous Way on Hand-Car.

(a) The court charges the jury that the plaintiff's intestate owed a greater or less duty to exercise care and caution, according as he

Milam, — Tex. Civ. App. —, 58 S. — Tex. Civ. App. —, 60 S. W. 591
W. 735 (737). (592).

26—H. & T. C. R. Co. v. Milam, 27—Gal., H. & S. A. Ry. Co. v.

was in a place more or less dangerous; and if the jury find from the evidence that the said J. J. was in such a situation that his peril was apparent to any one of ordinary intelligence, and that he failed to exercise the degree of care required, and that such failure contributed to the injury and death, then they must find for the defendant.

(b) If the jury believe from the evidence that there was a less dangerous way for the said J. J. to conduct himself while on said moving hand-car, and that he failed to choose the safest way and that such failure contributed proximately to his injury and death, then he was guilty of contributory negligence, and plaintiff cannot recover.²⁸

§ 1603. Negligently Striking Mauls One Against Another While Laying Railroad Track. The court instructs you that the plaintiff was only justified in using the maul furnished him for the purpose for which it was intended, or for such purpose as was authorized by defendant; and if you further find from the evidence that it was not designed or intended that such mauls should be used by striking one against another and that such use of the mauls was liable to cause pieces of one or the other of them to break and fly into the air, thereby endangering the persons using them, and that a person of ordinary care and prudence, engaged in the business of laying railroad track would not have so used one of such mauls unless thereto directly authorized by defendant, then if you further find from the evidence that the plaintiff was injured by a piece breaking from one of said mauls and striking him in the eye, in consequence of his striking the maul which he was using against another maul in the hands of a co-employee working with him at the time, then the plaintiff was guilty of such negligence as precludes a recovery, and your verdict must be for the defendant.²⁹

§ 1604. Employee Voluntarily Placing Himself in Place of Danger Between Engine and Car. In this case if the jury believe from the evidence that the plaintiff was working as a switchman in the yards of the T., St. L. & K. C. R. R. Co., and at the time of the injury to him he was one of a crew working in the yards of said company and said company and said crew were returning from the outer yard of said road to the yards at E. St. L. near the river, and that the engine was pushing two or more cars ahead of it on the track of said railroad, and that it was a snowy or disagreeable morning, and you further believe that the plaintiff voluntarily placed himself in front of the engine, between it and the car next to it; and you further believe from the evidence that while he was in such a position the said cars which the engine was pushing, collided with certain other cars

Sanchez, — Tex. Civ. App., 65 S. W. 893 (896).

28—Jones v. Ala. M. R. Co., 107 Ala. 400, 18 So. 30 (33).

29—Franklin v. M. K. & T. Ry. Co., 97 Mo. App. 473, 71 S. W. 540 (543).

left in the yards of said C. L. R. R. by certain employes of the C. & A. R. R.; and you further believe from the evidence that it was the custom or practice on the part of the employes of the C. & A. R. R., in leaving cars in the yard of the C. L. R. R., to put the cars on whatever switch they found, and to leave the switch as it was then used; and you further believe from the evidence that it was the duty of the employes of the C. L. R. R., in traveling as they were traveling at this time, to be on a constant lookout to ascertain whether any cars had been left in the yards after their departure, and to ascertain the condition of the switches, and to ascertain whether any cars projected on the track; and you further believe from the evidence that the servants in charge of the C. L. train were not exercising care to ascertain the condition of the switches, or whether any cars were where they were likely to strike them; and you further believe from the evidence that the plaintiff in this case had voluntarily placed himself between the engine and the car ahead of it, and that such place was a place of danger, and was a place where he need not have been, and he was negligently there; and if you further believe from the evidence that the injury was caused in whole or in part by his placing himself where he was, and that if he had not so placed himself there he would not have been injured, you will find the defendant not guilty.³⁰

§ 1605. Riding on Foot-Board of Engine—Engine Colliding With Other Cars—Series. (a) If the jury believes from the evidence in this case that on the — day of —, the plaintiff was in the service of R. B. P., receiver of the T. St. L. and K. C. R. Co. as a switchman at his yard in E. St. L.

(b) And if the jury further believe from the evidence that on the morning of —, the plaintiff was riding upon the footboard of an engine, used by said receiver, in his yard at E. St. L. pushing two cars in his said yard, between the engine and the car next to it;

(c) And if the jury further believe from the evidence in this case that at the said time the plaintiff was in the service of said receiver, in the proper discharge of his duty as such switchman;

(d) And if the jury further believe from the evidence in this case that the plaintiff was exercising ordinary care in riding upon the footboard of said engine while in the discharge of his duty as such switchman, and that said footboard was a proper place for the plaintiff to ride at said time in the discharge of his duty as a switchman;

(e) And if the jury further believes from the evidence in this case that whilst plaintiff was so riding upon said foot-board of said engine the cars so being moved by said engine collided with certain other cars, and that the plaintiff was injured thereby;

(f) And if the jury further believe from the evidence that defendant's servants placed said cars, so collided with, in said yard, so that one of said cars overlapped the main lead in said yard, and left the switch open, connecting the track on which said cars were placed with said main lead track;

(g) And if the jury further believe from the evidence that defendant's said servants did not exercise ordinary care in placing said cars upon said track so that one of the overlapped said main lead track, and in leaving said switch open;

(h) And if the jury further believe from the evidence that the cars so being pushed by said engine were caused to collide with said cars so placed upon said track by defendant's servants directly because said cars overlapped and said switch was left open; Then the jury should find the defendant guilty.³¹

§ 1606. Employee Sleeping in Caboose—Another Train Colliding with Caboose—Knowledge of Custom to Sleep in Caboose by Company. If the jury believe from the evidence that on and prior to ———, it was the custom of defendant's freight-train conductors to sleep in the caboose while waiting in T. overnight; and if you believe that such was the custom of the plaintiff; and if you believe such custom, if any, was known to, and acquiesced in by, defendant; and if you believe from the evidence that on the night of ———, the plaintiff was in the employment of defendant as freight conductor; and if you believe on said night the plaintiff was waiting over in T., the orders of defendant; and if you believe on said night the plaintiff was sleeping in his caboose on the siding in the yards of the defendant; and if you believe, while so sleeping, if he was, his caboose was violently run into and collided by some train, engine or cars under the control of defendant; and if you believe such collision, if there was such, threw the plaintiff against said caboose and injured him as alleged by the plaintiff; and if you believe that the servants of the defendant were guilty of negligence, as that is above defined, in striking the plaintiff's caboose, if you find they did; and if you believe such negligence, if any, was the direct and proximate cause of plaintiff's injuries, if any; and if you believe that the plaintiff, in sleeping in his caboose, if he was, was not guilty of negligence—then and in that event you will find for the plaintiff. But if you believe from the evidence that it was not the custom of the plaintiff and other such employes of the defendant to sleep in their cabooses; or if you believe there was such custom, but the same was not known to and acquiesced in by the defendant; or if you believe that the plaintiff's injuries, if any, were caused by the usual and ordinary operation of the engines and trains in defendant's yards; or if you believe that the plaintiff was guilty

of negligence, as hereinbefore described, in sleeping in his caboose—then, in either event, you will find for the defendant.³²

§ 1607. **Employee Riding on Work Train.** (a) The court instructs the jury that an employe who rides on a work train assumes the dangers ordinarily incident to travel on such trains, but does not assume any dangers on account of the negligent operation and equipment of such train.

(b) If you believe from the evidence that at the time of the alleged injury the plaintiff was riding on a work train, and if you further believe that the train was properly equipped and operated, and that the injuries, if any, were the ordinary and reasonable result incident to the operation of such train, then, in that event, the plaintiff assumed such risk, and cannot recover herein. But if you believe said train was being operated at a dangerous rate of speed, and was suddenly stopped, or was not equipped with reasonably sufficient couplings, and you further believe that the employes of defendant in charge of said train were guilty of negligence in the operation and equipment of said train; and if you believe that plaintiff's injuries, if any, were the result of such negligence, if any,—then, in that event, the plaintiff did not assume the dangers, if any, incident to such negligence.³³

§ 1608. **Remaining in Dangerous Position in Reliance on Foreman.** You are instructed that a member of a section gang rests under no duty or obligation, with knowledge of an impending danger, to continue in the dangerous situation in obedience to the order, direction or command of the foreman of the section gang. If, therefore, you believe from the evidence that the plaintiff knew of the approach of the train to the push car by or near which he was standing at said time, and the probability of a collision, and the danger to which the same exposed him, and remained in his said position, relying upon the foreman to notify him when to leave the same, and you further believe that said conduct on his part was not such conduct as an ordinarily prudent person would have pursued under the same circumstances, and that, but for such conduct, he would not have been hurt, then you will return a verdict for the defendant.³⁴

32—St. L. S. W. Ry. Co. of Texas v. McDowell, — Tex. Civ. App. —, 73 S. W. 974 (975).

33—Mo., K. & T. Ry. Co. v. Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037 (1039).

The court in a preceding paragraph of the charge had properly defined negligence. The charge,

when considered as a whole, fairly presented the issues to the jury.

34—Intl. & G. N. R. Co. v. Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347 (348).

"It would have been proper for the court to have given this. H. E. & W. T. R. Co. v. De Walt, 96 Tex. 121, 70 S. W. 531."

CHAPTER LXV.

NEGLIGENCE—MUNICIPAL CORPORATIONS.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 1639. Municipal corporations not liable for mere accidents.</p> <p>§ 1610. Accident and negligence.</p> <p>§ 1611. Streets and walks to be kept reasonably safe.</p> <p>§ 1612. Liable for unsafe condition of streets, when.</p> <p>§ 1613. No liability without negligence.</p> <p>§ 1614. Care must be proportionate to the known danger.</p> <p>§ 1615. Must guard against actions of the elements reasonably to be anticipated under ordinary circumstances.</p> <p>§ 1616. Not obliged to open streets.</p> <p>§ 1617. But once having opened streets, must keep them in safe condition.</p> <p>§ 1618. Municipality need not put entire width of street in condition for use, nor provide safe access to private property.</p> <p>§ 1619. Do not insure safety.</p> <p>§ 1620. Duty to keep streets in safe condition cannot be shifted to person employed by city.</p> <p>§ 1621. Liability for negligence of agents and servants.</p> <p>§ 1622. Liability of municipal corporation when crossing constructed by private person—Reasonable care by town.</p> <p>§ 1623. Liability for defects in walk constructed by private person.</p> <p>§ 1624. Duty to keep sidewalk and crossings of suburbs reasonably safe.</p> <p>§ 1625. Liability for negligence of independent contractor.</p> <p>§ 1626. Liability for negligence of person knowingly permitted to obstruct street.</p> <p>§ 1627. Duty of municipality to have notice of warning given of obstruction in streets.</p> <p>§ 1628. Not liable for the negligence of others, when.</p> <p>§ 1629. Must have notice, actual or constructive.</p> | <p>§ 1630. Defective sidewalk — Notice presumed, when.</p> <p>§ 1631. Person driving on street may presume it is in a reasonably safe condition.</p> <p>§ 1632. Necessity of notice to city of defect in street.</p> <p>§ 1633. Nature of liability for hole in street on locality and road.</p> <p>§ 1634. Fact that hole was filled with water may be considered one question of contributory negligence.</p> <p>§ 1635. Duty to provide guards and notice.</p> <p>§ 1636. Admissibility of evidence of other similar accidents at same place.</p> <p>§ 1637. Liability of municipality for safety of streets while improvements are being made.</p> <p>§ 1638. Street includes sidewalks.</p> <p>§ 1639. Essential elements necessary to warrant recovery for defective sidewalks.</p> <p>§ 1640. Person traveling on sidewalk or street may presume it is reasonably safe for ordinary travel.</p> <p>§ 1641. Necessity of notice to city of defect in sidewalk.</p> <p>§ 1642. When city deemed to have had constructive notice of defect in sidewalk.</p> <p>§ 1643. Effect of knowledge of municipal authorities that sidewalk is defective.</p> <p>§ 1644. In populous districts whole width of sidewalk should be kept in repair.</p> <p>§ 1645. Circumstances to be taken into consideration in determining liability for defective walk.</p> <p>§ 1646. Effect of failure to construct sidewalk according to provisions of ordinances.</p> <p>§ 1647. Effect of sidewalk becoming insecure from use or breaks.</p> |
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- § 1648. Injury through stick projecting over sidewalk.
- § 1649. Slippery condition of sidewalk resulting from ordinary accumulation of ice in winter.
- § 1650. Injury to child by defective sidewalk while indulging in pastime or play.
- § 1651. Defective plan of public improvement.
- § 1652. Injury to adjoining property—Changing grade.
- § 1653. Liable for want of reasonable care only.
- § 1654. Changing watercourses.
- § 1655. Liability for overflowing contiguous property in laying out of streets.
- § 1656. Liability for injuries through body of water both on street and adjacent private property.
- § 1657. Liability for damage to contiguous property by leak in water main.
- § 1658. Liability for flow of surface water where no system of drainage exists.
- § 1659. Liability for flow of surface water due to street railway lawfully operated on highway.
- § 1660. Liability for loss from flow of surface water occasioned by Act of God.
- § 1661. Duty of city as to water plug placed in streets.
- § 1662. Sewer out of repair.
- § 1663. County only required to provide bridge which will properly accommodate public at large.
- § 1664. Duty of county commissioners to construct bridges in a bridge in a workmanlike manner.
- § 1665. Defective condition of bridge must be proximate cause of injury to horse.
- § 1666. Effect of knowledge of traveler that bridge is in unsafe condition.
- § 1667. Contributory negligence—In general—Negligence, contributory negligence, and ordinary care defined.
- § 1668. Circumstances to be considered on question of contributory negligence.
- § 1669. Contributory negligence — Falling into a hole in sidewalk.
- § 1670. Contributory negligence — Absentminded driving.
- § 1671. Effect of knowledge on part of person using sidewalk that it is defective.
- § 1672. Passing over defective walk not necessarily contributory negligence.
- § 1673. Contributory negligence of person falling over wire in street.
- § 1674. Placing oneself in position of danger.
- § 1675. Burden of proof as to contributory negligence of plaintiff — States holding that it rests on defendant.
- § 1676. Same subject—States holding that burden of proof is on plaintiff.
- § 1677. Negligence of driver.

§ 1609. Municipal Corporations Not Liable for Mere Accidents.

The court instructs the jury that if, after considering all of the evidence, you should conclude that the injury was a pure accident, caused neither by the negligence of the city nor that of the plaintiff, then there could be no recovery. This must be so, because it is only negligence in itself, through its officers and agents, that makes the city liable; and, if neither party be negligent, of course the city is not.¹

¹—Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318 (323).

"This request is closely associated with those just dealt with. If there was no fault on the part of the plaintiff, and the defect causing the fall of the shed was one which was not brought about by the city, and which they could

not have discovered by the exercise of due diligence, then, relatively to the parties to this case, the fall must have been accidental, and the defendant could not be held liable. This request was not covered by the charge given, and we think its refusal was error."

§ 1610. **Accident and Negligence.** The court instructs the jury, that if they believe, from the evidence, that the plaintiff was injured and sustained damage, as charged in the declaration, and that such injury was the combined result of an accident, and of a defect in the walk, and that the damage would not have been sustained but for the defect, although the primary cause of the injury was a pure accident, still, if the jury further believe, from the evidence, that the plaintiff was guilty of no fault or negligence, and the accident one which common and ordinary prudence and sagacity, on the part of the plaintiff, could not have foreseen and provided against, then the city is liable; provided, the jury believe, from the evidence, that the city authorities were guilty of negligence in not remedying such defect.²

§ 1611. **Streets and Walks to be Kept Reasonably Safe.** (a) The court instructs the jury, as a matter of law, that a city is not required to have its sidewalks so constructed (or kept in such condition) as to secure immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution.

(b) And in this case, if the jury believe, from the evidence, that the sidewalk was so constructed as to be sufficiently level and smooth for ordinary travel, and so built that it would not, by reason of any peculiarities of its construction, cause snow or ice to accumulate thereon, and that the accident was attributable solely to the slippery condition of the sidewalk, occasioned by a recent fall of snow, and that the sole cause of the accident was the temporary slipperiness of that part of the sidewalk caused by the recent fall of snow thereon, such a condition of the sidewalk would not be a defect for which the city would be liable.³

(c) If the jury believe from the evidence that the plaintiff was injured by reason of the defendant's negligence in failing to keep its sidewalks in reasonably good repair, or negligently allowing the same to remain in an unsafe condition as explained in these instructions, and without fault on her part that she has sustained damage, then the jury have a right to find for her.⁴

(d) The jury are instructed, that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair, to render them reasonably safe, for all persons passing on or over the same; and if the jury believe, from the evidence, that the defendant failed to use all reasonable care and precaution to keep its sidewalk in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby,

2—Wilson v. Atlanta, 60 Ga. 473.

4—Gilson v. Cadillac, 134 Mich.

3—Chicago v. McGiven, 78 Ill. 347. 189, 95 N. W. 1084.

without negligence or want of care on plaintiff's part, then he is entitled to recover in this suit.⁵

(e) The law imposes upon cities the duty to exercise reasonable care to keep its streets and sidewalks in reasonably safe condition for use by persons traveling thereon; the city is not an insurer against injuries, received by reason of defects in its streets or sidewalks; if it maintains them in reasonably safe condition, it is not liable; and, in this case, if you believe from all the facts and circumstances, shown in the evidence, that the place where the plaintiff claims to have been injured was in such condition for travel thereon or thereover, that a person, while in the exercise of ordinary care for his own safety, would have passed safely over, then the defendant is not liable in this case.⁶

§ 1612. **Liability for Unsafe Condition of Streets, When.** The court instructs the jury, that the defendant corporation is bound by law to use all reasonable care, caution and supervision to keep its streets, sidewalks and bridges in a safe condition for travel, in the ordinary modes of traveling, by night as well as by day, and if it fails to do so, it is liable for injuries sustained, in consequence of such failure; provided, the party injured is himself exercising reasonable care and caution; and the fact that the plaintiff may, in some way, have contributed to the injury sustained by him, will not prevent his recovery if, by ordinary care, he could not have avoided the consequences to himself or the defendant's negligence.⁷

§ 1613. **No Liability Without Negligence.** (a) Municipal corporations, such as the defendant, are only liable for such defects in their sidewalks as are in themselves dangerous or such that a person exercising reasonable care and caution cannot avoid danger in passing over it and, if the jury believe, from the evidence, that the defect in the sidewalk in question was not in itself dangerous to the

5—Chicago v. Dale, 115 Ill. 386, 5 N. E. 578; Dillon on Municipal Corporations, § 996 et seq.

6—Gibson v. Murray, 216 Ill. 589, 75 N. E. 319.

"This instruction stated the law correctly, and therein stated the requirement of the city to be that of maintaining the sidewalk in a reasonably good and safe condition. The defect in the first instruction, given for appellee, was cured by the ninth instruction, given for appellant, and other instructions to the same effect. It cannot be said, as is claimed by the appellant, that the ninth instruction, given for appellant, is inconsistent with the first instruction given for appellee, and that, therefore, the latter is not cured by the former. The use of the

words, 'keep it in good and safe condition,' did not authorize the jury to find, that the sidewalk must be kept in a perfectly good and safe condition any more than that it should be kept in a reasonably good and safe condition. In other words, where the words 'good and safe condition' are used, as here, without qualifying words, the jury are as much authorized to construe them to mean 'reasonably good and safe condition,' as to regard them as indicating a higher and more perfect condition. Such was the construction given to a similar instruction in Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246."

7—Mayor, etc., v. Dodd, 58 Ga. 238; Centerville v. Woods, 57 Ind. 192; Rowell v. Williams, 29 Ia. 210; St. Paul v. Kuby, 8 Minn. 154.

safety of a person passing over it with reasonable care and caution, and that the alleged injury was the result either of a mere accident without negligence on the part of defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then the jury should find the defendant not guilty.

(b) The jury are instructed that, in this case, there can be no liability on the part of the defendant, unless there was neglect of duty in respect to the repair of the sidewalk on the part of the officers of the city; and there can be no such neglect of duty, unless the jury find from the evidence that the officers of the city knew of the defect in the sidewalk complained of, or with reasonable diligence could have known of it, long enough before the accident occurred, to have had it repaired.⁸

§ 1614. Care Must Be Proportionate to the Known Danger. (a) If the jury believe, from the evidence, that the place where the accident in question occurred, was necessarily more dangerous than the ordinary streets and sidewalks, and that, by the exercise of ordinary care and prudence, this condition of things could have been known to the plaintiff, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit.

(b) Although the jury may believe, from the evidence, that the city authorities had negligently suffered snow and ice to accumulate on the walk in question, until it was in a dangerous condition for walking, still, if you further believe, from the evidence, that this condition of the walk was known to the plaintiff before he attempted to walk over it, and that he might easily have avoided passing over such dangerous place, then he was not using that reasonable care and prudence to avoid injury which the law requires and he cannot recover in this case.⁹

§ 1615. Must Guard Against Actions of the Elements Reasonably to be Anticipated Under Ordinary Circumstances. The court instructs the jury that if the city of D. left the street at 6 o'clock in the evening in a condition that was proper and fit to be traveled over by horses, bicycles, wagons, and such, at that time, it does not necessarily follow that it was left in a reasonably safe condition. Something more is required of the city. The city is required to leave that street in such condition that it will remain in the condition in which it was put; that is, if it was put in a condition at 6 o'clock reasonably safe and fit for public travel at that time, then the further duty falls upon the city to consider what the elements are, and to consider what is likely to occur during the night; and they are required by law to put it in such a condition that it will stand or

8—Sheel et al v. The City of Appleton, 49 Wis. 125. 5 N. W. 27.

9—Schaefer v. Sandusky, 33 Ohio St. 246.

withstand the elements or conditions that might reasonably and ordinarily be expected at that season of the year. So, gentlemen of the jury, the principal fact in this case left for you to determine is, did the city leave that street in a condition in which it would be expected it would remain in a condition that was reasonably safe? Did they do all that prudence and foresight would demand of them? In other words, if the rain and storms that might be expected, if you believe that they may be expected at that time of the year, would put that street out of repair and render it dangerous, then, gentlemen of the jury, negligence would be chargeable against the city; but if you find that a storm of unusual severity, or a storm that might not be expected under ordinary circumstances and conditions at that time of the year, came up, then it is something human foresight cannot see or prevent, and that would be an extraordinary visitation of the elements, and the city of D. would not be, in such a case, chargeable with negligence.¹⁰

§ 1616. Not Obligated to Open Streets. (a) The court instructs the jury, that cities are under no legal obligation to open up streets for the use of the public. The legal obligation of a city to repair streets, sidewalks and bridges within its corporate limits, only relates to such as are opened or constructed under its authority, or those which its officers have assumed control over.¹¹

(b) There is no legal obligation resting upon a city to build sidewalks, construct gutters or pave streets, but when the city does make these improvements for the benefit of the public, it then becomes its duty to use all reasonable care and exertions to keep them in repair.¹²

§ 1617. But Once Having Opened Streets Must Keep Them in Safe Condition. (a) If you find from all the evidence in the case that the city, prior to the accident which resulted in the loss of the life of said ———, had taken charge of, and had performed work and labor upon, Twenty-fifth street, so as to open the same up for use and travel thereon by the public at and along where the accident occurred, then it was the duty of the city, under the law, to use all reasonable care and diligence in keeping and maintaining said street thereafter, so as to keep said street in a safe condition for the use of the public; and any negligence on the part of said city so to keep said street in a safe condition at all times thereafter for the use of the public would render the city liable if, because of such failure, an injury results to anyone who has occasion to use said street.

(b) You are further instructed that it is in law the duty of the city to so construct its streets as to make the same reasonably safe

10—Beattie v. Detroit, 137 Mich. 319, 100 N. W. 574 (576). Wilson v. The Mayor, etc., 1 Denio 595; Joliet v. Verley, 35 Ill. 58.
11—Craig v. Sedalia, 63 Mo. 417; 12—Alton v. Hope, 68 Ill. 167.

for the traveling public, and also that children may be upon the same with safety.¹³

§ 1618. Municipality Need Not Put Entire Width of Street in Condition for Use, nor Provide Safe Access to Private Property. The court instructs the jury that while it is the duty of a city to keep its streets in a reasonably safe condition for travel, it is not thereby implied that every street, and the whole width of the street must be placed and kept in good condition. The city may, without incurring liability, leave certain streets entirely unopened, and in others put only a portion of the width in condition for use. It is not the duty of a city to provide access from private property to the streets, nor is it liable for failure to guard its streets from approach at points where such approach is dangerous. It is not the duty of a city to provide safe means of access to private property, and if the city has built a safe and suitable sidewalk to accommodate the public travel along the sidewalk in the ordinary modes, it is not liable to one who knowingly and voluntarily leaves the sidewalk built by the city.¹⁴

§ 1619. Do not Insure Safety. (a) The jury are instructed that the obligations resting upon the defendant city to keep its streets in order and repair are not carried to the extent of making it an insurer of the safety of the streets, and that it does not insure the safety of persons traveling over and along the streets.¹⁵

(b) The city is not an insurer or a warrantor of the condition of her streets and sidewalks; nor is every defect therein actionable, though it may cause the injury sued for. It is sufficient to relieve the city from liability in this case if you find from the evidence that the street (or walk) was in a reasonably safe condition for travel at the time the accident is alleged to have occurred.

(c) If you believe, from the evidence, that at the place where the plaintiff met with the injury complained of, the street (or sidewalk) was at the time in a reasonably safe condition, your verdict should be for the defendant.¹⁶

(d) The jury are instructed that a municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in reasonably safe condition for public travel by night as well as by day, but it is not an insurer against accidents; nor is it required to

13—*Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528 (530).

"The negligence imputed to the city consisted in allowing this pond of water to accumulate in a public street used as a thoroughfare, without providing any barriers or signals of danger; and it was entirely proper for the court to inform the jury as to the duty of the city in keeping its streets in safe condition for the use of the

public. It was negligence on the part of the city to leave the pond of water unguarded, knowing that children would be attracted to such a place."

14—*Kansas City v. Smith*, 8 Kan. App. 82, 54 Pac. 329.

15—*Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445 (447); *Centralia v. Krouse*, 64 Ill. 19.

16—*Indianapolis v. Gaston*, 28 Ind. 224.

maintain the surface of its sidewalks free from all irregularities, and from any possible obstruction to mere convenient travel. I charge you, as matter of law, that a village, city or township is not an insurer against accidents to pedestrians passing along their streets or highways, and that all that is required of a village, city or township is to have their streets, highways or sidewalks in a reasonably safe condition for public travel; and such reasonably safe condition exists whenever such streets, highways or sidewalks can be safely passed over by a person who is in the exercise of reasonable and ordinary care.¹⁷

(e) A city is bound only to the exercise of reasonable prudence and diligence in the construction of its sidewalks, and is not required to foresee and provide against every possible danger or accident that may occur. It is only required to keep its streets and sidewalks in a reasonably safe condition, and it is not an insurer against accidents.¹⁸

(f) The jury are instructed that the city of S. is not liable for every accident that may occur from defects in its sidewalk. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents, or injury to the citizen. If they have exercised a reasonable care in that regard, they have discharged their duty to the plaintiff, and you should find the defendant not guilty.¹⁹

§ 1620. **Duty to Keep Streets in Safe Condition Cannot Be Shifted to Person Employed by City.** (a) The jury are instructed, that when the duty is imposed by law upon a city corporation to keep its streets in reasonably safe condition, for use by the public, the duty cannot be shifted off upon a person employed by the city to perform it; and if an injury results from the negligence of such person in the performance of such duty, the corporation will be liable for the damage.²⁰

(b) If the village of B. had actual notice of the defective condition of said walk, it could not order it to be repaired by some one else, and pay no further attention to it, but, after having such actual notice, it should see that it was repaired in a reasonable time, and put in a reasonably safe condition for travel in the day-time and in the night-time.²¹

§ 1621. **Liability for Negligence of Agents and Servants.** (a) The court instructs the jury, as a matter of law, that where work is done upon the streets of a city, there is a reasonable presumption that it is done by the proper authorities of the city, and in a suit to recover damages for an injury occasioned by the negligent manner

17—Hart v. Village of New Haven, 130 Mich. 181, 89 N. W. 677 (678).
 18—Chicago v. Bixby, 84 Ill. 82.
 19—Streator v. Liebendorfer, 71 Ill. App. 625 (626); Centralia v. Krouse, 64 Ill. 19.
 20—Springfield v. Le Claire, 49 Ill. 476.

21—Atherton v. Village of Ban-

of doing such work, it is not necessary, in the first instance, to prove that it was done by persons employed by the city, as this will be presumed, unless the contrary appears from the evidence.

(b) And, in this case, if the jury believe, from the evidence, that the injury complained of was caused by a dangerous (pile of dirt or opening), left in the street in question by persons employed by the city, to place a sewer or water pipe in such street, then the jury are instructed, that it is not necessary for the plaintiff, in order to recover in this suit, to prove that the city authorities had actual notice that such * * * was left in said street; provided, the jury further believe, from the evidence, that such work was done under the supervision of the (street commissioner, etc.).²²

(c) It is the duty of the village to use all reasonable care and vigilance in the selection of its agents and servants, in keeping the sidewalks in good repair and free from obstructions, and to retain control and superintendence over them in the performance of their duties, and to enforce such measures of care and vigilance as will guard the public against exposure to injury, so far as this can reasonably be done.

(d) The court instructs the jury that the duty to construct, repair, and keep in a reasonably safe condition its sidewalks, rests primarily upon the corporation, and its obligation to discharge it can not be cast upon others by any act of its own.²³

§ 1622. **Liability of Municipal Corporation, When—Crossing Constructed by Private Person—Reasonable Care by Town.** The jury are instructed that even if they believe, from the evidence, that the crossing in question was laid or constructed by a private person in a public street of the town of N—— and was used by the public, yet the town must use reasonable care to keep it in a reasonably safe condition, and the law does not absolve the town from such obligation because the crossing or walk may not have been laid or constructed by the town itself.²⁴

§ 1623. **Liability for Defects in Walk Constructed by Private Person.** Although the jury may believe, from the evidence, that the sidewalk in question was constructed by a private person, and not under the direction or supervision of the city, still this would not

croft, 114 Mich. 241, 72 N. W. 208 (209).

22—Chicago v. Brophy, 79 Ill. 277.

23—Village of Ava v. Greenawalt, 73 Ill App. 632; Chicago v. Brophy, supra.

24—Town of Normal v. Bright, 223 Ill. 99 (102), 79 N. E. 90.

"The criticism is that it assumes there was a crossing, and it is said it is a well established principle of law that controverted questions of fact cannot be assumed but must be proven. The rule is ad-

mitted, but we are at a loss to perceive its application to this instruction. That there was a crossing of some kind at the point where appellee was injured, is undisputed. There is some conflict in the evidence as to the condition of the crossing and the manner in which appellee was injured, but there is and can be no dispute as to the fact that there was a board or boards across the ditch at the point where she was injured."

exempt the city from liability from defects in the walk; provided, the jury believe, from the evidence, that the walk was so constructed as to be dangerous for ordinary travel, and that this defect was known to the officers of the city, or that by the exercise of ordinary care they might have known of such defect in time to have remedied it before the accident.²⁵

§ 1624. **Duty to Keep Sidewalks and Crossings of Suburbs Reasonably Safe.** The jury are instructed that it is the duty of a town or city to use reasonable care to keep all sidewalks and crossings in its public streets in reasonably safe condition, even if the crossing or sidewalk is in the suburbs of the town or city, where less used than in the more frequented streets.²⁶

§ 1625. **Liability for Negligence of Independent Contractor.** (a) If the jury believe, from the evidence, that the defendant let out the job of filling up and grading (Main street) to other persons, at so much per yard, the grading to be done under the supervision of defendant's engineer, and that such engineer went upon the ground with such other persons, and pointed out to them where to take the soil from and where to put it, and such other persons did the work as directed by the engineer, then the law is, that the relation of master and servant existed between the city, the engineer and such other persons doing the work, and the city is liable in all respects, the same as if it had done the work by men employed by it in any other way.²⁷

(b) Although the jury may believe, from the evidence, that the city officers had contracted with, etc., for the laying of the water pipes in the street, still the city, notwithstanding such contract, was charged with the duty of taking all reasonable precaution to keep the street in a safe condition, for use in the usual manner, so far as this could reasonably be done, while the work was progressing, and if you believe, from the evidence, that the city officers did not do this but were guilty of negligence in permitting a dangerous, etc., and

25—*Barnes v. The Town of Newton*, 46 Ia. 567; *Wendell v. Troy*, 39 Barb. 329; *Centerville v. Woods*, 57 Ind. 192; *Phelps v. Mankato*, 23 Minn. 276.

26—*Town of Normal v. Bright*, 223 Ill. 99 (102), 79 N. E. 90.

"It is insisted that this instruction is erroneous because it does not refer to the evidence, and requires the town to keep all sidewalks and crossings in reasonably safe condition, the contention being, that the issue in this case did not involve all the walks or crossings in the city, but the one in particular; also, that it is erroneous and misleading in that it refers to crossings and sidewalks in the suburbs, when the law requires

that the jury must take into account all the surrounding circumstances, including whether or not the particular crossing is away from the center of the town, how much it is used, etc. It was necessary that the instruction should refer to the evidence. The rules of law announced in it were applicable to the case, and it was therefore in no sense the statement of mere abstract propositions of law. The other objections to it are also untenable. *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *City of Decatur v. Besten*, 169 id. 340, 48 N. E. 186. The instruction is free from substantial error."

27—*Nevins v. Peoria*, 41 Ill. 502.

that the plaintiff was thereby injured, as alleged in his complaint, then the city is liable for such injury, provided the jury believe, from the evidence, that the plaintiff was himself, etc.²⁸

§ 1626. Liability for Negligence of Person Knowingly Permitted to Obstruct Street. The jury are instructed, that if the city authorities knowingly permit a person to occupy or obstruct a street, it is the duty of such authorities to use all reasonable care and precautions to see that the person so permitted properly guards and protects such obstructions, and if the city authorities negligently fail to perform such duty, the city will be liable to one who is injured by such obstructions, if he is himself, at the time, using reasonable care to avoid the injury. Whether, in this case, the city authorities did know, etc. etc., are questions of fact for the jury, to be determined by the evidence.²⁹

§ 1627. Duty of Municipality to Have Notice or Warning Given of Obstruction in Street. (a) The court instructs the jury that it is the duty of defendant, the city of L., to keep its streets and highways in a reasonably safe condition for use by the public, and, if it is necessary that a part of the street be used as a place of deposit for material for the erection of a building adjacent to the said street, it is the duty of the person using the street as a place of deposit for such material to protect persons using the said street at night from injury by giving notice or warning of the obstruction to the street by placing sufficient lights upon or near the said material to give timely warning to other persons using the said street; and it is the duty of the defendant, the city of L., to exercise ordinary care in causing the said warning to be given by persons to whom it may have given a license to use a portion of a public street as a place of deposit for such material. And if the jury shall believe from the evidence that the defendant, A., placed the material in J. street, with which the plaintiff came in contact, and which caused his injury, and the presence of said material, in the street was not indicated by sufficient lights to give reasonable and timely warning to persons using the street as the plaintiff was then using it, and by reason thereof he was caused the injuries of which he complains, and he did not, by negligence upon his part, help to cause, or bring about his injury, but for which contributory negligence, if any there was, he would not have been injured, then the law is for the plaintiff as against the defendant, A., and they should so find.

(b) If the jury find that the defendant, A., or his employes placed the said obstruction in the street, and failed to give warning of its presence, as mentioned in the above instruction, and they find for the plaintiff, and they shall believe from the evidence that the defendant the City of L. did not exercise ordinary care to have the said notice

28—Logansport v. Dicks, 70 Ind. 65; Butler v. Bangor, 67 Me. 385. 29—Indianapolis v. Doherty, 71 Ind. 5.

or warning given of the obstruction to the said street, then the law is for the plaintiff against the city as well as against said A.³⁰

§ 1628. **Not Liable for the Negligence of Others, When.** The jury are instructed, that when a party, without the consent of the authorities of an incorporated town, digs or leaves open a dangerous hole or pit in the street, and a person is thereby injured, the town will not be liable for such injury, unless the authorities have actual notice of the nuisance, or it has remained a sufficient time, so that in the exercise of ordinary care and diligence they ought to have had notice of the dangerous condition of the street.³¹

§ 1629. **Must Have Notice, Actual or Constructive.** (a) If the jury believe, from the evidence, that the sidewalk in which the defect is alleged to have been, and where the plaintiff is alleged to have been injured, was properly and safely constructed and laid down, and that prior, and up to, or about the time of the injury, it appeared to be in a proper and safe condition, then, if there be no evidence that the defendant had actual knowledge of such defect, or that the defect existed for such length of time before the injury, that the defendant, if exercising proper care and diligence, would have known of it, the jury should find the defendant not guilty.³²

(b) The jury are instructed, that when a dangerous place is made in the street by the unlawful act of third parties, unknown or without the knowledge or consent of the city authorities, the city cannot be deemed negligent until knowledge or notice of such defect is brought home to the officers of the city, unless the dangerous place has existed for such a length of time before the injury, that the city authorities, in the exercise of reasonable care and diligence, might, and ought to have known of its existence.

30—*Louisville v. Keher*, 25 Ky. Law Rep. 2003, 79 S. W. 270 (271 and 272).

"In support of the instructions of the court we are referred to the cases of *Dist. of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 930, 34 L. Ed. 472; *Boucher v. New Haven*, 40 Conn. 456; *Sutton v. Snohomish*, 11 Wash. 28, 39 Pac. 273, 48 Am. St. 847; *Anderson v. Wilmington*, 8 Del. 516, 19 Atl. 509; *Stephens v. Macon*, 83 Mo. 345; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845; all of which are much alike, and hold that, where a city authorizes an excavation to be made in one of its streets, and a traveler on the street is injured by the negligence of the person making the excavation in not sufficiently covering the hole, or not giving sufficient warning of the danger, the city is liable to the person injured by reason of the act which it licensed without

notice to it of the dangerous condition of the excavation. The rule on which these opinions rest is that the city, having exclusive control over its streets, and being charged with the duty of maintaining them, must keep its streets in a reasonably safe condition for public travel, and for a failure to do this is primarily liable, although the defect in the highway may be due to the act of some contractor or third person done by authority of the city. *Glasgow v. Gillenwaters*, 23 Ky. Law 2375, 67 S. W. 381; 2 *Smith on Municipal Corporation*, §§ 1289, 1290; 2 *Dillon on Municipal Corporations*, (4th Ed.) § 1027."

31—*Fahey v. The President*, etc., 62 Ill. 28.

32—*Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Hutchins v. Littleton*, 124 Mass. 289; *Chicago v. Stearns*, 105 Ill. 554; *Hearn v. Chicago*, 20 Ill. App. 249.

(c) The court instructs the jury, that when an act is done which is unlawful in itself, such as placing an obstruction in a public street, which detracts from the safety of travelers, the author will be held liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury.³³

§ 1630. **Defective Sidewalk—Notice Presumed, When.** The court instructs the jury, that when the sidewalk of a city is out of repair, and remains so for such a length of time that the public authorities of the city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the walk will not be necessary to hold the city liable for injury sustained by a person, in consequence of the dangerous condition of the street, if he is himself using reasonable care to avoid such injury.³⁴

§ 1631. **Person Driving on Street May Presume it is in a Reasonably Safe Condition.** The court instructs the jury that the streets of a city are for the benefit of all persons, and all have the right, in using them, to assume that they are in ordinarily good condition, and to regulate their conduct on that assumption; and they may drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street is in a reasonably safe condition.³⁵

§ 1632. **Necessity of Notice to City of Defect in Street.** The court instructs the jury that if you shall find that the plaintiff used due and ordinary care in driving along the street at the time and place when and where the accident occurred, you will then inquire whether,

33—Weick v. Lander, 75 Ill. 93.

34—Mayor v. Sheffield, 4 Wall. 189; Springfield v. Doyle, 76 Ill. 202; Schweickhardt v. St. Louis, 2 Mo. App. 571; Hume v. N. Y., 74 N. Y. 264; Albritten v. Huntsville, 60 Ala. 486; Chicago v. Dale, 115 Ill. 386.

35—Omaha v. Ayer, 32 Neb. 375, 49 N. W. 445 (447).

"Counsel make the point that the above paragraph of the charge given by the court on its own motion is erroneous, for the reason that it ignores the fact that the plaintiff admits in his own testimony that he had seen this obstruction, and knew where it was, and had driven three times past it on the very day of the accident. While I think that in this connection counsel stated the testimony of plaintiff too strongly against him, yet, if this paragraph stood alone, I should agree with counsel that, while laying down the law as the court did in this part of the charge, it should have di-

rected the attention of the jury to this peculiarity in the circumstances of the injury; but it will be seen by an examination of the instructions that, in number 7 of the same series, the court had already called the attention of the jury to the fact 'that he (plaintiff) had passed along the street frequently, both night and day, and mentioned the probability of his being able to see the obstruction if it were possible for a person using ordinary care and prudence then and there to see it'; and also, in and by the instructions given at the request of the defendant, the court had at least once called the attention of the jury to the knowledge of the plaintiff of the existence of this obstruction in the street, and to the consideration of the question whether he was or was not negligent in driving upon the same, possessed of such knowledge and his ability to keep clear of the obstruction."

under the testimony, the city authorities either had notice of the existence of the obstruction in the street, or that the obstruction had existed in the street for such a length of time before the accident that knowledge of the existence of such obstruction by the city authorities must be presumed.³⁶

§ 1633. Nature of Liability for Hole in Street Depends on Locality and Road. The court instructs the jury that the city is bound to keep the highways in a reasonably good condition for ordinary travel. If it be a paved street in the heart of the city, that is a matter for the jury to consider and understand in arriving at the duty of the city. If it be in the outskirts of the city—an unpaved street—the jury may very well consider that the duty of the city in regard to that street was entirely different from its duty in regard to a street at B. and M., or any such place; so that the jury, in arriving at the responsibility of the city, must carefully consider the locality and road, and especially the injury complained of.³⁷

§ 1634. Fact that Hole was Filled with Water May be Considered on Question of Contributory Negligence. The court instructs the jury that if the hole in the street at the time of the accident was full of water, this fact may be considered by the jury in determining the question whether plaintiff was using due care. Whether a pool of water at the time and place would have induced a prudent man to assume that it marked a deep and dangerous hole, and to run around it, is a question which the jury under the evidence may consider, with all the other facts, in arriving at a conclusion of the question of the plaintiff's case.³⁸

§ 1635. Duty to Provide Guards and Notice. (a) The court instructs the jury, that while a city has the right to construct sewers, or other improvements in its streets, yet, when it causes such work to be done, it is bound to take notice of the character of the work and the condition in which the streets are left, whether safe or dangerous.

(b) If, in making improvements, it becomes necessary to leave dangerous holes or openings in the street, or to leave piles of dirt, or other obstructions, in the street, in such a way as to render it dangerous for wagons or carriages to pass, then it is the duty of the city to put up guards or notices of some kind, to warn travelers of the dangerous condition of the street; and if they do not do so, and persons are thereby injured, while in the exercise of reasonable care and prudence themselves, the city will be liable for the injuries thus sustained.

36—*Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445 (445-7).

37—*McLaughlin v. Philadelphia T. Co.*, 175 Pa. 565, 34 Atl. 863 (864).

38—*Indianapolis v. Mullally*, — Ind. App. —, 77 N. E. 1132 (1135).

"This instruction is not objection-

able on the ground that it assumes that the defect complained of was a dangerous hole. In determining the question of appellee's care, the jury might consider the fact, if a fact, that the hole in the street was filled with water, and whether

(c) The court instructs the jury, that all incorporated towns, villages and cities, whether incorporated by special charter or under general laws, have the power, and it is their duty, to keep in repair the roads and bridges within their corporate limits, and if injury results to any individual by reason of a neglect of such duty, while he himself is exercising reasonable care and prudence to avoid such injury, the corporation will be liable in damages.³⁹

§ 1636. Admissibility of Evidence of Other Similar Accidents at Same Place. The court instructs the jury that there is undisputed testimony here that on the evening of ———, ———, between the hours of 7:30 and 10:00 p. m., before the plaintiff was injured, two other automobiles were run into the same excavation and broken, one so badly broken that it had to be wheeled into a neighboring yard; that this testimony is admitted for the purpose of showing the character and existence of the excavation on the boulevard into which the plaintiff ran, and not for the purpose of showing any reasonable care by the plaintiff, and should not be considered as bearing upon the question of reasonable care upon his part.⁴⁰

§ 1637. Liability of Municipality for Safety of Streets While Improvements are Being Made. The duty ordinarily resting upon the city to keep its streets in reasonably safe condition for public travel does not exist during the time occupied in making public improvements or repairs in or upon such streets, and such city is relieved from liability from such conditions as are reasonably necessary for the purpose of performing the work, and for the time reasonably required for its performance, and, while such improvements are in progress in or upon the streets of a city, the city must exercise reasonable care to protect those properly and lawfully upon such streets from the consequences of any unsafe condition that may exist.⁴¹

such a hole of water would have induced a prudent man to assume that it indicated danger, and induced him to run around it, was a question which, with all the other facts, the jury might consider in arriving at a conclusion on the question of appellee's care. The instructions may be somewhat ambiguous, but we cannot say that it would be construed by the jury in a way to prejudice appellant's rights."

39—*The President, etc., v. Meredith*, 54 Ill. 84.

40—*Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 66.

"The testimony given seems to have the sanction of authority within certain limits. See *Smith v. Township*, 62 Mich. 165, 28 N. W. 806; *Dundas v. Lansing*, 75 Mich.

508, 42 N. W. 1101, 5 L. R. A. 143, 13 Am. St. 457; *Lombar v. East Tawas*, 86 Mich. 20, 48 N. W. 947; *Thompson v. Quincy*, 83 Mich. 175, 47 N. W. 114, 10 L. R. A. 734; *Retan v. Railway*, 94 Mich. 154, 53 N. W. 1094; *Moore v. Kalamazoo*, 109 Mich. 178, 66 N. W. 1089; *Alberts v. Vernon*, 96 Mich. 549, 55 N. W. 1022. But see, also, *Corcoran v. Detroit*, 95 Mich. 86, 54 N. W. 692, and *Gregory v. D. U. R.*, 138 Mich. 368, 101 N. W. 546. As there are other points upon which the cause must be reversed, we do not pass upon the question of its admissibility here; the cases cited indicating the rule to be applied upon another trial."

41—*South Omaha v. Burke*, 3 Neb. (unof.) 314, 94 N. W. 528.

§ 1638. **Street Includes Sidewalks.** The jury are instructed, that the streets of a city extend to and include that portion thereof occupied and used for sidewalks. In the grant by the legislature of control over the streets of the city, to the city authorities, control over the sidewalks passes to them as a part of the street, and this imposes upon the city authorities the duty of keeping the sidewalks in repair, as a part of the street.⁴²

§ 1639. **Essential Elements Necessary to Warrant Recovery for Defective Sidewalk.** You are instructed that before you can find for the plaintiff, you must find that the plaintiff has suffered injury, that the injury was caused by a defect in the sidewalk, that said defect left the sidewalk in an unreasonably dangerous condition, that the plaintiff did not contribute to the said injury by any negligence on his part, that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same.⁴³

§ 1640. **Person Traveling on Sidewalk or Street May Presume it is Reasonably Safe for Ordinary Travel.** (a) The court charges you that it is the duty of the city authorities to keep the streets in repair and to prohibit obstructions or defects therein, so far as this can be done in the exercise of reasonable care and prudence; and that any person traveling upon the sidewalk, when using the same with due diligence and care, has a right to presume and act upon the presumption that it is reasonably safe for ordinary travel, throughout its entire width, and free from all dangerous holes, obstructions and other defects. And if you believe from the evidence that the plaintiff, while passing along one of the sidewalks in said city of H., was injured as alleged in her complaint, and that the injury would not have happened to her if the said sidewalk had been in a reasonably good repair and safe condition, then the defendant is liable for such injury; provided the jury believe from the evidence that the plaintiff was exercising reasonable care and caution to avoid injury while passing over said sidewalk, and that said city did not use reasonable care to keep said sidewalk in safe condition.⁴⁴

(b) If the jury believe, from the evidence, that the plaintiff went upon the sidewalk in question for the purpose of traveling over the

42—City of B. v. Bay, 42 Ill. 503.

43—Lexington v. Fleharty, — Neb. —, 104 N. W. 1056 (1058).

"The complaint about this instruction is that it does not require the jury to find the facts stated from the evidence." It is conceded in the brief of counsel for defendant that this instruction sets out the essential facts that the jury

must find to entitle the plaintiff to recover. The jury were, however, properly instructed by other instructions as to the burden of proof, and the instruction in question is hardly susceptible of the construction placed upon it by counsel."

44—Huntington v. Burke, 21 Ind. App. 655, 52 N. E. 415 (418).

same, and while doing so was in the exercise of ordinary care for her own safety, then as a matter of law the court instructs the jury that the plaintiff, S., had a right to presume or suppose that the sidewalk was reasonably safe for the purpose of traveling, providing there is nothing in the evidence to show any knowledge on her part that the sidewalk was defective.⁴⁵

(c) The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city, which is in constant use by the public, has a right, when using the same with due diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes, obstructions or other defects.⁴⁶

(d) The court instructs the jury that it is the duty of the defendant, the city of B., to keep its public streets, sidewalks and street crossings in a reasonably safe condition and repair, for the safety of persons who have occasion to pass over the same.

(e) The court instructs the jury that a person passing over a sidewalk or street is not bound to exercise more than reasonable care and caution in respect to his own safety. Until he is charged with notice to the contrary he has a right to presume the same to be in a reasonably safe condition.

(f) The court instructs the jury that if you believe, from the evidence in this case, that the defendant is a municipal corporation, and as such, on the ———, and prior thereto, was possessed and had control of the street and walk mentioned in plaintiff's declaration herein, then it was the duty of the defendant to keep said street and walk in reasonably good and safe repair for the safety of passengers passing along and over the same; and if you believe, from the evidence in this case, that the defendant constructed and maintained in, upon and across a part of said street a ditch or conduit substantially as charged in the plaintiff's declaration, or some count thereof, and that the same was not constructed and maintained so as to be reasonably safe for foot-passenger who had occasion to

45—*Strehmann v. Chicago*, 93 Ill. App. 206 (208).

"We think the instruction correct and that it should have been given, and that its refusal was error. *City of East Dubuque v. Burhyte*, 173 Ill. 553 (558), 50 N. E. 1077. In *Turner v. Newburgh*, 109 N. Y. 301-305, 60 N. E. 344, the court say: 'When a street is thrown open for the public use, those who travel upon it have the right to assume that it is in a reasonably safe condition, and if without fault of their own or without knowledge of some existing obstruction they are injured while using the street, the city is liable unless the defect

which has caused the injury has existed for so short a time that the city officers by the exercise of reasonable care and supervision could not have known of it' In *Board of Commissioners v. Legg*, 110 Ind. 479-481, 11 N. E. 612, the court say: 'And it is well settled that a traveler upon a street or a county public highway without knowledge of defects in bridges forming parts thereof, and using proper diligence himself has a right to presume that they are in a safe condition and to act upon that presumption.'"

46—*Indianapolis v. Gaston*, 58 Ind. 224.

pass on and over the same, and that the plaintiff, while in the exercise of due care and caution on her part for her own safety, unavoidably fell into said ditch or conduit, and was thereby injured, and has sustained damages in consequence of such injury, then you should find the issues for the plaintiff, and assess her damages at whatever sum you may find, from the evidence in the case, she is entitled to.⁴⁷

(g) The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city or village, which is in constant use by the public, has a right, when using the same with due diligence and care, to presume and to act upon the presumption that it is reasonably safe for travel throughout its entire width, and free from all dangerous holes, obstructions and other defects.

(h) The court instructs the jury that a person is not bound to abandon a sidewalk and pass around along the street merely because he knows the sidewalk is defective.⁴⁸

(i) The court instructs the jury that a person passing over a sidewalk or street is not bound to exercise more than reasonable care and caution with respect to his own safety. Until he is charged with notice to the contrary, he has a right to presume the same to be in a reasonably safe condition.⁴⁹

§ 1641. **Necessity of Notice to City of Defect in Sidewalk.** (a) The court instructs the jury that the defendant city is liable only for such unsafe condition of its streets as it had actual notice of, or ought to have known of, by exercising what would be, under all the circumstances, ordinary and reasonable caution and diligence. If, therefore, the preponderance of the evidence fails to show that the

47—*Beardstown v. Smith*, 150 Ill. 169 (173-4), 37 N. E. 211.

"The chief objection urged to the first and last instructions, if we understand it, is, that they attempt to lay down the rule of diligence incumbent upon the city in keeping its 'streets' as distinguished from its 'sidewalks and street crossings,' in repair for the use of foot passengers. It is contended, upon the authority of the City of Aurora v. Hillman, 90 Ill. 61, and other like decisions, that a pedestrian has not an equal right with one who drives a carriage, to travel in and along the driveway of a public street, and that a city is not under any obligation to keep such driveway, longitudinally, in a fit and safe condition for pedestrians.

"We are not prepared to hold that the duty of a city to keep its street crossings in a reasonably safe condition for the use of foot passengers arises only when it sees

fit, in the exercise of its discretion, to construct an artificial crossing over the street. And much less are we disposed to hold that after a street crossing has been established, de facto, by public use, the city is at liberty, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves, with dangerous ditches and pit-falls. We are of the opinion that, under the facts which the evidence in the case tended to establish, the duty of the city to keep the crossing in question in a reasonably safe condition and repair for the use of pedestrians had arisen, and that there was no material error in the instructions by which that duty was sought to be declared and enforced."

48—*Village of Ava v. Greenawalt*, 73 Ill. App. 632 (634).

49—*Chicago v. Gillett*, 91 Ill. App. 287 (291).

defendant knew or ought to have known of the unsafe condition of said box, if you find it was unsafe, then your verdict should be for the defendant.⁵⁰

(b) If you believe from a preponderance of the evidence that the meter box referred to in the testimony was rotten and out of repair, and that it was by reason of such unsafe condition, an unsafe and dangerous place in said street, and rendered it dangerous to use said street, and walk immediately adjacent thereto, and if you further find that plaintiff, without fault on her part, fell into said meter box, then you will return a verdict for her, provided you further find that the defendant city knew, or by the exercise of ordinary care ought to have known, of said condition of said box long enough before said accident to have put it in good repair.⁵¹

(c) The court instructs the jury that it is wholly immaterial how long the board in question in this case may have been cracked, broken, or defective, provided such crack, break or defect was of such nature that it could not be detected or discovered by the village authorities by the use of ordinary care, caution and diligence.⁵²

(d) The jury are instructed that if you believe from the evidence that a defect existed in the sidewalk in question on the ——— day of ———, that as to what length of time would be required to justify the inference of the knowledge of such defect by the city of St. L. there is no fixed or definite rule, and each case must depend upon the facts and circumstances attending it. Thus, if the jury believe from the evidence that R street, at the point in question, was a street much traveled and in use, the duty of the city in looking after its condition required greater diligence in seeing that it was reasonably safe for travel than if it had been but little used. And in a much-traveled street, if a defect existed which the jury believe from the evidence was easily to be seen, the existence of such a defect for only a few hours might justify the jury in the inference of knowledge on the part of the city of such defect, or that by reasonable diligence it could have acquired such knowledge, in time to have repaired it before the accident. Much depends upon the surroundings, and what might be negligence in not knowing of a dangerous condition of a sidewalk at one locality in the city would not be at another, and the jury are to determine the fact of whether or not the negligence on

50—*South Omaha v. Meyers*, 3 Neb. (unof.) 699, 92 N. W. 743 (744).

51—Ibid.

52—*Powell v. Village of Bowen*, 92 Ill. App. 453 (454).

"It is difficult for us to see how a city could be held liable for an injury caused by latent defect if it had no actual notice of its existence, and where the authorities had used all ordinary and reasonable means to discover it. That

there is a distinction between latent and patent defects as far as the presumption of notice is concerned is recognized in the following authorities: *Shear. & Red. on the Law of Negligence*, vol. 2, p. 641; *Dewey v. Detroit*, 15 Mich. 312; *Wakeham v. St. Clair*, 91 Mich. 15, 51 N. W. 696; *Hubbell v. Yonkers*, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522."

the part of the city existed in this case, from the facts and circumstances they believe the evidence herein shows.⁵³

(e) The court further instructs the jury that to render a city liable for a defect in a sidewalk, the defect must be of such a character that the city authorities, by using ordinary care and diligence, could discover it. If you should find from the evidence in the case that the defect was of such a nature that the officials of the city could not have discovered it by using ordinary care and diligence, the defendant is not liable in damages, and your verdict should be for the defendant city.⁵⁴

(f) The jury are further instructed that, before the plaintiff can recover, he must prove to your satisfaction that the city of O. had actual notice of the existence of the obstruction complained of a sufficient length of time before the happening of the accident to have removed the same, or that the obstruction complained of had existed a sufficient length of time to become so notorious that you would be justified in believing that the city did know of the existence of this obstruction for a sufficient length of time to have removed the same before the happening of the accident.⁵⁵

(g) The court instructs the jury that, if they find from the evidence that on the ——— day of ———, C. street was a public street of K. C.; that on the said day there was a hole in the sidewalk on the east side of said street, between E. and N. streets, at a point about twenty-five feet north of N. street, which made said sidewalk not in a reasonably safe condition for persons traveling over it; that said hole was known to the officers of K. C. having supervision of its sidewalks, or could have been known to them if they had used ordinary care and diligence in the discharge of their duties, in time to have repaired the same before said day; that on said day plaintiff, while in the exercise of ordinary care, as defined in other instructions, was traveling over said sidewalk, and stepped into said hole, and was thereby thrown down and injured, then your verdict should be for the plaintiff.⁵⁶

(h) The statute under which this action was brought contemplates that the defendant must have notice of the defect complained of, or have knowledge of such defect, and a reasonable time and opportunity to put said sidewalk in proper condition for use, and has not used reasonable diligence therein after such knowledge or notice. Therefore, if the jury find that on or about the ——— day of ———, the sidewalk in question was placed in a condition reasonably safe

53—*Beauvais v. St. Louis*, 169 Sup. Mo. 500, 69 S. W. 1043 (1044).

"We think that instruction presents the law correctly. A defect might occur when and where the city would be required to be on the watch, and, if so, would be chargeable with notice of what it

would have known if it had been doing its duty."

54—*Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055 (1056).

55—*Elliott v. Kansas City*, 174 Mo. 554, 74 S. W. 617.

56—*Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445 (447).

and fit for public travel, and, subsequently, and prior to said accident, became defective for any cause, and unsafe and unfit for travel, and that there was no notice of nor knowledge by said city that said sidewalk had become unsafe and insecure, then I charge you, as a matter of law, that the plaintiff has failed to establish a case, and your verdict must be for the defendant.⁵⁷

(i) If the preponderance of the credible evidence in the case satisfies you that the plaintiff was free from any want of due care or attention that contributed to cause the injury, and further satisfies you that the city was guilty of negligence that was the proximate or near cause of the injury, and liable, through having notice through its proper officer or officers, and not repairing or removing the dangerous character of the walk after a reasonable time elapsed after such notice, then you will allow her such damages as will fully compensate her for her injury, including her suffering, mental and bodily pain, doctors' bills, nursing and loss of time, as shown by the evidence in the case.⁵⁸

§ 1642. When City Deemed to Have Had Constructive Notice of Defect in Sidewalk. (a) The court instructs the jury that the plaintiff is not bound to prove that any officer or agent of the defendant, ———, had actual notice of the condition of the sidewalk in question; but if you find, from the evidence, that said sidewalk was unsafe and defective, and that plaintiff was injured by reason of such unsafe and defective condition of said sidewalk, and that a sufficient length of time had elapsed between the time when said sidewalk became defective and the date of the injury to plaintiff, for the city, by the exercise of reasonable diligence, to have discovered and repaired the defect in said sidewalk, then the city was negligent in not discovering and repairing said sidewalk.⁵⁹

(b) If the walk where it is alleged plaintiff fell was not in a reasonably safe condition by reason of defective stringers and boards, and that such a condition had existed for such a length of time before the accident to plaintiff that the defendant by the exercise of reasonable diligence should have discovered the same, then defendant would have what is called "constructive notice" of such condition.⁶⁰

§ 1643. Effect of Knowledge of Municipal Authorities that Sidewalk Is Defective. The court instructs the jury that it is the duty of the defendant, the city of S., to exercise reasonable care and diligence to keep and maintain its sidewalks in a reasonably safe condition and repair for the use of the public in walking thereon; and if the jury believe, from the evidence, that the sidewalk at the time and place in question was out of repair and in a dangerous con-

57—Moon v. Ionia, 81 Mich. 635, 46 N. W. 25 (26).

58—Munger v. Waterloo, 83 Iowa 559, 49 N. W. 1028 (1029).

59—Perrette v. Kansas City, 162 Mo. 238, 62 S. W. Rep. 448.

60—Belken v. Iowa Falls, 162 Iowa 430, 98 N. W. 296 (297).

dition, and that the city authorities knew of such condition in time to have remedied it before the injury complained of, and did not do so; and if you further believe, from the evidence, that the plaintiff was injured by reason of such condition of the sidewalk, as charged in her declaration, and that she was herself on the occasion and at the time of such injury in the exercise of ordinary care and caution for her own safety, then the city would be liable, and in such case you will find the defendant guilty.⁶¹

§ 1644. In Populous Districts Whole Width of Sidewalk Should be Kept in Repair. (a) The court further instructs the jury that if you find, from the evidence, that the point where the plaintiff received his injury was a populous portion of the city, and where there was a large amount of public travel, it was the duty of the city to keep and maintain the sidewalk at that point, and the whole thereof, in a reasonably safe condition for public travel; and the public at such point had the right to the use of the whole of said sidewalk, and had the right to assume that the whole thereof was reasonably safe for public travel.

(b) The court further charges the jury that if you find from the evidence that the place where the plaintiff received his injury was a thickly settled portion of the city, then it was the duty of defendant city to keep and maintain the whole of its sidewalk, from the building front to the curbstone, in a reasonably safe condition for public travel; and it is no defense that there was ample room for pedestrians to travel along that portion of the walk covered with flagging.⁶²

§ 1645. Circumstances to be Taken Into Consideration in Determining Liability for Defective Walk. (a) The court instructs the jury that in determining whether the defendant was negligent in the maintenance and repair of the walk at the place where plaintiff was injured, and whether it had notice, the jury should consider the length of time the alleged sidewalk had been built, the material with which it had been constructed, the manner of its construction,

61—Springfield v. McCarthy, 79 Ill. App. 388 (390).

62—Denver v. Stein, 25 Colo. 125, 53 Pac. 283 (284).

"While there is conflict between the adjudicated cases upon the question as to whether a city is bound to keep in repair its suburban streets and sidewalks to their entire width, yet, upon principle it is clear, and by the weight of authority it seems to be settled, that with reference to sidewalks in populous portions of the city, and such as are constantly used by the public, it is duty is to use reasonable care in keeping them in repair, and free from defects,

throughout their entirety. Indianapolis v. Gaston, 58 Ind. 224; City Council v. Wright, 72 Ala. 411, 47 Am. Rep. 422; Bacon v. Boston, 3 Cush. 174; Stafford v. Oskaloosa, 64 Iowa 251, 20 N. W. 174; Chicago v. Robbins, 2 Black. 418; Goins v. Moberly, 127 Mo. 116, 29 S. W. 985; Monongahela v. Fischer, 111 Pa. St. 9, 2 Atl. 87. We think, therefore, these instructions correctly define the duty of defendant with reference to the sidewalk in question, it being undisputed that it is located in a populous portion of the city and was constantly used by the public by day and in the nighttime."

the nature of the alleged defect, whether or not it was apparent and readily observable, or whether it was such that it would not be noticeable unless a person stepped on the extreme edge of the walk, whether the alleged loose plank was replaced by persons other than the city officers, who noticed it out of place, so it could not be seen by defendant's officers, and all other facts and circumstances as shown by the evidence.⁶³

(b) The court further instructs the jury that if the city made such an inspection of the walk as ordinary care and prudence would require, and found it to be in good condition, or if not in good condition it then made it so, then the city would not be liable, but if at that time it failed to exercise the care it ought to have exercised to discover the defect, then the city would be liable. Again: If appellant exercised that care and prudence it ought to have exercised, if it made examination of the sidewalk from time to time as it ought to have examined it, bearing in mind the condition, age and character of the walk, and found no defects, or if it found defects and repaired the same, then the city would not be liable.⁶⁴

§ 1646. Effect of Failure to Construct Sidewalk According to Provisions of Ordinance. The court instructs the jury that the ordinances of the city of M., introduced in evidence by the plaintiff, providing for the kind and manner of construction of sidewalks in the district where the plaintiff was injured are introduced only for the purpose of tending to show admissions on the part of the city of the kind of sidewalks which ought to be constructed in said district at the place of the accident, but the city was not bound to construct sidewalks according to said ordinances; and the jury are instructed that no negligence can be imputed to or charged against said city merely from the fact that it may appear from the evidence that said sidewalk at the place of the accident was not of the kind or was not constructed according to such ordinances; but the fact, if it be the fact that said sidewalk was not constructed according to said ordinances may be considered in connection with all the other evidences in the case in determining whether in fact the defendant was negligent.⁶⁵

§ 1647. Effect of Sidewalk Becoming Insecure from Use or Breaks. The court instructs the jury that a sidewalk may have become insecure from use or breaks, or planks may have become loose or displaced by the action of the elements or by accident, so that persons are liable to stumble and fall; but this does not necessarily involve the city in liability, so long as the effect can be readily discovered and easily avoided by persons exercising due care, provided

63—*Spicer v. Webster City*, 118 Iowa 561, 92 N. W. 884 (885).

64—*Kennedy v. St. Cloud*, 90 Minn. 523, 97 N. W. 417 (418).

65—*Reed v. Mexico*, 120 Mo. App. 155, 76 S. W. 53 (54).

the defect be of such a nature as not of itself to be dangerous to persons so using the walk.⁶⁶

§ 1648. Injury through Stick Projecting over Sidewalk. The court instructs the jury that it is the duty of the defendant to use ordinary care in keeping its sidewalks in a reasonably safe condition for persons walking upon the same, and it is the duty of those walking upon the sidewalk to use ordinary care for their own safety; and if the jury believe from the evidence that the defendant, its agents, servants or employes, were guilty of negligence in leaving the stick over which the plaintiff stumbled, if she did stumble over same, projecting into the sidewalk, and that by reason of such negligence, if any, the plaintiff was injured, they should find for the plaintiff, unless they believe from the evidence that the plaintiff was guilty of negligence which so far contributed to her injuries that, but for the same, she would not have been injured, in which latter event they should find for the defendant.⁶⁷

§ 1649. Slippery Condition of Sidewalk Resulting from Ordinary Accumulation of Ice in Winter. The court instructs the jury that the slippery condition of a sidewalk, resulting from ordinary accumulation of ice in winter, is not an actionable defect if such accumulations are smooth; and, if you find in this case that the alleged injury of the plaintiff was due to such cause, you will answer the first issue "No," and not consider the other issues.⁶⁸

§ 1650. Injury to Child by Defective Sidewalk While Indulging in Pastime or Play. The court instructs the jury that if a child, while using the sidewalk in going from one place to another, incidentally indulges in some pastime or play, but is not thereby diverted from going straight to her destination, she is a traveler in the eye of the law, and that if respondent was using the walk in going directly from her home to a neighbor's, as she claims, and at the same time she was accompanied by children who were playing, but she did not

66—*Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. 415 (418).

67—*Louisville v. Bailey*, 81 Ky. 6, 74 S. W. 688.

"It is insisted that by the instruction the case was erroneously made to turn upon what the jury believed was negligence in the city leaving the stick projecting upon the sidewalk. This is true, and properly so, as the right of appellee to recover depended upon the question whether it was negligence to leave the stick at the place where found."

68—*Cresler v. Asheville*, 134 N. C. 311, 46 S. E. 738 (739).

The trial court gave the above instruction, but modified it after the word "winter," by adding the words "not from neglect of city."

The Supreme court said: "We think the modification was certainly misleading to the jury, and was therefore erroneous. The instructions, as ordinarily prayed for, simply meant that the law would not hold liable in damages a town or city for an injury caused through the slipping of a person on its sidewalk, on account of ice formed there at a season of the year when such formation of ice might be reasonably anticipated, and not through an unusual accumulation and after being allowed to remain there for an unreasonable length of time. Putting that interpretation upon the prayer for instruction, we think it ought to have been substantially given."

stop to play with them, or if she was engaged in any pastime incidentally, but was not thereby diverted from going straight to her destination, she was a traveler.⁶⁹

§ 1651. **Defective Plan of Public Improvement.** The jury are instructed, that a city cannot be made liable for injuries to persons or property which arise from a defective plan of a public improvement, although the city may be liable for want of reasonable care or skill in the execution of the work itself; and although the jury may believe, from the evidence, that the plan adopted by the city for draining the streets, was defective and unskillful, and likely to result in injury to, etc., still the city would not be liable for any injuries resulting from such defect or want of skill in the plan adopted, provided the city was not guilty of negligence or want of reasonable care and skill in doing the work necessary to carry out the plan.⁷⁰

§ 1652. **Injury to Adjoining Property—Changing Grade.** (a) The jury are instructed that a municipal corporation, while acting within the scope of its authority, in making excavations in a street, for the purpose of opening it or improving it, if using reasonable care and skill in performing the work, is not liable to a lot owner for an injury resulting therefrom to his lot or the buildings thereon.⁷¹

(b) The jury are instructed, that while the corporate authorities of cities are vested with power to grade their streets, yet the mode in which the power is to be exercised, in reference to the rights of others in the enjoyment of their property, is limited in the same way and to the same extent as the power of a private person in the use of his property, and if the authorities of a city in altering or changing the grade of the streets, do not do the work in good faith and with reasonable care and skill, to avoid damaging the adjoining property owners, the city will be liable to such owners for all damage directly resulting therefrom.⁷²

§ 1653. **Liable for Want of Reasonable Care Only.** (a) The jury are instructed, that a city has full control over the grades of its streets, and may lower or elevate them at will, and the owner of lots adjacent to the street cannot call it to account for error in judgment, in fixing the grade, nor recover damages for inconvenience or expense incurred in adjusting their premises to the grade of the street, provided, the city authorities exercise reasonable care and skill in the performance of this work.

(b) That the authorities of a city have a right to alter the grades

69—Collins v. Janesville, 111 Wis. 348, 87 N. W. 241 (243).

70—Lansing v. Toolan, 37 Mich. 152; Detroit v. Beckman, 34 Mich. 125; Darling v. Bangor, 63 Me. 108; Dever v. Capelli, 4 Col. 25.

71—Quincy v. Jones, 76 Ill. 231; Pontiac v. Carter, 32 Mich. 164; Wegmann v. Jefferson, 61 Mo. 55.

72—Callender v. Marsh, 1 Pick. 418; Radcliff's Executors v. Mayor, etc., 4 Comst. 195; Delphi v. Evans, 36 Ind. 90; Reading v. Kephleman, 61 Penn. St. 233; Hendershott v. Ottumwa, 46 Iowa 658; Mayor, etc., v. Hill, 58 Ga. 595; Bloomington v. Brokaw, 77 Ill. 195.

of the streets at their discretion, and if this is done with reasonable care and skill, no liability arises from their acts. Neither courts nor juries can inquire whether the grade adopted is the best one or not, and, in this case, the only question for the jury is whether, in doing the work in question, the city officers acted in good faith, and with reasonable care and skill to avoid damage to the plaintiff's property.⁷³

(c) Contra: The jury are instructed, that the owner of a lot abutting on an unimproved street, or where no grade has been established by the city authorities, erecting a building thereon, assumes the risk of all damage which may result from the city subsequently establishing a grade, and improving the street to conform to such grade. The liability of the city for injuries to a building abutting on a street by the grading of the street, only exists when the building was erected.

(d) If the jury believe, from the evidence, that the city, in improving (Main street) in said city, fixed the grade and caused to be constructed sewers and drains in said street, to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading, and that, on or about, etc., there came a rain and said sewers or drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of the plaintiff's building, and the plaintiff thereby damaged, then the jury should find for the plaintiff to the amount which the proof shows such damage to be.

(e) The jury are instructed, that the city of ——— has control of all streets and sidewalks in said city; and if the jury believe, from the evidence, that the sidewalk or street, in front of plaintiff's premises, pitched toward his lot, and was permitted so to be constructed by said city, or was permitted by said city so to remain after being so built by others, after a reasonable time in which to have changed it, then the city cannot shield itself from liability for flooding plaintiff's premises, if the evidence shows they were so flooded, on account of the pitch of said street or sidewalk.⁷⁴

(f) If the jury believe, from the evidence, that the city authorities before the erection of the building in question, had so improved and appropriated the street to public use as to fairly and reasonably indicate to the public that the grade of the street had been permanently fixed and that no change therein would be made, and that the plaintiff or his grantor, relying on such corporate acts as a final decision as to the wants of the public regarding the grade of such streets, erected the building in conformity to such grade, then, if the

73—Lee v. Minneapolis, 22 Minn. 13; Detroit v. Beckman, 34 Mich. 125; Cheever v. Ladd, 13 Blatchf.

258; Tate v. Mo., etc., Rd. Co., 64 Mo. 149.

74—These instructions approved in Aurora v. Gillet, 56 Ill. 132.

jury further believe, from the evidence, that by the recent improvement and change of grade of said street the plaintiff's building and other improvements connected therewith have been injured and the plaintiff thereby damaged, then the defendant is liable therefor.⁷⁵

§ 1654. Changing Watercourses. (a) The court instructs the jury, that if a city, in exercising its power of changing the grade of its streets, fails to exercise reasonable prudence and skill, it will be liable for all damages that result from such failure.

(b) And if a city, in fixing the grade of a street, or in afterwards changing it, flows water upon a lot that it did not naturally carry off, the city will be liable for damages, if any are caused thereby.⁷⁶

(c) The court further instructs the jury, that a city has no more power over its streets than a private person has over his own land. A city has no right to turn surface water onto private property, and if a city, in fixing the grade of a street, turns a stream of water and mud onto the ground or into the cellar of a citizen, or creates in his neighborhood a stagnant pool, likely to generate disease, the city will be liable in damages, the same as an individual would for doing the same thing.⁷⁷

§ 1655. Liability for Overflowing Contiguous Property in Laying Out of Streets. (a) The court instructs the jury that an incorporated city has full authority and control over the laying out and constructing of its streets, and is not responsible for damages for contiguous property being overflowed, unless said city was guilty of negligence in constructing or in the maintaining of said street; and if you should find, from the evidence, that none of the injuries complained of by plaintiff was caused by any negligence of said city of McK——, then, in that event, you should find for said defendant, the city of McK——.

(b) If you should find and believe, from a preponderance of the evidence, that the defendant railroad had put in and near said intersection of said —— street a culvert, and that said culvert was negligently constructed, so that same was wholly insufficient to carry off the water, filth and refuse matter that would naturally flow to said culvert, and that said company negligently permitted said culvert to become choked and filled up, and thereby directly causing said water, filth and slime to back up and stand on plaintiff's premises, and thereby directly causing the injury complained of by plaintiff, and that said injury was not in any way directly contributed to by any negligence on the part of its codefendant, the city of McK——, then you should find in favor of the plaintiff against said defendant railroad company alone.⁷⁸

75—Cincinnati v. Penny, 21 Ohio St. 499; Mayer, etc., v. Nichol, 59 Tenn. 338; Elgin v. Eaton, 83 Ill. 536; French v. Milwaukee, 49 Wis. 584; Dore v. Milwaukee, 42 Wis. 108.

76—Ashley v. Fort Huron, 35 Mich. 296; Bloomington v. Brokaw, 77 Ill. 194; Kobs v. Minneapolis, 22 Minn. 159.

77—Aurora v. Reed, 57 Ill. 29.

78—Taylor v. Houston & T. C.

§ 1656. **Liability for Injuries through Body of Water Both on Street and Adjacent Private Property.** If you find, from the evidence in the case, and by a preponderance thereof, that because of the negligence of the city in not providing suitable escapes for the water ordinarily flowing down the ravine and creek, or either, said water was allowed and permitted to accumulate at the point where said accident occurred, and also upon ——— street, making said ——— street unsafe for children to be upon said street, then the fact, if it be a fact, that said accumulation of water extended also upon property not in said street, would not be material; and it would not be material whether said ——— was in fact drowned in the water in the street, or on property adjacent to said street, providing the water in the street and on the adjacent property where such drowning may have occurred constituted one body of water, and providing such drowning was caused by the negligence of the city, as hereinbefore explained.⁷⁹

§ 1657. **Liability for Damage to Contiguous Property by Leak in Water Main.** (a) The court instructs the jury that if they find from the evidence, that the flooding of plaintiffs' premises and the damage to their building and personal property was caused by a leak in a public water main laid by the city of St. L. in one of its public streets, and that such leak was directly caused by the negligent and unskillful laying of said pipe by the persons in charge of said work, or the failure on the part of the officers of defendant to exercise ordinary care or prudence in keeping the same in a safe condition, then their findings must be for the plaintiffs.

(b) If the jury find for the plaintiffs, then they will assess to them the difference in value of the building as it stood before the injury and its value as the jury shall find the same to have been after said injury, less the actual value of any improvements or repairs made thereon by the defendant city. And the court further instructs the jury that, if they find for the plaintiffs under other instructions

R. R. Co. et al., — Tex. Civ. App. —, 80 S. W. 260 (261).

"As stated by Mr. Dillon (2 Dill. Mun. Corp. 4th Ed. p. 1335): 'There is a municipal liability where the property of private persons is flooded either directly by water or sewage being set back, when it is the result of a negligent execution of a plan adopted for the construction of gutters, drains, culverts or sewers, or the negligent failure to keep the same in repair and free from obstructions.' The cases support this proposition with great unanimity. Consequently there was no error in the charge as alleged."

79—Omaha v. Richards, 49 Neb. 244, 68 N. W. 528 (530).

"The part of the above instruction criticised is the statement

therein that 'it would not be material whether said ——— was in fact drowned in the water on the street, or on the property adjacent to said street.' This language correctly stated the rule of liability as applicable to the case made by the proofs, according to the authorities. It would have been different if the pond had been entirely upon private property, and not in close proximity to a street. In such case there would be no liability upon the city, since it would have been guilty of no breach of duty. It is undisputed that this pond of water extended into the street, and the city cannot escape liability merely because the drowning occurred upon the adjacent premises."

given, they should include in their finding such damage, if any, as they find to have been directly caused by reason of the bursting of the water pipe in question to any articles of personal property belonging to both plaintiffs together, as well as the reasonable expense of removing the same to a place of safety; and such expense, by way of rental, as you may find the plaintiffs were compelled to pay for quarters elsewhere until the delivery of possession of the plaintiffs' building by the defendant city.⁸⁰

§ 1658. Liability for Flow of Surface Water Where No System of Drainage Exists. The court instructs the jury that if the damage to the plaintiff's land was caused by the flow of surface water, and the jury find there is no system of drainage in the town of C., then the plaintiff cannot recover. That the construction of a wide gutter along W. street and S. street to carry off the surface water that may come into said streets from adjoining land and streets does not constitute a system of sewers or drainage.⁸¹

§ 1659. Liability for Flow of Surface Water Due to Street Railway Lawfully Operated on Highway. (a) The court instructs the jury that if the street railway was duly established by law, with a rightful location, and a right to operate as a street railway in the highways of said town, the fact that the railway so constructed caused surface water to flow back upon and into the plaintiff's land would not make the defendant liable for such injury.

(b) If the location of the railway was by law authorized, and it was operated and maintained in a proper condition, then it was lawfully in the highway, and the town would have no right to remove it, and cannot be held liable for damage to the plaintiff's land by turning upon it the surface water from the street.⁸²

§ 1660. Liability for Loss from Flow of Surface Water Occasioned by Act of God. (a) The jury are instructed that by the term "Act of God" is meant those events and accidents which proceed from natural causes and cannot be anticipated and guarded against or resisted, such as unprecedented storms or freshets, lightning, earthquake and so forth. For loss occasioned by an "Act of God" a city is not liable, provided its own negligence has not contributed to the damages sustained. On this defense, however, the city assumes the burden of proof to the extent that it must prove by a preponderance of evidence that the storm was of such a violent and unprecedented nature that no ordinary and reasonable amount of care would have prevented the damage. Therefore if the plaintiff has established by a preponderance of the evidence that the defendant was guilty of negligence then the burden of the proof is upon the defendant city to prove by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by plaintiff without the concurrence of such negligence; for if the negligence of

80—*Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932. ton, 182 Mass. 220, 65 N. E. 42 (43).

82—*Hewett v. Inhabitants of Can-*

81—*Hewitt v. Inhabitants of Can-* ton, *supra*.

the city contributed to plaintiff's damage the city is liable. The question for you to determine in this case is simply: Did the allowing of the drain, ditches, culverts, and embankments to become and remain in the condition in which they were at the time of the storm cause or contribute to the plaintiff's damages? If it did not, and the rain storm was of such violence that the plaintiff would have been damaged to the same extent even with such drainage in the condition it was in when established and constructed, then your verdict must be for the defendant.⁸³

§ 1661. Duty of City as to Water Plugs Placed in Streets. When the system of waterworks is used in the city, the officers of the city have a right, and it is their duty, to construct and place the water plugs in such positions in the street as, in their judgment, may be necessary for the protection of the property in case of fire; but, in constructing and placing such hydrants or plugs, it is the duty of the city to place and locate them in such a manner, and to exercise such care and prudence in the placing thereof, as not to endanger persons who might be passing along the street in the ordinary modes of travel,

83—*McCook v. McAdams*, — Neb. —, 106 N. W. 988 (1898-990).

"The defendant complains of these instructions and construes them to mean that although the plaintiff's negligence proximately contributed to the injury the defendant would still be liable. We do not think they admit of that construction in view of the evidence and the theory upon which the case was submitted by the court. The contributory negligence charged is that the plaintiff's store building was situated in a place where large quantities of surface water would naturally accumulate, that it was constructed without proper barriers to guard against surface water and that the loss complained of was due to such omission, and plaintiff's own negligence. The only evidence we find that tends even remotely to sustain this charge is that the water at the time of the storm broke down the area wall in front of the store building, flooded the basement and damaged plaintiff's goods and the testimony of one witness who appears to have known nothing of the character of the wall or its condition, who as an expert testified as to the character of a wall required under circumstances not shown to be similar to those in which the wall in question was constructed and maintained. Assuming that contributory negligence is charged, the evidence is wholly insufficient

to warrant the submission of that issue to the jury. The trial court evidently held that view, because the question of contributory negligence was not submitted, nor do we find, among numerous instructions tendered by the defendant, any request for the submission of that question.

"The instructions in question, then, are to be construed in the light of the fact that the element of contributory negligence is eliminated from the case, and with that fact in mind, it is plain that in these the court was dealing only with the defendant's theory that the loss was occasioned by the act of God. Taken together, and in connection with other instructions defining negligence and the defendant's duty in the premises, the effect of these two instructions was to convey to the jury that if the plaintiff's loss was occasioned by the act of God, the defendant was not liable, unless its negligence, co-operating with the act of God, contributed to the injury and increased the damages. Thus construed, the instructions state the law as favorably to the defendant as the authorities would warrant. *Collier v. Valentine*, 11 Mo. 299, 49 Am. Dec. 81; *New B. Steamboat, etc., Co. v. Tiers*, 24 N. J. Law 697, 64 Am. Dec. 404; *Baltimore, etc., R. Co. v. Sulphur Springs Ind. School Dist.*, 96 Pa. 65, 24 Am. Rep. 529."

either by the day or night time, and to adopt such precautions as to point out the dangers, so as to enable persons who are passing or using the streets, by the exercise of ordinary care and prudence, to avoid the danger. If the city neglected to do so in this case, and injury resulted to the plaintiff therefrom, then the city would be liable to him in whatever damages he might have sustained by reason thereof. If the jury believed from the evidence that the fire hydrant or plug had been located or placed on the streets by direction of the city authorities, as alleged by plaintiff, then it was the duty of the city to see that the hydrant or plug was so placed as not to endanger persons passing along the streets in the ordinary mode of travel, either in day or night time. If a person traveling along the street or highway intentionally or carelessly and unnecessarily leave the traveled route, and is injured by an obstruction in the street or highway, entirely outside of the traveled route, then the city would not be liable for the injury; but if the obstruction is so near the traveled route that the traveler, in the exercise of ordinary care, should accidentally and unintentionally deviate slightly from the traveled route, and be injured thereby, and by such obstruction, without fault on his part, then the city will still be liable for such injury, although the obstruction was necessary for fire purposes, as in this case.⁸⁴

§ 1662. **Sewer out of Repair.** The jury are instructed, as a matter of law, that the city is under no legal obligation to construct drains or sewers in any particular portion of the city, but, if it does build drains or sewers for corporate purposes, it is bound to exercise reasonable care and oversight over them to keep them unobstructed and in repair, so that adjoining property owners shall not be unnecessarily injured thereby. And in this case, if the jury believe, from the evidence, that the city either built the sewer in question or has adopted and controlled it as a part of the general sewerage of the city, then the city was bound to use all reasonable and ordinary care and supervision over it to keep it in such a state of repair as that it should do no unnecessary injury to plaintiff's property; and if you further believe, from the evidence, that the city authorities did not exercise reasonable and ordinary care and supervision over the said drain or sewer to keep it in repair, but carelessly and negligently permitted it to become choked up and out of repair, and that plaintiff's property has been damaged thereby, as charged in his complaint, then the city is liable for such damages, and the jury should find for the plaintiff, provided you further find, from the evidence, that he was guilty of no fault or negligence which contributed to such injury.⁸⁵

§ 1663. **County Only Required to Provide Bridge Which Will Properly Accommodate Public at Large.** The court instructs the jury that in maintaining a bridge for public use the county is not

⁸⁴—*Columbus v. Sims*, 94 Ga. 483,
20 S. E. 332 (333).

⁸⁵—*South Bend v. Paxon*, 67 Ind.
228.

limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unreasonably heavy loads, but it is only required to provide what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which the deceased J. E. N. drove on the bridge in question was an extraordinary or unreasonably heavy load is a question for you to determine from the evidence before you.⁸⁶

§ 1664. **Duty of County Commissioners to Construct Bridges in a Workmanlike Manner.** (a) It is the duty of defendant, in constructing bridges across streams, to build them in a workmanlike and proper manner, having due regard for the safety of persons traveling over them, and to maintain them in a safe condition.

(b) If you believe from the evidence that the defendant did construct this bridge since ———, 18—, and did so build it in a workmanlike manner, and that it was in a reasonably safe condition for travelers to pass over it without danger, then you would be authorized to find for the defendant.

(c) The law puts upon the county commissioners the duty of constructing bridges on the public highways across streams in a reasonably safe and workmanlike manner.

(d) It was the duty of the defendant, in constructing the bridge, to do so in a workmanlike manner and so maintain it that persons might drive over it in safety; and if necessary to make it ordinarily safe, to put up guard rails, then it was the duty of defendant to put up such guard rails.⁸⁷

86—Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756 (758).

'The contention is that it was error for the court to leave the question as to whether or not the load was unreasonable or an extraordinary one to the jury because it is claimed the bridge should have been built in anticipation of just such a load. The instruction in question seems to have been taken from the case of Anderson v. St. Cloud, 79 Minn. 88, 81 N. W. 746. The rule laid down in that case is as follows: 'In maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where it is situated.' In the case of Yordy v. Marshall Co., 80 Iowa 405, 45 N. W. 1042, a case similar to the one at bar, the court held that 'In an action against a county

for an injury to plaintiff's team and threshing outfit, caused by the breaking of a bridge while attempting to drive across it, it is for the jury to determine whether the use which plaintiff was making of the bridge was unusual and extraordinary, and such as the county was not bound to anticipate, and it is error for the court to decide this question and to direct a verdict in the county's favor.' This being the rule, it follows that an instruction taking that question from the jury, by stating as a matter of law that the load was not an unusual or extraordinary one would have been erroneous. This was one of the questions which the court was bound to submit to the jury, and the instruction in question under which it was submitted states the law as laid down by a majority of the cases, and is supported by the greatest number and the best considered decisions."

87—Bibb County v. Ham, 110 Ga. 340, 35 S. E. 656 (657).

§ 1665. Defective Condition of Bridge Must Be Proximate Cause of Injury to Horse. The court instructs the jury that if you find that the backing of the horse was not occasioned by the defective condition of the bridge or apron, then it would make no difference whether the railing was sufficiently strong or not, because in that case the defendant's negligence would not be the proximate cause of the injury.⁸⁸

§ 1666. Effect of Knowledge of Traveler that Bridge Is in Unsafe Condition. If you find from the evidence that the bridge in question was in an unsafe condition, and if you further find that the deceased J. E. N. knew of such unsafe condition or had reason to know that the stringers on said bridge were cracked or broken by a previous strain, then you are instructed that the deceased would be negligent in not examining said bridge before he drove upon it.⁸⁹

§ 1667. Contributory Negligence in General—Negligence, Contributory Negligence and Ordinary Care Defined. (a) If the jury believe from the evidence that there was a slight want of ordinary care, which contributed to the injuries complained of, the plaintiff cannot recover, unless the jury further find the negligence on the part of defendant was so gross as to justify the jury in finding that the alleged injury was caused by defendant or its servants. Although there may have been slight negligence and slight want of ordinary care on the part of plaintiff, he is entitled to recover in this case if injured, as alleged, by the negligence and want of ordinary care of defendant, and could not, by the exercise of ordinary care and prudence, have avoided the consequence of defendant's negligence and want of ordinary care.⁹⁰

(b) The court instructs you, that if, after considering all the evidence, you should believe the defendant's servants in charge of the street in controversy failed to exercise ordinary care in keeping its sidewalks on that street in safe condition, yet if you also believe, from the evidence, that plaintiff at the time of the injury failed to exercise ordinary care for her own safety to prevent or to avoid the in-

"The objections were directed principally at the use of the word 'workmanlike.' We think that a positive and unqualified charge that the county was bound to construct and maintain the bridge in a workmanlike manner, would probably have been error, but in the present case the error, if any, was cured by the context and the remainder of the charge on this subject. The word 'workmanlike' was used in such connection as clearly to show that the judge meant by it to impose upon the county no higher degree of care or diligence than does the law. Even if the words 'workmanlike manner' would, without modification,

have meant more than a manner suitable for the uses intended, they were so qualified and explained by the other expressions used that we think the jury could not have misunderstood the court's meaning."

88—*St. Clair Min. Spr. Co. v. St. Clair*, 96 Mich. 463, 56 N. W. 13 (19).

"The law was correctly stated in the above portion of the court's instructions. *Beall v. Township of Athens*, 81 Mich. 536, 45 N. W. Rep. 1014."

89—*Seyfer v. Otoe County*, 66 Neb. 566, 92 N. W. 756 (758).

90—*Village of Orleans v. Perry*, 24 Neb. 831, 40 N. W. 417 (419).

jury complained of, then there can be no recovery by the plaintiff in this case, and the jury should find the defendant not guilty.⁹¹

(c) By "negligence" is meant in these instructions the failure to observe ordinary care. By "ordinary care" is meant a failure to observe such care and prudence as persons of ordinary care usually exercise under the same or similar circumstances. By "contributory negligence" is meant the failure on the part of the plaintiff to use ordinary care for his own safety, and by reason of which he helped to cause or bring about the injuries complained of, and, but for such contributory negligence, at the time and place complained of unless, by the exercise of ordinary care on his part, he could have seen the obstructions or materials in connection with which he was injured, before striking the same, in time to have avoided the injuries complained of. Unless the plaintiff knew the obstructions were in the street, or unless they were marked by some light as hereinbefore defined, the plaintiff, in traveling the street, was compelled to use only such care as persons of ordinary care would use, presuming the street to be safe under the same or similar circumstances.⁹²

(d) The court instructs the jury that it is incumbent upon the people who are crossing the streets and sidewalks of South Omaha to use ordinary care to protect themselves from injury and accident liable to occur because of streets or sidewalks being unsafe for public use, and if they fail to do so they will be guilty of contributory negligence which will prevent a recovery of damages. If you find from a preponderance of the evidence that plaintiff did not exercise ordinary and reasonable care in stepping on said meter box or the ground next to it, as you may find the fact to be, then your verdict must be for the defendant, even though you find that the defendant was negligent.⁹³

You are instructed that the only care and caution required by the plaintiff in using the crossing in controversy, was such conduct and care and caution for her own personal safety as a reasonably prudent and cautious person would have exercised under the same condition and circumstances.⁹⁴

§ 1668. Circumstances to Be Considered on Question of Contributory Negligence. (a) The jury are instructed that the plaintiff was

91—Chicago v. McLean, 133 Ill. 148 (154), 24 N. E. 527, 8 L. R. A. 765.

"What particular facts amounted to an exercise of ordinary care, or what particular facts amounted to a want of ordinary care, it was for the jury, not for the court to determine. Wabash R. R. Co. v. Elliott, 98 Ill. 481."

92—Louisville v. Keher, 25 Ky. Law 2003, 79 S. W. 270 (273).

"This instruction properly defined contributory negligence, for, as the plaintiff did not know of the obstruction of the street, unless he

might by ordinary care have discovered it in time to have avoided the injury, he might recover; and he had a right, in the absence of anything indicating the contrary, to assume that the street was safe, or reasonably so. Glasgow v. Gilenwaters, 23 Ky. Law 2375, 67 S. W. 381; Pettengill v. Yonkers, 116 N. Y. 564, 22 N. E. 1095, 15 Am. St. 442."

93—So. Omaha v. Meyers, 3 Neb. (unof.) 699, 92 N. W. 743 (745).

94—Town of Normal v. Bright, 223 Ill. 99 (103), 79 N. E. 90.

bound only to use such care and caution as a person of ordinary prudence would use under like circumstances.

(b) In considering the question of contributory negligence, the jury are to take into consideration the time of the day when the injury occurred, the darkness of the night, the fact that snow had recently fallen, and the ease or difficulty of seeing the obstruction with the lights as then located; also the fact that no guards or signals of any kind were placed near the obstruction.

(c) In considering the question of negligence on the part of the plaintiff, the jury might consider plaintiff's condition on that night, his horsemanship or ability to drive his horse, the fact that he had passed along the street frequently, both night and day, and the probability of his being able to see the obstruction, if it were possible for a person using ordinary care and prudence then and there to see it.

(d) The court instructs the jury that plaintiff had the right to assume that she could use the sidewalk on which she alleges she was walking when she fell, with safety, using such care as an ordinarily prudent person would exercise under like circumstances, and, though she may have known the sidewalk was defective, yet this fact would not prevent her from recovering in this action, but should be taken into consideration by the jury with other facts and circumstances in evidence as to whether she was exercising ordinary care as above defined.⁹⁵

§ 1669. Contributory Negligence—Falling into Hole in Sidewalk.

(a) If you are of the opinion that the city is responsible by reason of having allowed that hole to remain there for so great a length of time without causing it to be filled up and the defect removed, the next inquiry is whether the plaintiff herself was guilty of negligence or carelessness, because where there is carelessness on both sides we do not measure the degree of carelessness, but we set off one against the other, and say that neither party can recover.

(b) If you are of the opinion that the plaintiff was walking along carelessly and heedlessly not giving due attention to her safety, and carelessly and heedlessly walked into this hole, and the fall was her own fault, then, no matter how bad her injuries may be, she would have no claim against the city. In that case her injuries would be as much chargeable to her own fault as to the fault of the city. Damages are not given in cases of this kind simply because a person is injured. Damages are not given because we sympathize with the person injured. They are given because the injury is caused by the negligence of the party sued, without any negligence on the part of the party suing.

(c) If you are of the opinion that this lady was also careless, and that she heedlessly and carelessly walked into this hole, she is not

⁹⁵—Above instructions approved, *Omaha v. Ayer*, 32 Neb. 375, 40 N. W. 445 (447).

entitled to recover, and in that case she ought not to have a verdict. If, however, you are of the opinion that she was not careless,—that she was walking along the city's sidewalk,—in that case you may give her damages which will compensate her for the injury which she has sustained, any expenses to which she has been put, any loss of earning power you think she has sustained, and for any pain and suffering she has undergone, or is likely to undergo in the future. She says that at the time she was walking on the street a number of people were passing. You will consider that, in determining whether or not she was looking ahead, and whether she was exercising due care.

(d) If, in your opinion, she was exercising due care, and her injury was caused by the negligence of the city in permitting the hole to remain in the sidewalk for an undue length of time, then you will give her damages which will compensate her for the pain and suffering she has undergone, the expenses to which she has been put, and any loss of earning power which she may have sustained by reason of this accident. If, however, you believe that she was not as careful as she should have been under the circumstances, had she been exercising reasonable and due care that is expected of people walking along the streets of the city, and that the fall was her fault, as well as that of the city, in that case your verdict should be for the defendant.⁹⁶

§ 1670. Contributory Negligence—Absent-Minded Driving. (a) If the jury find from the evidence that the plaintiff, knowing of the obstruction, was driving along the street in a careless, inattentive or absent-minded manner, and by reason thereof drove against or upon the obstruction, then the plaintiff was guilty of contributory negligence, and the plaintiff cannot recover damages in this suit.

(b) The court instructs you that before the plaintiff can recover, you must be satisfied from the evidence that he was free from any negligence on his part which contributed directly to the alleged injury, and if, from all the evidence, you believe that the plaintiff's negligence contributed to the happening of the accident and the causing of the alleged injury, then he cannot recover.

(c) In deciding upon the question of the plaintiff's negligence, the jury are to consider the length of time that the plaintiff had personally known that the obstruction existed in the street, and you are also to take into consideration the number of times plaintiff had driven along the street by and around this obstruction, and how familiar he was with the street, and that locality, and the other circumstances surrounding the case; and if, from all the circumstances, you are of the opinion that, by the use of ordinary care, he could and would have avoided this obstruction, then you would be justified in finding that he was guilty of negligence contributing to the injury, and in such case the plaintiff cannot recover.

(d) The jury are instructed that if the plaintiff had actual knowledge of the existence of the obstruction complained of, and had driven by the same many times, and if, from all the evidence, you believe that, through inattention on his part to the condition of the street, or through carelessness in not watching where he was driving he drove against or upon the obstruction, then he was guilty of contributory negligence, and cannot recover.

(e) The jury are instructed that if, from all the evidence, you believe that the plaintiff knew of this obstruction, and had driven by it many times, and if you find from the evidence that there was abundant room in the street which was free from obstruction so that, by the use of ordinary care and diligence, he could have driven around the obstruction with safety, then you are instructed that it was the duty of the plaintiff to have avoided the obstruction, and, if he failed to avoid it by mere lack of attention or want of care on his part, then he was guilty of contributory negligence, and cannot recover.⁹⁷

§ 1671. Effect of Knowledge on Part of Person Using Sidewalk That It Is Defective. (a) The court instructs the jury that it is the general duty of the city to keep its sidewalks in a reasonably safe condition for use. If you find that the plaintiff knew that the walk in front of the M. property (the walk in question) on W. street had planks out in places, had rotten stringers, and was shaky, or was in any other way defective, the plaintiff might yet use the walk, provided she did so with care and caution, rendered reasonably necessary by her knowledge of such defects. If, while so using such walk, one side of a board was suddenly raised by her companion stepping on the other end, so that she fell and was injured, and was then exercising due care in view of her knowledge of all defects, and that the defendant knew of the defective condition of the walk, your finding should be for the plaintiff.⁹⁸

(b) You are instructed that ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding him at the time. If you should find from the evidence that at the time and prior thereto plaintiff knew of the defective and dangerous sidewalk and where it was located, he was required to use more care than if he had not such knowledge, and if he neglected to do so and such neglect contributed to the injury he cannot recover; but if he did use more than he would be required to do in case he had

97—Above approved, *Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445 (447).

98—*Huntingburg v. First*, 26 Ind. App. 66, 53 N. E. 246 (248).

"We think it cannot be said that this instruction leaves plaintiff's conduct to conjecture. The expression 'plaintiff might yet use the walk, provided she did so with care and caution, rendered reasonably necessary by her knowledge of

such defects,' is equivalent to informing the jury that appellee was required in passing over the walk known by her to be defective to exercise a care proportioned to the known danger to avoid injury. Nor do we think the instruction erroneous because it did not state what facts might constitute contributory negligence."

no such knowledge and was injured by reason of defendant's neglect, and no fault of plaintiff contributed to the injury, you should find for the plaintiff.⁹⁹

(c) The jury are instructed that a person has no right to knowingly expose himself to danger, and then recover damages for injuries he might have avoided by the use of reasonable precaution; and if the jury believe, from the evidence, that the plaintiff, before and at the time of the alleged injury, knew of the defect in the sidewalk, and in going to his house on the night of the alleged injury could have taken another and safe route, of equal, or nearly equal, distance, then the jury have a right to consider his failure to take such other route, if such there was, into consideration in determining whether the plaintiff was, at the time of the injury, exercising due care and caution for his own safety.¹⁰⁰

(d) Upon this branch of the case, you are further instructed that, if you find, from the evidence, that the defendant was negligent in permitting the sidewalk to remain in the condition in which you find it was at the time the plaintiff fell, and that said walk was at said time in a dangerous and unsafe condition for travel, and you further find, from the evidence, that the plaintiff, at the time he attempted to pass over the walk, well knew this fact, and that it was imprudent for him to attempt to pass over it at the time he did attempt to pass over it for any reason, and with this knowledge he still persisted in passing over it, although there was another walk which he might have taken going in the direction which he desired to go, then his own negligence contributed to his injury, and he cannot recover. That is, if you find, from the evidence, that the plaintiff knew at the time he attempted to pass over the walk of the negligence of the defendant, and that the walk was in a dangerous and unsafe condition, and that it was imprudent for him to attempt to pass over it in company with B. as the evidence shows he did attempt to pass over it, and yet, notwithstanding this fact, and the knowledge he had concerning the danger, he did attempt to pass over it, and was injured in so doing, and you find that there was another walk which he might have taken going in the direction he desired to go, which was perfectly safe for travel, then he was negligent in so attempting to pass over such walk and cannot recover.¹

99—*Lexington v. Fleharty*, — Neb. —, 104 N. W. 1056 (1908).

"It is contended that this instruction is erroneous because, under the evidence in the case, the jury should have been instructed that the burden of proof was on the plaintiff to establish the fact that he by his own act did not contribute to the injury. Such is not the law."

100—*Town of Elkhart v. Ritter*, 66 Ind. 136.

1—*Barnes v. Town of Marcus*, 96 Iowa 675, 65 N. W. 984 (1905).

"The instruction seems to be modeled upon, if not copied from, one approved by this court in the case of *Kendall v. Albia*, 73 Iowa 241, 34 N. W. 833. It also finds support in the following: *Parkhill v. Town of Brighton*, 61 Iowa 103, 15 N. W. 853; *Walker v. Decatur Co.*, 67 Iowa 307, 25 N. W. 256; *Rice v. Des Moines*, 40 Iowa 642; *McGinty v. Keokuk*, 66 Iowa 725, 24 N. W.

(e) The jury are instructed in regard to the question respecting whether respondent exercised due care on the occasion in question, that since she knew of the defect in the walk it was her duty to use greater care than she would have been required to use to come up to the standard of ordinary care in the absence of such knowledge.²

(f) The court instructs the jury that, if you find as a fact that the plaintiff knew that the sidewalk at the point where he alleges he fell and was injured was out of repair and in bad condition, you may take that fact into consideration in determining whether or not plaintiff was negligent; but such knowledge will not be a defense in this action unless you find that the defect of which the plaintiff knew, if any, was such a defect as to render the walk necessarily dangerous to a person ordinarily careful.³

(g) The jury are instructed that the testimony of the plaintiff discloses that at the time of the alleged injury he was familiar with the sidewalk at the place where he alleges that injury occurred, and was familiar with the existence, nature and character, and extent of the alleged defect therein, and that he frequently passed over and about said defect shortly before the date on which the injury is alleged to have been sustained. You are further instructed that, in the light of this testimony on the part of the plaintiff herein, the plaintiff cannot recover in this case unless he has proven to you by a preponderance of the evidence that at the time of or immediately before receiving the injury, if he did receive an injury, his attention was momentarily attracted elsewhere and in this moment of forgetfulness, he received the injury, or that the defect, if any, was so obscured, hidden, or covered, by darkness or otherwise that he was deceived, mistaken, or misled, and while so mistaken, deceived or misled, and while in the exercise of ordinary care, he received the injury of which he complains.⁴

(h) The jury are instructed that the plaintiff, in the absence of any knowledge or information as to the defective condition of the walk, if it was defective, had the right to assume that defendant had

506; *Hartman v. Muscatine*, 70 Iowa 511, 30 N. W. 859. But, aside from these authorities, we do not think the use of the adverb 'well,' taken in connection with what follows, made the instruction objectionable. It means no more than 'fully' as here used; and the distinction between 'known' and 'well or fully known' is rather too refined for a court to consider the use of one or the other a defect which will vitiate an instruction. The case of *Galpin v. Wilson*, 40 Iowa 91, is quite in point. In that case it is held that there is no material difference between the words 'proven' and 'fully, conclusively or satisfactorily proven.' . . .

The other objections urged against the instruction are fully met by the authorities cited. It is well settled that all the matters referred to in the instruction must be shown and concur before it can be said as a matter of law that a plaintiff is guilty of contributory negligence. *Ross v. Davenport*, 66 Iowa 548, 24 N. W. 47; *Baldwin v. Railroad Co.*, 63 Iowa 210, 18 N. W. 884; *Parkhill v. Brighton*, *supra*."

2—*Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311 (317).

3—*Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448 (449).

4—*So. Omaha v. Taylor*, 4 Neb. (unof.) 757, 96 N. W. 209 (210).

exercised ordinary care to keep the same in a reasonably safe condition. If, however, you find he did know or had notice of the defective condition of the walk, then it will be for you to say, under all the facts and circumstances, whether he was negligent in going upon it.⁵

(i) The plaintiff admits that she knew that the sidewalk in question was in a defective condition, and had known it for some time previous. A person passing over a sidewalk known to be in a defective and dangerous condition must use greater care and caution than if she were ignorant thereof.⁶

§ 1672. Passing Over Defective Walk Not Necessarily Contributory Negligence. (a) The court instructs you that you are to consider all the facts, including the condition of the sidewalk, the facts which were within the knowledge of the plaintiff in relation thereto, the character and nature of the defect in the walk which was the direct cause of the injury, the fact that the plaintiff was passing over the walk on a bicycle, and the manner in which he sought to pass, and then determine whether, under all the circumstances, he was in the exercise of such care and prudence as would have been used and exercised by a man of ordinary care and prudence under the same circumstances and conditions.

(b) I charge you, gentlemen of the jury, that prior knowledge of a defect in a sidewalk by one who is injured is not necessarily proof of contributory negligence; and if you believe from the evidence in this case that the plaintiff had knowledge that the sidewalk was out of repair, and even dangerous, yet because of that fact alone he would not, therefore, be bound to forego travel on such sidewalk.

(c) The real fact for you to ascertain as bearing upon the question of contributory negligence, if any you so find, is this: Did the plaintiff, by his own fault or negligence, contribute directly to produce the injury? Could he, by ordinary prudence, have prevented the injury? And if you find that he was guilty of contributory negligence, then he cannot recover, and your verdict must be for the defendant.⁷

§ 1673. Contributory Negligence of Person Falling Over Wire in Street. If under all the circumstances surrounding him (plaintiff), he could readily have seen, and as an ordinarily prudent and careful man ought to have seen, the wire over which he claims to have fallen, then he was guilty of contributory negligence, and he can recover nothing in this case.⁸

5—Hill v. Glenwood, 124 Iowa 479 (483), 100 N. W. 522 (524).

6—Collins v. Janesville, 111 Wis. 348, 83 N. W. 695 (696).

7—Above approved in Gagnier v. Fargo, 12 No. Dak. 219, 96 N. W. 841 (842).

8—Buchholtz v. Town of Radcliffe, 129 Iowa 27, 105 N. W. 336 (337).

"It is scarcely necessary to cite any authorities in support of this instruction. But see, Cressy v. Postville, 59 Iowa 62, 12 N. W. 757; Tuffee v. State Center, 57 Iowa 538, 11 N. W. 1; Munger v. City, 56 Iowa 216, 9 N. W. 192; Langhammer v. City, 99 Iowa 295, 68 N. W. 688."

§ 1674. **Placing Oneself in Position of Danger.** If the plaintiff placed himself in a position of danger, when he might have avoided it, and while there received the injury of which he complains, he was guilty of negligence, although the danger may have been caused by the negligence of the town authorities.⁹

§ 1675. **Burden of Proof as to Contributory Negligence of Plaintiff—States Holding that It Rests on Defendant.** (a) By contributory negligence is meant negligence of the plaintiff contributing to the injury complained of. Contributory negligence is a defense, and if it is shown by the evidence to exist, the plaintiff cannot recover. The burden of proving contributory negligence is on the defendant, but it may arise in the whole evidence.¹⁰

(b) If you find that the city negligently suffered the hole to be, and remain, in the street at the time of the accident, and that plaintiff had no actual knowledge of the existence before the happening of the accident, then he will be entitled to a verdict unless it has been proven by a fair preponderance of the evidence that he was negligent himself in not seeing the hole in time to avoid it. And the burden of proof is upon the city on this point to satisfy the jury that he was not exercising due care for his own safety, and that such conduct on his part contributed towards the happening of the accident.

(c) The defendant insists that the plaintiff himself was guilty of negligence in not avoiding the hole. The burden of proof is on the defendant to establish by a fair preponderance of all the evidence in the case that plaintiff was guilty of negligence contributing to his injury.¹¹

§ 1676. **Same Subject—States Holding that Burden of Proof Is on Plaintiff.** The burden of proof is upon the plaintiff to satisfy you, by a preponderance of the testimony, of all the material allegations of his petition not admitted by the answer, including the allegation that he used due care and diligence, and was not negligent in any such manner as to contribute substantially or directly to his injury.¹²

§ 1677. **Negligence of Driver.** The law is, that the driver of a private conveyance is the agent or servant of the person riding in such conveyance, provided such driver is employed by him or subject to his control, and if such person, while riding along a public highway or street, is injured, in consequence of obstruction or defects negligently permitted to remain in the street or highway, and the driver is guilty of a want of ordinary care and caution, and his negligence materially contributes to such injury, then the person injured cannot recover, as against the city, for the injury thus received.¹³

9—*Lynch v. Waldwick*, 123 Wis. 351, 101 N. W. 925 (926).

10—*Town of Sellersburg v. Ford*, — Ind. App. —, 79 N. E. 220 (222).

"This instruction is correct. The act of 1899 (Acts 1899, p. 58, c. 41) puts the burden of contributory negligence on the defendant. So.

R. Co. v. Peyton, 157 Ind. 692, 61 N. E. 722."

11—*Indianapolis v. Mullally*, — Ind. App. —, 77 N. E. 1132 (1134).

12—*Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445 (446).

13—*Prideaux v. Mineral Point*, 43 Wis. 513; *Lockhart v. Lichten-thaler*, 46 Penn. St. 151.

CHAPTER LXVI.

NEGLIGENCE—PUBLIC HIGHWAYS.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 1678. Highway — Obstruction by construction of fence across it.</p> <p>§ 1679. Obstruction of public way by ashes or cinders.</p> <p>§ 1680. Obstruction of public way by pile of cross-ties.</p> <p>§ 1681. Collision on the highway.</p> <p>§ 1682. Automobile running at greater speed than statutory rate.</p> <p>§ 1683. Snow and ice—Constructing building near highway so that snow and ice endanger travelers, on highway.</p> <p>§ 1684. Sidewalk space—Liability of person making excavation.</p> | <p>§ 1685. Sidewalk — Injury through falling into manhole—Ordinary care — Contributory negligence.</p> <p>§ 1686. Sidewalks — Liability for opening used for raising and lowering baggage and protected by bar of gas-pipe.</p> <p>§ 1687. Injury to child through bar of iron on recklessly driven wagon.</p> <p>§ 1688. Highway—Barbed wire causing injury to horse—Contributory negligence of plaintiff.</p> <p>§ 1689. Horses—Allowing same to stand unhitched — Injury from runaway horses.</p> |
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§ 1678. Highway—Obstruction of by Construction of Fence Across It. A failure to exercise such care and prudence in performing an act as an ordinarily careful and prudent man would exercise under the same or like circumstances and conditions is ordinarily negligence; and in this case, if you find from the evidence that the defendant, the A. company, in constructing said fence on said land and across said road or passway, if it did so, failed, under the facts and circumstances in evidence before you, to exercise such care and prudence as an ordinarily careful and prudent man would have exercised under the same or like circumstances, then such failure on defendant's part would constitute negligence.¹

§ 1679. Obstruction of Public Way by Ashes or Cinders. The court instructs the jury in this case that if you believe, from the evidence, that the defendant placed ashes or cinders on the street where the injury complained of occurred, as charged in the declaration, and that such act was negligence on the part of the defendant, as charged in the declaration, and that by reason thereof the deceased was injured and killed, as charged in the declaration, and that it might have been reasonably foreseen that some such injury as that received by said deceased would be likely to occur as the result of such negligence, and that the deceased was at the time exercising

¹—Abilene C. O. Co. v. Briscoe, 27 Tex. Civ. App. 157, 66 S.W. 315 (316).

for his own safety reasonable care and diligence for one of his years and capacity, then you will find for the plaintiff.²

§ 1680. **Obstruction of Public Way by Pile of Cross-ties.** The court further instructs the jury, that, although they might find that the pile of cross-ties was an obstruction there in the street, the plaintiff's cause of action was not founded upon that primarily, and that before they could say that the intestate's injury and death were caused by the negligence of the defendant, they should inquire whether or not the defendant knew that the pile of cross-ties in the street was a common resort of little boys of tender years in that neighborhood to play, and the burden was on the plaintiff to show that the railroad company knew that fact, and that if the defendant did not know it, then they should answer the issue as to the defendant's negligence "No."³

§ 1681. **Collision on the Highway.** (a) The jury are instructed as a matter of law, that the rights of footmen and horsemen, on a public highway, are equal, and the law requires both parties to use all reasonably prudent precautions to avoid accident and damage to themselves or others.

(b) If the jury believe, from the evidence, that at the time of the alleged injury the plaintiff was walking along one of the public streets of the city of C., with his back towards the said S. W. and at the same time the said S. W. was riding a horse on the same street, in the direction of the plaintiff, and that the said S. W. saw, or by the exercise of reasonable care and caution could have seen, the plaintiff in season to have stopped his horse, altered its course, or in some way avoided the accident; and if the jury further believe, from the evidence, that the said S. W. did not do so, but carelessly and negligently permitted the horse which he was riding to run against the plaintiff and knock him down, and thereby injured him, as charged in the declaration, this would be negligence on the part of S. W.; and if the jury further believe, from the evidence, that the said S. W. was, at the time, in the employ of the said defendants, and pursuing their business, then the defendants are liable for such negligence; provided, the jury further believe, from the evidence, that the plaintiff was himself without fault or negligence which contributed to the injury. And was at the time exercising ordinary care to avoid personal injury.

(c) Even though the jury should believe, from the evidence, that the plaintiff was at first guilty of some degree of negligence, still, if the jury further believe from the evidence that the driver of the wagon actually saw the plaintiff and had a full view of the situation before the accident and by the exercise of reasonable and ordinary care could have avoided or prevented the injury, and he then failed to

2—Chi. & A. R. R. Co. v. Nelson, 153 Ill. 89 (92), 38 N. E. 560.

3—Kramer v. So. Ry. Co., 127 N. C. 328, 37 S. E. 468 (469), 52 L. R. A. 359.

exercise such care and, in consequence of the want of such reasonable and ordinary care on his part, the plaintiff received the injury complained of, then the defendant is guilty.

(d) A person about to cross a street in a city, in which there is an ordinance against fast driving, has a right to presume, if he has no knowledge or notice to the contrary, that others will observe and conform to the ordinance in driving on said street, and it would not be negligence on his part in such a case to act on the presumption that, in attempting to cross, he will not be exposed to a danger which could only arise through a disregard of the ordinance by others.⁴

§ 1682. **Automobile—Running at Greater Speed than Statutory Rate.** The court instructs you that in an action brought to recover damages, either to the person or property, caused by running an automobile propelled by mechanical power in the public highway at a greater rate of speed than fifteen miles per hour, the plaintiff is deemed to have made out a *prima facie* case by showing the fact that he or she has been injured, and that the person running such automobile, either by himself or his agent, was at the time of the injury running the same at a speed in excess of fifteen miles per hour.⁵

§ 1683. **Snow and Ice—Constructing Building Near Highway so that Snow and Ice Endanger Travelers on Highway.** The defendant has no right to erect or maintain a building, if it be of no unusual construction, so near the street that snow or ice will fall from it, in

4—*Baker v. Pendergast*, 32 Ohio St. 494.

5—*Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118.

"It is claimed that this instruction is vicious and misleading for the reason that it ignores the question as to whether or not the injuries sustained were occasioned by the running of the automobile in excess of fifteen miles per hour. Section 4 of chapter 121 (Hurd's Stat. 1903, p. 1630), provides that in any action brought to recover damages, either to person or property, caused by running an automobile at a greater rate of speed than fifteen miles per hour, the plaintiff shall be deemed to have made out a *prima facie* case by showing the fact of such injury and that such person driving such automobile was at the time of the injury running the same at a speed in excess of fifteen miles per hour. This section of the statute and the foregoing instruction are in substantially the same language. We have held in many cases that no error is committed by giving an instruction in the substantial language of a statute; that the instruction must be regarded as sufficient when it

lays down a rule in the words of the law itself. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Donk Bros. C. & C. Co. v. Peton*, 192 Ill. 41, 61 N. E. 330; *Mount Olive C. Co. v. Rademacher*, 190 id. 538, 60 N. E. 888; *Duncan v. People*, 134 id. 110, 24 N. E. 765. But it is insisted that this instruction is not in the exact words of the statute because it contains the words 'either by himself or his agent.' The addition of these words in no way changes the legal sense or meaning of the instruction. The contention that the instruction ignores the question whether the injuries sustained were occasioned by the running of the automobile at excessive speed cannot be sustained. The first part is: 'The court instructs you that in any action brought to recover damages, either to the person or property, caused by running an automobile propelled by mechanical power in a public highway at a greater rate of speed than fifteen miles per hour,' etc. This language is explicit, and tells the jury that the injury sustained must be caused by running the automobile at the prohibited rate of speed."

the ordinary course of things, so as to endanger travelers in passing; and if the building in question was so constructed and maintained, the defendant would be liable without further proof of negligence.⁶

§ 1684. Sidewalk Space—Liability of Person Making Excavation. The want of authority to make an excavation, and operate an elevator in the sidewalk space where the accident happened, would not render the defendant liable therefor without negligence in the method of construction or condition in which the bar or railing was suffered to remain.⁷

§ 1685. Sidewalk—Injury through Falling into Manhole—Ordinary Care—Contributory Negligence. (a) The plaintiff in this case must prove two things by a preponderance of the evidence. He must prove, first, that the defendant was guilty of negligence. That is the first thing. He must prove, secondly, that he himself was not guilty of negligence,—that the plaintiff was not guilty of any negligence on his part which contributed to the injury. That we call, in law, contributory negligence; and when I speak of contributory negligence, you will know I mean that the plaintiff was guilty of contributory negligence. The burden of proof is on the plaintiff to show both of these propositions, and unless he has shown, and does in every action of damages show, that, your verdict must be for the defendant.

(b) The care and prudence which the defendant was bound to exercise must be in proportion to the danger to the passersby from the work, and the injury which was liable to happen to passersby from disregard of such care and prudence. It follows that the care and prudence which an ordinarily prudent man would exercise is a relative term. It depends on the danger which would happen to a passerby from a disregard of care and prudence.

(c) So the danger to passersby is an important element for you to consider in estimating what is reasonable care. It is the care which an ordinarily prudent and careful man would have exercised under the circumstances having regard to the work which was necessary to be done, and the danger from not observing that care.

6—*Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475.

"The exception to the instruction to the jury cannot be sustained. If the ground of liability is negligence, as the defendant contends it is, then it was negligence to maintain a building so near the street and so constructed that, in the ordinary course of things, snow or ice was liable to fall from the roof upon travelers on the adjoining highway. *Smethurst v. Barton Sq. Church*, 148 Mass. 261, 19 N. E. 387; 2 L. R. A. 695, 12 Am. St. Rep. 550; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318. If the defendant was bound, at his peril, to prevent snow and ice from fall-

ing from the roof upon those lawfully on the adjoining highway, then the instruction was too favorable to him. If the maintenance of the building as constructed was, as matter of law, negligence, the fact that the roof was constructed in the usual manner, and like that which has been used for many years on a large portion of the buildings on streets in Salem, would not help the defendant. *Hill v. Winsor*, 118 Mass. 259; *Maguire v. Railroad Co.*, 115 Mass. 239; *Hinckley v. Barnstable*, 109 Mass. 126."

7—*Hotel Ass'n v. Walters*, 23 Neb. 380, 36 N. W. 561 (564).

(d) If you find the defendant did, at the time of the injury, exercise the care and precaution to prevent injury to passersby which an ordinarily prudent and careful man would have used, in view of all the circumstances, and in view of probable injury, then your verdict should be for the defendant. But if you find that it was not exercising reasonable care,—care and prudence which a reasonable man would have exercised,—having in view the danger to passersby, then you will come to consider the other question.

(e) You remember the other question is: Was the plaintiff, or did the plaintiff himself exercise the care and prudence which an ordinarily prudent man would in passing along that street? What was the duty of the plaintiff? A person traveling on the sidewalk in this city has a right to expect that the walk will be in a condition reasonably safe and fit for travel. I do not say absolutely safe, so as to prevent all possibility of accident. There are many miles of sidewalk in this city, and many thousand owners of lots, who are constantly repairing sidewalks, and pulling them up for one cause or another. So that to my mind, it is absurd to say that the law requires them to be in a condition of absolute safety. But a traveler on a sidewalk has a right to expect that the walk will be in a condition reasonably safe for travel. Now, it is the plaintiff's duty on his part to exercise that care and prudence in passing along the sidewalk which an ordinarily prudent man would have used under those circumstances. Generally speaking, it was his duty to use his eyes and look ahead of him; but I do not say, gentlemen of the jury, that it is his duty to keep his eyes on the walk in front of him all the time. As I said, a passenger has a right to expect that the walk is in a condition reasonably safe and fit for travel, and if his attention is attracted for a moment or two to something going on in the street, he has a right to expect that he can continue to go forward a short distance with safety; but he must exercise the care and prudence which an ordinarily careful and prudent man would in passing along the street. And I repeat, I do not say that a man must keep his eyes on the walk all the time; and, as I said before, he has a right to presume that the walk is reasonably safe for travel, and if he turns his eyes to one side or the other, or his attention is attracted by one thing or the other, he has a right to presume,—he has a right to be attracted to one thing or the other for a short time, and presume he can walk forward in safety.

(f) Unless the jury find both of the following facts, viz.: (1) That the defendant was guilty of negligence, and (2) that plaintiff was not guilty of negligence,—your verdict will be for the defendant. The burden of proof in this case is upon the plaintiff, and he must prove, by a preponderance of evidence, both the negligence of the defendant and the lack of negligence or the exercise of due care on his part. Although a foot passenger on the sidewalk is not required to keep his eyes constantly on the walk before him, yet he must observe his general course on the street; and if he meets with an accident which could have been avoided by the exercise of ordinary care and prudence

in observing his general course, he is guilty of contributory negligence.⁸

§ 1686. **Sidewalks—Liability for Opening Used for Raising and Lowering Baggage and Protected by Bar of Gas-pipe.** (a) It was the duty of the defendant to use and observe reasonable care and caution in placing and securing the bar in question, and for preventing injuries or accidents to persons who might be at or near the same.

(b) It was likewise the duty of plaintiff to use reasonable care and caution to avoid an injury or accident to himself while at and near the bar and place in question.

(c) If the accident occurred solely in consequence of negligence or want of reasonable care or precaution on the part of defendant, it is liable for such injuries to plaintiff as resulted therefrom.⁹

§ 1687. **Injury to Child through Bar of Iron on Recklessly Driven Wagon.** The court does not instruct you as a matter of law that the employe of the defendant was or was not negligent in the manner of his placing or loading said iron in the wagon, and in carrying said iron therein, but will leave the question to you as reasonable, fair-minded men to determine the question whether at the time and place where the plaintiff was injured, if you find she was injured, the employe of the defendant, taking into consideration all the facts and circumstances of the case, was or was not guilty of negligence in the manner of loading and carrying the iron in controversy.¹⁰

§ 1688. **Highway—Barbed Wire Causing Injury to Horse—Contributory Negligence of Plaintiff.** (a) In order to entitle the plaintiff to recover, the plaintiff must establish that the defendant was negligent in the acts complained of, and that the accident complained of, and the damages sustained by reason thereof, were not contributed to, in any way or manner, by any negligent or careless act of the plaintiff. It would be negligent for the defendant to place in the highway, in close proximity to the traveled and beaten track, a barbed-wire fence, which might occasion damage to travelers by reason of the ordinary casualties that travelers are liable to encounter while traveling said highway; and it would devolve upon the plaintiff,

8—*Le Beau v. Tel. & Tel. Const. Co.*, 109 Mich. 302, 67 N. W. 339 (341).

"We think the charge of the trial judge was a fair statement of the law of negligence as applicable to the facts in this case. See *Butterfield v. Forrester*, 11 East. 60; *Abernethy v. Van Buren Tp.*, 52 Mich. 383, 18 N. W. 116; *McCool v. Gr. Rapids*, 58 Mich. 41, 24 N. W. 631, 55 Am. Rep. 655; *Hutchins v. Priestly, etc., Co.*, 61 Mich. 252, 23 N. W. 85; *Wakeham v. St. Clair Tp.*, 91 Mich. 15, 51 N. W. 696;

Moore v. Richmond, 85 Va. 542, 8 S. E. 387; *Walker v. Reidsville*, 96 N. C. 382, 2 S. E. 74, and cases there cited; *City of Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235; *Kelly v. Doody*, 116 N. Y. 581, 22 N. E. 1084; *McLaury v. McGregor*, 54 Iowa 171, 7 N. W. 91; 2 Dill. Mun. Corp. para. 1020, and note; *Beach, Pub. Corp. para. 1537.*"

9—*Hotel Ass'n v. Walters*, 23 Neb. 380, 36 N. W. 561 (564).

10—*Van Camp H. & I. Co. v. O'Brien*, 28 Ind. App. 152, 62 N. E. 464 (466).

while traveling upon said highway, to use ordinary care in driving and managing his horse, and avoid accidents that might happen, and if the horse driven by the plaintiff would be found, from the evidence, to be spirited and liable to fright, then it would devolve upon the plaintiff, and he would be held to use a greater degree of care than otherwise.

(b) If you find from the evidence that the plaintiff's horse, while being driven along the highway in a careful and prudent manner, became frightened at objects near the road, and shied from his course, and if you further find from the evidence that the horse, in so shying, acted as a horse of reasonable docility and training might act under the same circumstances, then the fact of the horse so shying would not defeat the plaintiff's right of recovery. The occurrence must be attributed to one of the casualties of the road. It would be otherwise, however, if you would conclude from the evidence that the circumstances were not such as to frighten a horse of reasonable docility and training, and that the shying of plaintiff's horse was caused by a previously acquired vicious habit.

(c) If a horse driven with due care upon a highway becomes, by reason of fright, actually uncontrollable, so that his driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a fence in the highway, by which an injury is occasioned, the owner of the fence is not liable, unless it appears that the accident would have occurred if the horse had not been so uncontrollable; but a horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver.¹¹

§ 1689. **Horses—Allowing Same to Stand Unhitched—Injury from Runaway Horses.** (a) The court instructs the jury that the plaintiff claims that her injuries were occasioned by the following negligence on the part of the defendant; that is to say, that the defendant negligently left a team of horses owned by him unhitched and unguarded, and negligently permitted them to run away and over plaintiff by reason of which she was greatly injured. These allegations the defendant has denied in his answer. Defendant has also alleged by way of an affirmative defense that whatever injuries plaintiff sustained by his horses were caused in whole or in part by her own contributory negligence. The mere fact that the horses ran away, and the plaintiff was run over and severely injured, do not of themselves make defendant liable in this case. The gist of the action is the charge that the defendant failed to exercise ordinary care, diligence and watchfulness thereby causing these injuries. The burden of establishing this charge is upon the plaintiff, and if the evidence bearing on this proposition does not preponderate in favor of the plaintiff, then the jury will find for the defendant. By "a preponderance

11—These instructions approved in *Young v. Sage*, 42 Neb. 37, 60 N. W. 313 (315).

of evidence" is meant that the evidence in support of the proposition in your judgment, outweighs that to the contrary. The burden of proving any negligence of the plaintiff or of proving the facts which under these instructions are defined as constituting such negligence is upon the defendant to establish the truth of them to your satisfaction by a preponderance of evidence in regard to them.

(b) The court instructs the jury that if you find and believe from the evidence that on the — day of January, 19—, D., O. and T. streets were open and public streets in the city of S., and if you further find and believe from the evidence that defendant was on said date, January —, 19—, the owner and in charge of a span of horses attached to a sleigh, and that he negligently left said horses standing on said D. street, and walked away from said horses, and that said horses were unhitched, unguarded and unattended, and that said horses ran away and then upon and over plaintiff at the intersection of said T. and O. streets, and that plaintiff received the injuries complained of directly thereby, and if you further find and believe from the evidence that the plaintiff was at said time exercising ordinary care for her own protection, then the defendant is liable in this case, and your verdict should be for the plaintiff.

(c) If you find and believe from the evidence that the plaintiff was struck by the runaway horses while she was crossing the street, and that she stepped onto the street or crossing, and in front of said horses without exercising ordinary care in looking or listening for the approach of horses or vehicles, and if you believe that if she had exercised such ordinary care, she could have seen or heard the team in time to have prevented the collision and gotten away, then your verdict should be for the defendant, although you may believe he was guilty of negligence in allowing the team to run away. It is the duty of a person crossing a public street in the city to exercise ordinary care and prudence in avoiding the danger of collision with horses on such street, and you are to determine from all the evidence in the case whether or not she exercised such ordinary care.

(d) The court instructs the jury that with respect to the allegations of contributory negligence set up in the defendant's answer, the burden of proof rests upon the defendant; that is, the defendant must prove to your satisfaction, by a preponderance of evidence that the plaintiff did not exercise ordinary care for her own protection. By "preponderance of evidence" as used in these instructions, is not necessarily meant the greater number of witnesses, but the greater weight of the evidence; that is, that the evidence in support of the proposition to be proved, is, in your judgment, of more weight than the evidence against it. By "ordinary care" as used in these instructions, is meant that degree of care which would be used by a person of ordinary prudence under like or similar circumstances. By "negligence" as used in these instructions is meant the absence of ordinary care under the circumstances shown in evidence.

(e) The court instructs the jury that the defendant was not bound, under all circumstances, to prevent his horses from running away; and unless you believe that he failed to exercise that degree of care and prudence which an ordinarily careful and prudent person would have exercised under like circumstances, then your verdict will be for the defendant.

(f) The court instructs the jury that if you believe from the evidence that the injuries of plaintiff were the result of mere accident or casualty, and not of negligence on the part of the defendant, then your verdict will be for the defendant.

(g) Although the jury may believe from the evidence that defendant was guilty of negligence in failing to guard his said horses so as to prevent them from running away, yet if you also believe from the evidence that the plaintiff was also negligent in failing to discover the approach of said horses in time to have kept out of their way, or to have gotten out of their way if in it, then your verdict will be for the defendant.¹²

12—The above series of instructions approved in *Groom v. Kavanaugh*, 97 Mo. App. 362, 71 S. W. 362.

CHAPTER LXVII.

NEGLIGENCE—COMMON CARRIERS.

See Erroneous Instructions, same chapter head, Vol. III.

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- § 1690. Who is a common carrier of goods.
- § 1691. Express companies and railway companies are common carriers.

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- § 1692. When the liability of the carrier commences.
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BILL OF LADING.

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COMMON CARRIER'S LIABILITY AND EXCEPTIONS THERETO.

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 - § 1718. Burden on the carrier to show loss within exemption.
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- § 1722. Must carry within a reasonable time.

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| <p>§ 1723. Common carrier not an insurer as to time of transportation.</p> <p>§ 1724. Not liable for delay caused by inevitable accident or act of God.</p> <p>§ 1725. Not liable for special damages unless notified of importance of shipment.</p> <p>§ 1726. Shipping perishable property.</p> <p>§ 1727. Same subject — Owner's rights when perishable goods are damaged by carrier's negligent delay.</p> <p>§ 1728. Same subject—Duty of carrier toward perishable goods when damaged by inevitable accident or act of God.</p> <p>§ 1729. Duties and liabilities of carrier in transportation of live stock.</p> <p>§ 1730. What will excuse injuries to, or lack of readiness to deliver, live stock.</p> <p>§ 1731. What care required of carriers of live stock.</p> <p>§ 1732. Essential elements for recovery against carrier for injury or damage to live stock.</p> <p>§ 1733. Duty of carriers to furnish stock pens at point of shipment.</p> <p>§ 1734. Care required of carriers in loading live stock.</p> <p>§ 1735. Carrier not liable for injuries due to natural propensities or vice of animals.</p> | <p>§ 1736. Care required of carriers of hogs.</p> <p>§ 1737. Failure of shipper to properly care for live stock when he has contracted to do so.</p> <p>§ 1738. Degree of care required to avoid delay.</p> <p style="text-align: center;">DELIVERY BY CARRIERS.</p> <p>§ 1739. Railroad companies are not bound to deliver to consignee personally.</p> <p>§ 1740. Rule as to delivery by railroads in Georgia, Illinois, Indiana, Iowa, Massachusetts, North Carolina, Pennsylvania, and South Carolina.</p> <p>§ 1741. Rule as to delivery by railroads in Alabama, Arkansas, Kansas, Kentucky, Louisiana, New Hampshire, Vermont, West Virginia and Wisconsin.</p> <p>§ 1742. If goods are not delivered to consignee, they must be stored.</p> <p>§ 1743. Duty and liability of express companies.</p> <p>§ 1744. Care required by warehousemen.</p> <p>§ 1745. What is ordinary diligence and care.</p> <p style="text-align: center;">RIGHTS OF THE CARRIER.</p> <p>§ 1746. Suit by carrier for freight and charges.</p> |
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WHO IS A COMMON CARRIER.

§ 1690. **Who is a Common Carrier of Goods.** The jury are instructed, that one who, for hire, carries passengers and their baggage, or baggage alone, for all persons choosing to employ him, from, to and between railroad depots and hotels, and other places in a city, is a common carrier of goods.¹

§ 1691. **Express Companies and Railway Companies Are Common Carriers.** You are instructed, that express companies and railway companies are common carriers, and are liable as such; they are insurers for the safe delivery of the property intrusted to them for transportation; and they will not be excused for its non-delivery, except they are prevented from delivering it by an act of God, or the public enemy.²

1—*Parmelee v. Lowitz*, 74 Ill. 116; 2 Am. and Eng. Enc. 781; *Hutchinson on Car.* (3rd Ed.) § 47, et seq.

2—*Morrison v. Davis*, 20 Penn. St. 171; *Railroad Co. v. Reeves*, 10 Wall. 176; *Sherman v. Welles*, 28

DELIVERY TO THE CARRIER.

§ 1692. When the Liability of the Carrier Commences. The law is, that as soon as property is received into the exclusive possession of the common carrier, with its knowledge and consent, for the purpose of being shipped, then the liability of a common carrier commences, no matter whether it is received into a car, depot or warehouse.³

§ 1693. Delivery to Carrier May Be from Owner or from Another Carrier. You are instructed, that the liability of a common carrier, for the safe delivery of property which has come into its possession, is the same, whether it was received directly from the owner or from another carrier, to whom it had been originally delivered.⁴

§ 1694. Written Receipt Not Required. The jury are instructed, that to charge a common carrier with the receipt of goods, it is not necessary that any written receipt should be given; provided, the jury believe from the evidence, that the property in question had actually come into the possession of the carrier, to be transported by it, and that it was afterwards lost or destroyed, as alleged in the declaration.⁵

§ 1695. What Constitutes a Through Contract of Carriage. The jury are instructed, that when goods are delivered to a common carrier in this state, and marked to a particular place of destination, the carrier impliedly agrees to carry and deliver the goods at that place, although it may be beyond its own lines of carrying, unless there is some special contract relieving the carrier from such implied obligation.⁶

BILL OF LADING.

§ 1696. Bill of Lading Implies What—Contract. The jury are instructed that the bill of lading, offered in evidence, recites that the goods were in good order and condition when received by the defendant, and by said bill of lading the defendant contracted to deliver said goods in like good order and condition at P.; and if the jury believe, from the evidence, that the goods were not delivered in as good order and condition as when received by defendant—ordinary wear and tear and ordinary deterioration excepted—and that the

Barb. 403; Langworthy v. N. Y. & H. Ry. Co.; 2 E. D. Smith 195; Hutchinson on Car. (3rd ed.), § 80, et seq.

3—Coyle v. Western, etc., Corp., 47 Barb. 152; Barren v. Eldridge, 100 Mass. 455; Michigan, etc., Rd. Co. v. Schurtz, 7 Mich. 515; Mo. Pac. Ry. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; St. Louis, etc., Ry. Co. v. Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554; Hutchinson on Car.

(3rd. ed.), § 105, et seq.

4—Gulliver v. Adams Ex. Co., 38 Ill. 503; Hutchinson on Car. (3rd ed.), § 129, et seq.

5—Hutchinson on Car. (3rd ed.), § 127, 152; I. C. Rd. Co. v. Smyser, 38 Ill. 354; Hickox v. Nangatuck Rd. 31 Conn. 281.

6—Hutchinson on Car. (3rd ed.), § 238; Milwaukee, etc., Rd. v. Smith, 74 Ill. 197; Bohannon v. Hammond, 42 Cal. 227; McMillan v. Mich., etc., Rd. Co., 16 Mich. 78.

plaintiff was injured and has sustained damage thereby, then the plaintiff is entitled to recover, unless the jury believe, from the evidence, that the damage or injury to such goods resulted from some fault or negligence of the plaintiff, or from, etc.⁷

§ 1697. Receipt or Bill of Lading Prima Facie Evidence of Goods in Good Order. That the receipt introduced in evidence is *prima facie* proof that the goods therein mentioned were in good order at the time they were received by the defendant, and so far as regards that question, the burden of proof is on the defendant to show, by a preponderance of evidence, that the goods were in a damaged condition at the time they were received by the defendant, or else that the injury occurred from a cause for which the defendant is not liable, as explained in these instructions; provided, the jury believe, from the evidence, that the goods were damaged when delivered to the plaintiff, as charged in the declaration.⁸

§ 1698. Same Subject—Burden of Proof on Defendants to Show Fraud. The bill of lading, introduced in evidence in this case, is *prima facie* evidence that the box of goods was received by the defendants, and was at that time in good order; and if the defendants claim that it was not so in good order, it is incumbent on them to show this, and that they were deceived or defrauded when the bill of lading was signed; and unless you believe, from the evidence, that the defendants were so deceived or defrauded, you will find a verdict for the plaintiff for the amount of his loss, as shown by the evidence; provided that you find, from the evidence, that the plaintiff demanded said goods before the commencement of this suit, and that the goods were not delivered on demand, as charged in the plaintiff's declaration; and further, that said loss did not occur from (causes excepted in the receipt).⁹

§ 1699. Bill of Lading Not Conclusive of Condition of the Goods. The court instructs the jury, that a bill of lading, while *prima facie* true, may be explained by other evidence; and if the jury believe, from the evidence in this case, that the goods in question were wet or otherwise injured, or in bad condition, before they came into defendant's hands, and that they were, externally, in good condition when defendant received them, and that the person receiving the goods could not, without opening them, have ascertained their actual condition, then, the fact of receipting for them as in good order and condition will not preclude the defendant from showing their true condition in this suit.¹⁰

7—Hutchinson on Car. (3rd ed.), 157, 163; Bissell v. Price, 16 Ill. 408; Wallace K. v. Long, 8, Ill. App. 504; I. C. R. R. Co. v. Cobb, 72 Ill. 148; Warden v. Green, 6 Watts 424; Pollard v. Vinton, 105 U. S. 7.
8—Hutchinson on Car. (3rd ed.), § 158; Montgomery, etc., Rd. Co. v. Moore, 51 Ala. 394.

9—G. W. R. R. Co. v. McDonald, 18 Ill. 172.

10—Hutchinson on Car. (3rd ed.), § 158, 163, 164; Bissell v. Price, 16 Ill. 408; Carson v. Harris, 4 G. Gr. 516; Porter v. C. & N. W. Rd. Co. 20 Ia. 73; Ellis v. Williard, 5 Selden 529; Meyer v. Peck, 28 N. Y. 590.

CONNECTING CARRIERS.

§ 1700. Delivery of Goods to Carrier Without Directions for Carriage Beyond Carrier's Own Line. The law is, that where goods are delivered to a carrier marked to a particular place beyond or not upon the line of such carrier and the goods are unaccompanied by any other direction for their transportation and delivery, then the carrier is only bound to transfer and deliver them according to the established usage of the business in which the carrier is engaged, whether that usage were known to that other party or not.¹¹

§ 1701. Carrier Ordinarily Liable Only for Losses and Injuries Occurring on His Own Line. That when parts of a continuous line or route of transportation are owned by different carriers, then, unless there is some contract expressed or implied to the contrary, each carrier is only liable for losses and injuries occurring on his own particular portion of the route.¹²

§ 1702. Same Subject—Rule in Illinois. (a) The court instructs the jury, that the rule in this state is, that when goods are delivered to a common carrier, in this state, marked to a place not upon or beyond its line of road, with no other direction, and without any express contract as to the place of delivery, the law will imply an undertaking, on the part of the carrier, to transport the goods to and deliver them at the place to which they are marked.¹³

(b) You are further instructed, that when there is no special contract to the contrary, and goods are lost by any one carrier in a line composed of several carriers, the first to whom the goods were delivered will be liable to the owner for the goods lost and the owner is not required to sue the carrier who actually lost the goods, provided you believe from the evidence that the first carrier either expressly or impliedly agreed to carry the goods to their destination as explained in the instructions upon that point.¹⁴

§ 1703. Burden of Proof on Carrier to Prove no Negligence Where Injury Shown to Have Occurred on Its Line. If you believe, from the evidence, that the injury, if any, to the cotton occurred whilst the same was in possession of any one of the carriers defendant in this cause, then as to the plaintiff the burden of showing that such injury was without negligence of such carrier is on it; and if you find that the evidence does not show that such injury was without negli-

11—*Vansantvoord v. St. John*, 6 Hill 157; *F. & M. Bank v. Champlain Trans. Co.*, 18 Vt. 140; *Converse v. Norwich Trans. Co.*, 33 Conn. 166; *Montgomery, etc., Rd. Co. v. Moore*, 51 Ala. 394; *Crawford v. Southern Rd. Co.*, 51 Miss. 222.

12—*Hutchinson on Car.* (3rd ed.), § 226, et seq.; *Montgomery, etc.,*

Rd. Co. v. Moore, 51 Ala. 394; *Ortt v. M. & St. L. R. Co.*, 36 Minn. 396, 31 N. W. 519.

13—*Milwaukee, etc., Rd. Co. v. Smith*, 74 Ill. 197; *Elgin, etc., Ry. Co. v. Bates Mach. Co.*, 200 Ill. 636, aff'g 98 Ill. App. 311, 66 N. E. 326, 93 Am. St. 218.

14—*C. & N. W. Rd. Co. v. N. Line P. Co.*, 70 Ill. 217.

gence on the part of a particular carrier, if any, in whose possession you find it was at the time of such injury, if any, then as to that carrier you will find for the plaintiff.¹⁵

§ 1704. Partnership Between Common Carriers. You are instructed, as a matter of law, that where several carriers by agreement unite to complete a line of transportation, the freight to be divided between them in definite proportions, and one of them receives goods for one freight to be paid for the whole line and gives a through bill of lading, then each carrier is the agent of all the others, and each is liable for any damage done to the goods on whatever part of the line the damage is received; and, in this case, you are further instructed that the bill of lading introduced in evidence recites that the goods therein mentioned were received by the defendant corporation at C. to be carried to N. Y. (freight to be paid, etc.), and if you believe, from the evidence, that the defendant corporation at the time the goods were received had an arrangement or agreement (with the other common carriers) by which they were all to unite and form a completed line of transportation between C. and N. Y., each of the connecting companies to have an agreed or definite part of the freight as between themselves, then the defendant would be liable for any damage or loss happening to the goods on any part of the entire route.¹⁶

§ 1705. First Carrier Cannot Relieve Himself of Liability as Common Carrier by Warehousing Goods Without Delivery to Next Carrier. The jury are instructed, that under the bill of lading introduced in evidence in this case, the defendant was bound to transport the goods safely to the end of its route, loss from the act of God or the public enemies excepted, and then deliver them to (next carrier, etc.) and in such case the company would not be relieved from its liability as a common carrier by simply unloading the goods and storing them in a warehouse without delivery to the next carrier. Whether the defendant did unload and store the goods or did, etc., are questions of fact to be determined by the jury, from the evidence.¹⁷

COMMON CARRIER'S LIABILITY AND EXCEPTIONS THERETO.

§ 1706. Liability of Common Carriers of Goods. The jury are instructed, that a common carrier of goods, who receives and under-

15—Houston & T. C. R. Co. v. Bath, — Tex. Civ. App. —, 90 S. W. 55 (57).

"This is objected to generally, and is adopted by appellant as its proposition and statement, but we fail to discover any error in the charge. We think it is in keeping with the rule upon the question of burden of proof as announced in the cases of Gulf, Colorado & S. Fe R. Co. v. Cushney, 95 Tex. 309, 67 S. W. 77; Missouri, K. & T. Ry. Company v. Mазzie, 29 Tex.

Civ. App. 295, 68 S. W. 56; and Ft. Worth & D. C. Ry. Co. v. Shanley, 10 Tex. Ct. Rep. 759, 81 S. W. 1014."

16—Hutchinson on Car. (3rd ed.), § 249, et. seq.; Harp v. The Grand Era, 1 Woods 184.

17—Irish v. Milwaukee Rd. Co., 19 Minn. 376; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Dunson v. N. Y., etc., R. Co., 3 Laws 265; Hutchinson on Car. (3rd ed.), § 131, et seq.

takes to carry a trunk, for one not a passenger with such carrier, is responsible for the delivery of the trunk and its contents, as against everything but the act of God or the public enemies, notwithstanding they consist of articles not usually carried as baggage, unless the owner has been guilty of some fraud or deception in relation to the contents of said trunk.¹⁸

§ 1707. **Liable for All Loss, Except by Act of God, etc.** The court instructs the jury, that a common carrier is liable for all losses of goods which do not arise from the act of God, or the public enemies; while a warehouseman is only liable for such losses as might have been guarded against by the exercise, on his part, of ordinary care and diligence.¹⁹

§ 1708. **What is Meant by Act of God.** (a) By the term, act of God, is meant superhuman—something beyond the power of man to foresee or guard against. It means inevitable accident—something that happens without the intervention of man. A loss by fire is not a loss by act of God.²⁰

(b) By the term, act of God, is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted; such as unexampled freshets, violent storms, lightning and frosts. For losses occurring by any of these means, a common carrier is not liable; provided, he has not been guilty of any want of ordinary and reasonable care to guard against such loss.²¹

§ 1709. **Carrier Must Use Reasonable Care to Avoid Injury by Act of God.** (a) The jury are instructed, that a common carrier is bound to use reasonable care and diligence to prevent loss or injury to goods intrusted to it, by what are termed acts of God; that is, such care and diligence as ordinarily prudent men usually exercise towards their own property, under like circumstances; and if the carrier do not use such care and diligence, and loss or damage results therefrom, he will be liable therefor.

(b) Whether, in this case, such care and diligence were or were not used by the defendant, and whether any loss resulted therefrom, are questions to be determined by the jury, in view of all the facts and circumstances proved on the trial.²²

LIMITATION OF CARRIERS' LIABILITY BY CONTRACT.

§ 1710. **Legal Duty of Carriers Imposed by Law.** That the right conferred upon railroad corporations, in their charters, to carry

18—*Parmelee v. Lowitz*, 74 Ill. 116; *Hutchinson on Car.* (3rd ed.), § 265, et seq.

19—*St. L., A. & T. H. R. R. Co. v. Montgomery*, 39 Ill. 335.

20—*Hutchinson on Car.* (3rd ed.) § 269, et seq.; *Mer. Disp. Co. v. Smith*, 76 Ill. 542.

21—*Michaels v. N. Y. Cent. Rd. Co.*, 30 N. Y. 564; *Parker v. Flag*, 26 Me. 181; *Moore v. Mich. Rd.*, 3 Mich. 23; *Cox v. Petterson*, 30 Ala. 608; *Chevallier v. Straham*, 2 Tex. 115.

22—*Ill. Cent. Rd. Co. v. McClellan*, 54 Ill. 58.

passengers and property for compensation, is coupled with the duty that they shall receive and carry passengers and freight on their roads as they may be offered, under the liabilities and responsibilities which the law imposes upon common carriers, as explained in their instructions; and these liabilities cannot be avoided except by a special agreement to that effect.²³

§ 1711. **Liability not Limited by Notice.** The jury are instructed, that a common carrier cannot discharge itself from the duty to safely carry and deliver goods intrusted to it for transportation, by notice, public or private, of the terms on which it receives or carries goods or property; to make such notice effectual, the shipper must assent to its terms.²⁴

§ 1712. **Carriers Can Only Restrict Their Common Law Liabilities by Special Contract.** The law is, that a common carrier is bound to receive and carry goods offered to him for transportation, if in proper condition for shipping, subject to all the incidents of his business as a common carrier, and there can be no presumption that the shipper intended to abandon any of his legal rights; and the burden of proving a contract, by which his common law liability, as explained in these instructions, has been restricted, is upon the carrier.²⁵

§ 1713. **Shipper Will Be Presumed to Agree to Exemption Clause, When.** The court instructs the jury, that when a shipper delivers goods to a common carrier to be transported by the carrier, and takes a receipt for the goods in the nature of a bill of lading, specifying in the body of it, so as to form a part of the receipt, the terms upon which they are to be carried and delivered, the shipper will be bound by the terms of the receipt, unless it appears, by the evidence, that some fraud or imposition was practiced upon the shipper to induce him to take such a receipt.²⁶

§ 1714. **Same Subject—Rule in Illinois—Shipper's Assent Must Be Shown.** That where goods are received by a common carrier, and a receipt or a bill of lading is given, containing a clause exempting the carrier from certain liabilities therein mentioned, such receipt is not binding upon the shipper, unless it appears, by a preponderance of the evidence, that he knew of and assented to the exemption; and whether he did so assent is a question of fact for the jury.²⁷

23—P. & R. I. Ry. Co. v. Coal Valley, etc., Co., 68 Ill. 489; Wallace v. Matthews, 39 Ga. 617; Thayer v. St. Louis, etc., Rd. Co., 22 Ind. 26.

24—Hutchinson on Car. (3rd ed.), § 406; N. J. Steam Man. Co. v. Merchants Bank, 6 How. (U. S.) 344; McMillan v. Michigan, etc., Rd. Co., 16 Mich. 79; Blossom v. Dodd, 43 N. Y. 264; Verner v. Sweitzer, 32 Penn. St. 208.

25—Western T. Co. v. Newhall, 24 Ill. 466; McCoy v. The K. & D.

M. R. Co., 44 Ia. 424; N. Y. C. R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357.

26—Long v. N. Y. Cent. Rd. Co., 50 N. Y. 76; Grace v. Adams, 100 Mass. 505; Hutchinson on Car. (3rd ed.), § 408.

Editor's Note.—The above instruction would not be good in Illinois. See Hutchinson on Car. (3rd ed.), § 410, and following section.

27—Field v. C. & R. I. Rd. Co., 71 Ill. 458.

§ 1715. Same Subject—Rule in Illinois—Acceptance of Receipt with Full Understanding of Conditions. (a) The court instructs the jury, that if a shipper take a receipt for his goods from a common carrier, which contains conditions limiting the liability of the carrier, with a full understanding of such conditions, and intending to assent to them, it becomes his contract as full as if he had signed it, and he will be bound by the conditions; but if a shipper accept such a receipt, because he has no alternative but to receive it, and not intending to assent to the conditions limiting the liability of the carrier, then he will not be bound by such conditions.²⁸

(b) The court instructs the jury, that when a common carrier, receiving goods for transportation, gives a receipt for the goods, containing provisions limiting the common law liability of the carrier, other than those arising from its own fault or negligence, and the shipper accepts the receipt with a full knowledge of its terms, and intends to assent to such restrictions, it becomes his contract as fully as if he had signed it. But the simple acceptance of such a receipt does not conclusively bind the shipper; in order to bind him, it must appear, from the evidence, that he had knowledge or notice of the terms of the receipt and assented to them.²⁹

§ 1716. Shipper Not Bound by Notice Printed on Receipt. The court instructs the jury, that the printed notice upon the (back of the) receipt, of the terms and conditions upon which the defendant received and carried the goods in question, is not binding upon the plaintiff, unless the jury find, from the evidence, that his attention was particularly called to that notice when he took the receipt, and that he expressly assented to the terms and conditions therein contained. The fact alone that the plaintiff accepted the receipt is no evidence that he assented to the terms of said notice.³⁰

§ 1717. Requiring Claim for Damages to Be Presented Within Specified Time. If the jury find, from the evidence, that when the plaintiff shipped his cattle he entered into a contract with the defendant for the shipment of such cattle to A, and in such contract agreed that no claim for damages growing out of such shipment should be sued for unless a claim for such damages were first made in writing verified by affidavit and delivered to the general freight agent of the defendant at C within five days from the time the cattle were removed from the car, and if you further find that the plaintiff did not make such demand in writing verified by affidavit and deliver it to the said freight agent before commencing this suit, then the plaintiff cannot maintain this suit and your verdict should be for the defendant.³¹

28—*The Anchor Line v. Dater*, 68 Ill. 369.

29—*Adams Ex. v. Haynes Co.*, 42 Ill. 89.

30—*E. & W. Tr. Co. v. Dater*, 91 Ill. 195.

31—It was held reversible error not to have given the above instruction. *B. & O. S. W. Ry. Co. v. Ross*, 105 Ill. App. 54 (59); *Hutchinson on Car.* (3rd ed.), § 442 et seq.

§ 1718. Burden on the Carrier to Show Loss Within Exemption.

Where goods are received by a common carrier, to be carried under the usual bill of lading, containing a clause exempting the carrier from certain liabilities, other than those arising from his own fault or negligence, which are assented to by the shipper, and the goods are lost or injured, it is incumbent upon the carrier to show that the loss resulted from one of the causes excepted in the receipt, as explained in these instructions, or from an act of God, or the public enemies.³²

§ 1719. Must Exercise Reasonable Care to Prevent Loss Within Exemption. Although the jury may believe, from the evidence, that the goods in question were destroyed (by fire), still, if the jury further believe, from the evidence, that by the exercise of ordinary prudence on the part of the defendant, or its servants, such destruction might have been prevented, then the defendant is liable in this suit.³³

§ 1720. Can Not Restrict Liability Arising from its Own Negligence. (a) The law, on grounds of public policy, will not permit a common carrier of passengers or freight, to contract against liability for its own actual negligence, or that of its servants and employees.³⁴

(b) The court instructs the jury, that although they may believe, from the evidence, that there was a special contract between the plaintiff and the defendant, that defendant should not be liable for any loss or injury to said goods, which might occur by reason of * * * still, such a contract would not relieve the defendant from loss resulting from negligence, or the want of ordinary care and prudence on the part of the defendant, or its servants.

(c) And in this case, if you believe, from the evidence, that the defendant was guilty of negligence, or any want of ordinary care and caution, and that the loss complained of resulted therefrom, without any fault upon the part of the plaintiff, then he has a right to recover in this case.³⁵

(d) You are instructed, that by the terms of the receipt introduced in evidence in this case the defendant is not liable for any loss or damage to the goods in question, arising from or caused (by fire) while in the possession of defendants as common carriers, unless such (fire), or loss or damage was occasioned by some want of ordinary prudence or reasonable care on the part of the defendant; and although you may believe, from the evidence, that said goods were destroyed

32—Hutchinson on Car. (3rd ed.), § 449; Western T. Co. v. Newhall, 24 Ill. 466; Mitchell v. U. S. Ex. Co., 46 Ia. 214; U. S. Ex. Co. v. Graham, 26 Ohio St. 595; Shaw v. Gardner, 12 Gray 488.

33—Hutchinson on Car. (3rd ed.), § 477; Penn. Rd. Co. v. Fries, 87 Penn. St. 234.

34—Hutchinson on Car. (3rd ed.), § 450; U. M. S. Co. v. Ind., etc.,

Rd. Co., 1 Disney (Ohio) 480; Erie, etc., Rd. Co. v. Wilcox, 84 Ill. 239; Ind., etc., Rd. Co. v. Allen, 31 Ind. 394; Penn. Rd. Co. v. McCloskey, 23 Penn. St. 526; School Dis., etc., v. Boston, etc., Rd. Co., 102 Mass. 552.

35—Ill. C. Rd. Co. v. Smyser et al., 38 Ill. 354; L. & C. Rd. Co. v. Brownlee, 14 Bush (Ky.) 590.

(by fire) while in the possession of the defendants, still the defendant is not liable therefor, unless you further believe, from the evidence, that the said defendant, or its servants, by the exercise of ordinary diligence or reasonable care, might have avoided such loss.

(e) You are instructed that a common carrier is liable for the full value of goods, if they are lost through his negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount therein named, provided it is understood by the parties when the bill of lading is given, that the sum so agreed upon is less than the value of the goods. Whether, in this case, the goods in question were lost through the negligence of the defendant, and whether the goods were worth more than the price mentioned in the bill of lading, and whether this fact was known to the defendant when the bill of lading was given, are all questions of fact to be determined by you from the evidence in the case.³⁶

§ 1721. Burden of Proof. If goods are lost or damaged while in the custody of a common carrier, the presumption of law is that such loss or damage was occasioned by its default or negligence, and the burden of proof is on the carrier to show that it arose from causes for which the carrier was not responsible.³⁷

DUTY AS TO TRANSPORTATION OF GOODS.

§ 1722. Must Carry Within a Reasonable Time. The jury are instructed, that when a railroad company contracts to forward and deliver goods at any particular point it is bound to forward and deliver the goods at that point within a reasonable time, and it will not be released from its liability by delivery to another connecting road; but it will still be liable for any unreasonable delay, although the same occurs on account of the crowded condition of the connecting road, or for any other cause attributable to such road.³⁸

§ 1723. Common Carrier Not an Insurer as to Time of Transportation. A common carrier of goods is not an insurer as to the time at which the goods shall arrive at their destination but he is bound to carry them to their destination in a reasonable time, after they are received.³⁹

§ 1724. Not Liable for Delay Caused by Inevitable Accident or Act of God. If delay is occasioned by an inevitable accident or an act of God, and loss or damage results from such delay without any

36—U. S. Ex. Co. v. Backman, 28 Ohio St. 144.

37—Hutchinson on Car. (3rd ed.), § 1353; Nelson v. Woodruff, 1 Black. 156; Lindsey v. Chicago, M. & St. P. R. Co., 36 Minn. 539, 33 N. W. 7.

38—Penn. Rd. Co. v. Benz, 68 Penn. St. 272; King v. Macon, etc.,

Rd. Co., 60 Barb. 169; Toledo, W. & W. R. R. Co. v. Lockhart, 71 Ill. 627; Hutchinson on Car. (3rd ed.), § 651.

39—McLaren v. Detroit & C. R. Co., 23 Wis. 138; Parsons v. Hardy, 14 Wend. 215; Hutchinson on Car. (3rd ed.), § 653.

fault on the part of the carrier, such loss or damage is not chargeable to the carrier.⁴⁰

§ 1725. Not Liable for Special Damages Unless Notified of Importance of Shipment. The court instructs the jury that plaintiff cannot recover for the reasonable value of his gin, or any other damages, unless they believe, from a preponderance of the evidence, that the defendant had notice of the importance of the shipment and of its prompt delivery at some time before the shipment had been lost, or had been misplaced or miscarried.⁴¹

§ 1726. Shipping Perishable Property. (a) If the jury believe, from the evidence, that the fruit in question was injured and damaged by being frozen after it was received by the defendant and while in transit to C., and that carriers in the same line of business were at that time accustomed to use refrigerator cars for the purpose of protecting fruit from the effects of the weather, and that such injury or damage could have been prevented by the use of reasonable and ordinary care on the part of the defendant, either by shipping the same in refrigerator cars or by another means generally known and recognized among railroad men as suitable and proper for the purpose of protecting fruit from the effects of the weather, then the damage was not produced by an act of God, within the meaning of the law, and the defendant would be liable therefor.

(b) You are instructed, as a matter of law, that where a common carrier accepts fruits liable to be affected by the weather for transportation over long distances, in the winter season, the character of his employment, independently of any special contract to that effect, clearly implies that he will ship them in such vehicles or cars as are reasonably suitable for the purpose, and exercise such care and diligence as may be reasonably necessary for their safe passage to their destination. Whether, in this case, such care and diligence were or were not used by the defendant, and whether any loss resulted therefrom, are questions to be determined by you in view of all the evidence in the case.⁴²

§ 1727. Same Subject—Owner's Rights When Perishable Goods Are Damaged by Carrier's Negligent Delay. (a) If you believe, from the evidence, that the defendant, by the exercise of reasonable

40—Nashville R. Co. v. David, 6 Heisk. (Tenn.) 261; R. R. Co. v. Reeves, 10 Wall. (U. S.) 176; Hoadley v. N. T. Co., 115 Mass. 304; Hutchinson on Car. (3rd ed.), § 654.

41—Am. Exp. Co. v. Jennings, 86 Miss. 329, 38 So. 374.

"This instruction asked for by defendant should have been given. Defendant was entitled to even a more favorable statement of the law than was contained in this refused instruction. Certainly it

could not be made liable for special or extraordinary damages unless notice of the importance of the shipment and prompt delivery had been made at some time before the shipment had been lost or had been misplaced or miscarried."

42—Merchants' D. T. Co. v. Comforth, 3 Col. 280; St. L. I. M. & S. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555; Hutchinson on Car. (3rd ed.), § 649.

diligence in the loading and shipment of the (oranges) mentioned in the bill of lading, could have transmitted the same to their destination in a sound and undamaged condition, and the jury further believe, from the evidence, that said (oranges), or any part thereof, arrived at their destination in a damaged and unsound condition by reason of the want of reasonable care and diligence on the part of the defendant and without any fault or neglect on the part of the plaintiff then you should find the issues in favor of the plaintiff.

(b) The court instructs you as a matter of law that where goods are damaged while in the hands of a common carrier through the negligence of the carrier, if they are only damaged and are not rendered wholly worthless the owner is bound to receive them and he cannot abandon them and proceed against the carrier as for total loss, but in such case the owner has a right of action against the carrier for the depreciation in the value of the goods occasioned by such damage and negligence provided no fault or negligence on the part of the plaintiff has contributed to such loss or damage.⁴³

§ 1728. Same Subject—Duty of Carrier Toward Perishable Goods When Damaged by Inevitable Accident or Act of God. If a carrier is transporting property of a perishable nature and a delay is occasioned by an inevitable accident or an act of God, he must use all reasonable efforts to avoid all unnecessary damage to the property either by forwarding it to its destination by other means of conveyance, or in some other way. If he is unable to forward it to its destination by the exercise of reasonable efforts in that behalf in time to avoid a total loss, he is justified in selling the property for the best price it will bring, exercising reasonable discretion in that regard; but, whether, in this case, there was any unusual delay in transporting the goods in question, and whether such delay, if any, was caused by inevitable accident and whether the defendant did everything that could reasonably be done to avoid damage to the goods, are all questions of fact to be determined by the jury, from the evidence in the case.⁴⁴

§ 1729. Duties and Liabilities of Carrier in Transportation of Live Stock. It is the duty of a railroad company which undertakes to carry live stock for hire, to exercise all reasonable care, skill and judgment to provide cars of sufficient strength to prevent the animals from breaking through the same; and it will be responsible for a loss if it occurs through its failure to exercise such care, skill and judgment, although the animals be unruly and vicious.⁴⁵

§ 1730. What Will Excuse for Injuries to, or Lack of Readiness to Deliver, Live Stock. If a common carrier receives live stock to be

⁴³—Shaw v. S. C. Ry. Co., 5 Rich 462.

⁴⁴—Am. Express Co. v. Smith, 33 Ohio St. 511.

⁴⁵—Smith v. New Haven, etc., Rd. Co., 12 Allen 531; Great W. Rd.

Co. v. Hawkins, 18 Mich. 427; McDaniel v. C. & N. W. Rd. Co., 24 Ia. 412; Peters v. N. O. & C. R. R., 16 La Ann. 222; O., etc., R. R. Co. v. Pratt, 89 U. S. 123; Hutchinson on Car. (3rd ed.), § 634, et seq.

transported from one point to another, then he is bound to carry it safely to the point of destination, and there have it ready to deliver to the consignee and nothing will excuse a lack of readiness to deliver except what are known as acts of God or the public enemy, or such accidents as arise from the conduct, vicious temper and propensities of the animals themselves.⁴⁶

§ 1731. **What Care Required of Carriers of Live Stock.** (a) The jury are instructed, that the carrier of live stock must exercise all reasonable care, skill and judgment to provide safe and properly constructed cars, in which to carry the stock—to provide stations or stopping places along the road, where cattle may be fed; and if it fails to exercise such care, skill and judgment, and loss or damage results therefrom, the carrier will be liable to the owner for the damage thus sustained, if he is himself free from fault or negligence contributing to such injury.

(b) A common carrier for hire is bound to exercise all the care and diligence which prudent and cautious men, in the same business, usually employ, for the safety and preservation of the property confided to its care; and, in this case, if you believe, from the evidence, that the defendant did not use all such reasonable care and prudence to provide a safe and suitable car for plaintiff's stock, or in the running and management of the train in question, and that, by reason of such want of care and diligence, plaintiff's stock was injured, as charged in the declaration, then the defendant is liable for the resulting damage to the amount proved by the evidence.⁴⁷

(c) You are instructed that if you find from the testimony that said defendant, ———, received the cattle of plaintiff, as alleged, to be transported to T.; and you further find that while being so transported some of said cattle died, and others were injured and damaged; and you further find that said defendant failed to transport said cattle over its line of road within a reasonable time or failed to use ordinary care in the handling and transportation of said cattle; and you further find that such failure, if any, was negligence, and that such negligence of said defendant, if any, was the proximate cause of the injury and damage, if any, to plaintiff's cattle, then you are instructed to find for plaintiff unless you find for defendant, under instructions hereinafter given you.

(d) Reasonable or ordinary care, as used in this charge, is such care as would be exercised by an ordinarily prudent person under the same or similar circumstances. Negligence consists in a want of that care that would be exercised by an ordinarily prudent person under like circumstances.⁴⁸

46—Maynard v. S., etc., Rd. Co., 71 N. Y. 180; Banberg v. J. C. Rd. Co., 9 S. C. 61; McCoy v. R. & D. M. Rd. Co., 44 Ia. 424; S. & Ala. Rd. Co. v. Henlien, 52 Ala. 106.

47—Rhodes v. Louisville, etc., Rd. Co., 9 Bush 688.

48—Mo., K. & T. Ry. Co. v. Chittim, 24 Tex. Civ. App. 599, 60 S. W. 284 (285).

§ 1732. Essential Elements for Recovery Against Carrier for Injury or Damage to Live Stock. The jury is instructed that, before the plaintiff can recover damages in any amount against the defendant, the A. B. Company, it is necessary for each and every one of the following facts to be established by a preponderance of the evidence: (1) That the plaintiff's horses were damaged when they arrived at G., over and above the injury or damage that would necessarily be caused to a shipment of the kind and character of horses that these were, and in their condition, in making the trip by rail that these horses made. (2) That if there was any damage, that the same was caused by the negligence of the said defendants. (3) That the plaintiff or his agent were not in fault in looking after the stock while in transit, contributing to the damage, if any.⁴⁹

§ 1733. Duty of Carriers to Furnish Stock Pens at Point of Shipment. The court instructs the jury that it was the duty of the railway company to furnish sufficient stock pens at A. to load such lots of cattle as were ordinarily tendered at that point for shipment.⁵⁰

§ 1734. Care Required of Carriers in Loading Live Stock. It is the duty of a railway company to use ordinary care in loading of live stock to avoid injuring them. If you believe from the evidence that defendants, or either of them, failed to use ordinary care in the loading of said horses, and said stock were injured thereby, and plaintiff was thereby damaged, you will find for the plaintiff against such defendant or defendants failing to use ordinary care in loading said stock.⁵¹

§ 1735. Carrier Not Liable for Injuries Due to Natural Propensities or Vice of Animals. (a) If the jury believe, from the evidence, that the defendant furnished a suitable car in which to ship the stock in question, and used all due care in managing and transporting the same, and that the injury complained of was caused by the peculiar character of the animals themselves, such as bad temper, unusual restiveness or viciousness, then the defendant is not liable in this case.⁵²

(b) You are instructed that the plaintiff can recover nothing for so much, if any, of the damage, if any, to his stock as may have been caused by the inherent vice of said stock, or by their natural character and condition, or by treatment to which they had been subjected before being loaded, or on account of being overloaded, if they were overloaded, or by the usual and ordinary course of their transportation by rail without negligence on the part of the railroad company or companies; and in making up your verdict you will allow

49—St. Louis, I. M. & S. Ry. Co. v. Berry, — Tex. Civ. App. —, 93 S. W. 1107 (1109).

50—Texas & P. Ry. Co. v. Fambrough, — Tex. Civ. App. —, 55 S. W. 188, 189.

51—San An. & A. P. Ry. Co. v.

Dolan, — Tex. Civ. App. —, 85 S. W. 302 (303).

52—Hutchinson on Car. (3rd ed.), § 336, et seq.; Smith v. N. H., etc., Rd. Co., 12 Allen 531; Evans v. Fitchburg, etc., Rd. Co., 111 Mass. 142.

plaintiff nothing for any damage which you may believe, from the evidence, was caused by the inherent vice of said stock, or by their natural character and condition, or by the treatment to which they had been subjected before being loaded, or on account of being overloaded, if you find they were overloaded, or by the usual and ordinary course of their transportation by rail, without negligence on the part of the railroad company or companies.⁵³

(c) If the stock, before they were loaded, were in bad condition, by being fed on cotton-seed meal and hulls, or from any other cause, and if this affected them so they could not stand up, and this was the cause of their injury and death, then the plaintiff could not recover.⁵⁴

(d) If you find that the train was at any time left standing while en route, and the cattle injured themselves by fighting and moving about, then in order for plaintiffs to recover for injuries sustained by the cattle by fighting and moving about while the train was standing, it devolves upon the plaintiffs to show that the train was standing an unusual length of time, and that the train was standing by reason of the negligence of the defendant or its agents, and that the cattle would not have been so injured but for such negligence, and that the acts of the cattle were such as are the ordinary acts of cattle under the same circumstances, and that the defendant or its agents knew of such actions of cattle, or could have known by ordinary care and diligence; and if you fail to so find in this case, the plaintiffs cannot recover for injuries received by the cattle in fighting and moving about.⁵⁵

§ 1736. **Care Required of Carriers of Hogs.** (a) That when hogs are shipped in railroad cars at a season of the year when, for their proper care and treatment, it is necessary to apply water to prevent them from being suffocated or overheated, then it is the duty of the railroad company to have proper stations and appliances for furnishing such water, and to so run and manage its trains as to afford reasonable opportunities to the persons in charge of the stock to apply such water, and if it does not exercise such care, skill and judgment, and loss or damage to the stock results therefrom, the carrier will be liable to the owner for the damage thus sustained; provided, he is himself free from fault or negligence contributing to such injury.⁵⁶

(b) In the transporting of the hogs in question the defendant was a common carrier, and, as such, was bound to use all care and precaution for their safety, while in transit, so far as human vigilance and foresight and care would go. It was an insurer of the property, except in respect to such injuries as may or might unavoidably result from the essential nature of the property itself, the nature and pro-

53—Houston & T. C. R. Co. v. Gray, — Tex. Civ. App. —, 85 S. W. 838 (841).

54—Felton v. Clarkson, 103 Tenn. 457, 53 S. W. 733 (734).

55—Texas & P. Ry. Co. v. Fambrough, — Tex. Civ. App. —, 55 S. W. 188 (189).

56—Toledo, etc., Rd. Co. v. Thompson, 71 Ill. 434.

pensity of the hogs, and their capacity to inflict injury upon each other.

(c) In this case, unless you find that these hogs died from some inherent want of vitality, or by reason of their inflicting injuries upon each other, or by inevitable accident, the defendant company is liable; and, if it would escape liability the burden of proof is upon it to show that the hogs died from some other cause than its negligence. In the absence of such proof, the law presumes negligence, and that such negligence caused the death of these hogs. In other words, the defendant, in order to escape liability in this action, must prove to your satisfaction, by a preponderance of the evidence, that the death of the hogs was the result of some other cause than its negligence, or the negligence of its employes or train men.⁵⁷

§ 1737. Failure of Shipper to Properly Care for Live Stock When He Has Contracted to Do So. The testimony, without conflict, affirmatively shows that the cattle in question were transported from L to W, under special contracts in writing, one made and entered into between plaintiff and the defendant, H. Co., providing for the transportation of said cattle from L to E, and there to be delivered to its next connecting carrier, the M. Ry. Co.; and the other made and entered into between the M. Ry. Co. and the plaintiff at E, providing for the further transportation and shipment of said cattle from said E station, over the line of said road of the said M. Ry. Co. and of the M. K. & T. Ry. Co. to W, providing in terms that the plaintiff in person, or by his agent or agents, should accompany the stock, load, unload, and reload the same and feed and water the same en route; and if, from the evidence, you believe the cattle were in a drawn and enfeebled condition when they reached their destination, and that such condition, in whole or in part, was attributable to the failure, if any, of the plaintiff to properly care for, feed and water, and to load, unload and reload the said cattle, then you are instructed that the plaintiff cannot recover for any damage or injury which may have resulted from said failure, if any.⁵⁸

§ 1738. Degree of Care Required to Avoid Delay. (a) The jury are instructed, that the carrier of live stock for pay must exercise reasonable diligence in the business, and complete the journey within a reasonable time, and if he does not do so, and the stock is injured by the delay, the carrier will be liable to be owner for all damage caused by such delay.⁵⁹

(b) The court instructs the jury that what would be an unreasonable delay in forwarding and transporting said cattle, or what would be a reasonable time within which said cattle should have been trans-

⁵⁷—Lindsley v. Chicago, M. & St. P. R. Co., 36 Minn. 539, 33 N. W. 6 (8), 1 Am. St. Rep. 692.
⁵⁸—Houston & T. C. R. Co. v. Gray, — Tex. Civ. App. —, 85 S. W. 838 (842).
⁵⁹—Tucker v. Pacific Rd. Co., 50 Mo. 385; Sisson v. Cleveland, 14 Mich. 489.

ported, are purely questions of fact for your exclusive determination from all the facts and circumstances in evidence before you.⁶⁰

DELIVERY BY CARRIERS.

§ 1739. Railroad Companies are not Bound to Deliver to Consignee Personally. The court instructs the jury, that railroad companies are not bound to deliver goods carried by them to the consignee personally. When the goods have reached their destination, and the consignee is not present to receive them, then the carrier may store them in a suitable warehouse, and when the goods are thus stored, the duty and liability of the company as a common carrier is terminated, and that of the warehouseman begins.⁶¹

§ 1740. Rule as to Delivery by Railroads in Georgia, Illinois, Indiana, Iowa, Massachusetts, North Carolina, Pennsylvania and South Carolina. The court instructs the jury, that railroad companies must deliver the goods shipped by them to the owner or consignee at the point of destination, or store the goods, subject to the order of the consignee; and they cannot relieve themselves from their liabilities as common carriers until the goods are delivered to the owner or consignee, or till they are placed in a warehouse for safe keeping; and there must be some open, distinct act of delivery to a warehouse in order to change the liability from that of a common carrier to that of a warehouseman, and the proof of this change rests on the carrier. The liability of a common carrier will continue until a different liability attaches on the part of some one.⁶²

§ 1741. Rule as to Delivery by Railroads in Alabama, Arkansas, Kansas, Kentucky, Louisiana, New Hampshire, Vermont, West Virginia and Wisconsin. Although you may believe from the evidence that the goods in question were safely carried by the defendant to S. and there unloaded and safely deposited in a reasonably safe warehouse and were afterwards burned (or stolen) without any negligence on the part of defendant still the defendant would be liable as a common carrier for the loss of the goods as explained in the instructions upon that point, provided you further believe from the evidence that the goods were burned (or stolen) before the plaintiff had had notice of their arrival and before he could, by the use of ordinary and reasonable diligence, have learned of the arrival of the goods and have had a reasonable time in which to remove them.⁶³

§ 1742. If Goods are not Delivered to Consignee, They Must be Stored. (a) If the jury believe, from the evidence, that the goods of

60—Texas & P. Ry. Co. v. Smisen, 31 Tex. Civ. App. 549, 73 S. W. 42.

61—Chicago & A. Rd. Co. v. Scott, 42 Ill. 121; Jarrett v. Railway Co., 74 Minn. 477, 77 N. W. 304.

62—C. & R. I. Rd. Co. v. Warren, 16 Ill. 502; Francis v. D. & S. City Rd. Co., 25 Ia. 60; Hutchinson on Car. (3rd ed.), § 702.

63—Wood v. Crocker, 18 Wis. 345; Ala. & Tenn. Rd. Co. v. Kidd, 35 Ala. 209; Moses v. Boston & Me.

the plaintiff were carried by the defendant to their destination, and not then and there delivered to the plaintiff, or to some one for him, by reason of there being no one there to receive them, or for any other cause not the fault of the plaintiff, then it was the duty of the defendant to store the goods in an ordinarily safe warehouse.

(b) You are instructed, that it is the duty of a carrier of goods, when the goods have arrived at the place of destination, to unload and place them in a convenient place for delivery, and if the consignee is there ready to receive them, to deliver them to him; but if he is not there, the carrier must store them in a reasonably safe warehouse, or place them under the charge of competent and careful servants, ready to be delivered when called for by those entitled to receive them; and if the carrier fails to do this, and the goods are thereby lost or injured, the carrier will be liable to the owner for such loss or injury.⁶⁴

§ 1743. **Duty and Liability of Express Companies.** (a) That an express company, as a common carrier, is not only required to transport the goods to the place of destination, but the further duty is enjoined upon it to deliver the goods to the consignee, at his residence or place of business, if, with the exercise of reasonable care and efforts in that behalf, such residence or place of business can be found.

(b) The court further instructs you that where goods transported by an express company are by it tendered to the consignee, and he fails to receive and pay for them, it is the duty of the express company to so notify the consignor, and when this is done, the company is relieved of its responsibility as a common carrier, and holds the goods as a warehouseman, subject to the order of the consignor, and not before.

(c) The court further instructs you, as a matter of law, that an express company can discharge itself of responsibility, as a common carrier, in no other way than by an actual delivery of the goods to the proper person, at his residence or place of business, when, with reasonable efforts, these can be found, except by proving that the company has been excused from so doing, or prevented by an act of God, or the public enemy.⁶⁵

(d) It is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee, and the only way it can relieve itself from this responsibility is by showing performance, or its prevention by the act of God, or a public enemy. And in this case, if you believe, from the evidence, that the defendant, at the time in question, was a common carrier,

Rd. Co., 32 N. H. 523; Hutchinson on Car. (3rd ed.), § 704.

64—Cahn v. Mich. Cent. R. R. Co., 71 Ill. 96; Mechanic's Bank v. Trans. Co., 23 Vt. 211; New Albany & S. Rd. Co. v. Campbell, 12 Ind.

55; Hutchinson on Car. (3rd ed.), § 714.

65—Am. Merchants U. Ex. Co. v. Wolf, 79 Ill. 430; Stadhecker v. Combs, 9 Rich (S. C.) 193; Hutchinson on Car. (3rd ed.), § 716 et seq.

and as such received the money in question, to be carried and delivered to the plaintiff at K., and that the defendant delivered said money to one E., on a writing purporting to be an order of the plaintiff, and that said order was a forgery, then such delivery will not excuse the defendant, and the plaintiff is entitled to recover the amount of said money.⁶⁶

§ 1744. Care Required of Warehousemen. (a) The jury are further instructed, that when the carrier assumes the duty of warehouseman, he is bound to use ordinary care and diligence in the preservation of the property. The building in which the goods are stored must be a reasonably safe one, and under the charge of careful and competent servants.

(b) And if you further believe, from the evidence, that after the goods arrived at their destination, and after a reasonable time for the consignee to call for and receive the same, the defendant retained possession of them, such possession would be in the capacity of a warehouse keeper of goods for hire, and as such warehouseman, the defendant was bound to use all ordinary diligence and caution in the care of the same.⁶⁷

(c) That the ordinary diligence or care which a warehouseman is bound to use, is that degree of care and attention which, under the same circumstances, a man of ordinary prudence and discretion would ordinarily use in reference to the particular goods, if they were his own property.⁶⁸

§ 1745. What is Ordinary Diligence and Care. That ordinary diligence is such diligence as men of common prudence usually exercise about their own affairs; and ordinary care is such care as an ordinarily prudent person usually takes of his own goods.⁶⁹

RIGHTS OF THE CARRIER.

§ 1746. Suit by Carrier for Freight and Charges. If the jury believe, from the evidence, that at the time in question the plaintiff was a common carrier, and in the ordinary course of business received the goods in question, in the proper line of transit, and paid freight and charges thereon to preceding carriers or warehousemen, then the plaintiff is entitled to reasonable charges for the transportation of said goods, besides the amount so paid to others, although the jury may believe, from the evidence, that said goods were damaged before they reached the plaintiff, while in the hands of some prior carrier; provided the jury further believe, from the evidence, that said goods were not injured after coming to the hands of plaintiff.⁷⁰

66—Am. M. U. Ex. Co. v. Milk, 73 Ill. 224.

67—Chi., R. I. & P. Rd. Co. v. Fairclough, 52 Ill. 106.

68—Mote v. C. & N. W. Rd. Co., 27 Ia. 22; Francis v. D. & S. C. Rd. Co., 25 Ia. 60.

69—C. & A. Rd. Co. v. Scott, 42 Ill. 132.

70—Bissell v. Price, 16 Ill. 408; C. & N. W. Rd. Co. v. N. W. U. P. Co., 38 Ia. 377.

CHAPTER LXVIII.

NEGLIGENCE—RAILROADS—PASSENGER CARRIERS.

See Erroneous Instructions, same chapter head, Vol. III.

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- § 1747. Degree of care required of carriers of passengers—Varying statements of different courts.
- § 1748. Carrier not an insurer against accidents.
- § 1749. The passenger takes all the risks necessarily incident to the mode of conveyance.
- § 1750. Riding on freight or mixed trains—Risks assumed by passenger.
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- § 1752. Degree of care due trespasser.
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- § 1754. Payment of fare—As condition precedent to establishing passengership relation.
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- § 1762. Liability as to cars and appliances.
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- § 1765. Riding on loaded freight cars belonging to another carrier—Duty of carrier furnishing motive power as to inspection of vehicles used.
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MANAGEMENT AND OPERATION OF CARS AND VEHICLES.

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- § 1771. When delay is presumptively negligent.
- § 1772. Freight trains not required to stop at platforms to receive or discharge passengers.
- § 1773. Negligently starting train while passenger is getting on.
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- § 1775. Boarding train at place where stop is required by statute—Effect of usage.
- § 1776. Duty to give notice of arrival at stations.
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- § 1778. Effect of conductor's promise to come for passengers at destination—Carrying passengers past destination.
- § 1779. Duty to stop a reasonable time for passengers to alight.
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- § 1781. Starting train while passenger is in act of alighting.
- § 1782. Fall while alighting must be due to negligence of carrier, or his servants, to render carrier liable.
- § 1783. Getting off train while in motion—Obeying directions of sleeping car porter.
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- § 1811. Jumping from the cars negligence, when.
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- § 1832. Liability for baggage.
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- § 1839. Rule in Georgia as to burden of proof when fact that plaintiff was a passenger is shown.
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- § 1841. Burden of proof as to condition in passenger's tickets.

ELEVATORS.

- § 1842. Injury to passenger through fall of elevator.

This chapter does not include instructions relative to street railroads as carriers of passengers. For such instructions see chapter on NEGLIGENCE—STREET RAILROADS.

IN GENERAL.

§ 1747. Degree of Care Required of Carriers of Passengers. (a)

The jury are instructed, as a matter of law, that it is the duty of a railroad company to use the highest degree of care and caution, consistent with the practical operation of the road, to provide for the safety and security of the passenger while being transported.¹

(b) The jury are instructed that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers.²

1—Chicago C. Ry. Co. v. Pural, 224 Ill. 324, 79 N. E. 686 (688).

"The point is made that the word 'reasonably' should have been inserted before the word 'consistent.' We do not think such qualification necessary to a proper presentation to the jury of the law as to the duty of the carrier to its passenger. To be consistent with the practical operation of the road means in harmony with such operation, and we fail to see that there could be degrees of harmony or consistency in the practical operation of a railroad. Anything required not consistent with the practical opera-

tion of its road would be unreasonable. The word 'practical' in the instruction is a full and sufficient qualification, and the word 'reasonably' would have added no other element for the consideration of the jury. An instruction nearly identical with the one here set out, and clearly open to the objection here taken, was approved by this court in West Chi. St. R. R. Co. v. Kronshinsky, 185 Ill. 92, 56 N. E. 110."

2—Larkin v. Chicago & G. W. Ry. Co., 118 Iowa 652, 92 N. W. 891; H. & St. J. R. R. Co. v. Martin, 111 Ill. 219.

(c) The utmost degree of care which the human mind is capable of inventing is not required, but the highest degree of care and diligence which is reasonably practicable, under the circumstances of the case, is required.³

(d) You are instructed, that the law imposes upon common carriers of passengers the duty of providing for their safe conveyance, as far as human care and foresight can reasonably secure that result; and the passenger takes no risks, except such as are necessarily incident to the particular mode of conveyance or travel, while the carrier is using the utmost care and diligence that is reasonably practicable.⁴

(e) The plaintiff had a right, therefore, as a passenger of the defendant, to be safely carried and safely delivered at her destination by the defendant company; and it was the duty of the defendant company to use the highest degree of care and skill in carrying the plaintiff from D to M, and to use the highest degree of care and skill in seeing that she was safely delivered at her destination in M. These are the general principles of law which apply to all cases where the relation of passenger and carrier exists.⁵

(f) Railway companies are not insurers of the safety of their passengers, but they are required to exercise the highest degree of care that very cautious, competent and prudent persons would exercise under similar circumstances, and a failure to exercise such care is negligence.⁶

3—Tuller v. Talbot, 23 Ill. 357; Edwards v. Lord, 49 Me. 279; Sales v. W. Stage Co., 4 Ia. 547; Fairchild v. Cal. Stage Co., 13 Cal. 599; Taylor v. Day, 16 Vt. 566.

4—Holley v. B. G. Co., 8 Gray 131.

5—Olson v. C. M. & St. P. Ry. Co., 94 Minn. 241, 102 N. W. 449.

6—St. L. S. W. Ry. Co. v. Byers, — Tex. Civ. App. —, 70 S. W. 553 (559).

"The charge imposed upon appellant the duty to use the care which would have been exercised under like conditions by a certain class of persons, and not the care which would have been exercised by the most skillful and careful individuals to be found in the class of persons named. It thus furnishes a safe and sound standard for measuring the care required, the criterion being what the average man of the given class would have done under the same circumstances. That carriers of persons are bound to use the care which would be exercised by very cautious, competent and prudent persons is so well settled that it is not questioned. But it is contended that railway companies are required to use only that degree

of care which would ordinarily be exercised by the said class of persons, and are not required to use the highest degree of care which would be exercised by such persons. We are not sure of the existence of the distinction which the appellant attempts to draw. It seems to us that ordinarily very skillful and careful persons would, where the personal safety of their fellow men was involved, exercise the highest care which the nature of the case permitted. At all events, a less degree of care than the highest care practicable is nowhere recognized as the measure of the duty of a carrier of passengers. The charge under consideration does not require of the carrier the highest possible care, but only the highest care which would be exercised by very cautious, competent and prudent persons under similar circumstances, and does not, therefore, transgress the rule laid down in adjudicated cases in this state. Charges have been condemned which required 'all possible care,' 'the greatest possible care and diligence,' and 'the highest degree of care and diligence that human judgment and foresight are capable of.' Int. & G.

(g) The court instructs you, as a matter of law, that if there is the least failure by a common carrier of passengers to exercise all the care and diligence that is reasonably practicable, in keeping its vehicles and appliances in safe condition, then the duty of the carrier is not fulfilled, and it is answerable for any injury or damage of which such neglect is the proximate cause; provided, the person injured is himself using reasonable care and caution to avoid such injury.⁷

(h) The court instructs the jury, that if they believe, from all the evidence in this case, that on or about the 16th day of February, ———, the defendant was controlling and operating a train of cars on a railroad in this county, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars, and manage and control its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger.⁸

(i) The court instructs you, as a matter of law, that it is the duty of a railroad company engaged in the transportation of passengers to use the highest degree of care, vigilance and foresight for the safety of its passengers that is consistent with the proper and practical operation of its road, and it is liable for any injuries that may result to passengers from the neglect of this duty.⁹

(j) Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted, and the practical prosecution of the business, to prevent accidents to the passengers riding upon their trains, getting upon them or alighting therefrom.¹⁰

(k) It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do under the circumstances and in view of the character of the mode of conveyance adopted reasonably to guard against accident and consequential injuries, and

N. Ry. Co. v. Welch, 86 Tex. 204, 24 S. W. 390, 40 Am. St. 829; Fordyce v. Withers, 1 Civ. App. 544, 20 S. W. 766; Fordyce v. Chancey, 2 Civ. App. 27, 21 S. W. 181; Gulf, C. & S. F. Ry. Co. v. Shields, 9 Tex. Civ. App. 655, 28 S. W. 709, 29 S. W. 652.

"On the other hand, charges have been approved which required the use of 'the utmost care' and 'the highest degree of care.' Gallagher v. Bowie, 66 Tex. 625, 17 S. W. 407; Houston & T. C. Ry. Co. v. George, — Tex. Civ. App. —, 60 S. W. 313; Ry. Co. v. Craig, 69 S. W. 239, 5 Tex. Ct. Rep. 25.

"See also Dallas Cons. E. St. Ry. Co. v. Broadhurst, 28 Tex. Civ. App. 630, 68 S. W. 315, and cases there cited. The charge in this

case affirmatively instructed the jury that appellant was not an insurer of the safety of appellee, and we do not think that the jury could have been misled to the injury of appellant."

7—Briggs v. Taylor, 28 Vt. 180.

8—H. & St. J. R. R. Co. v. Martin, 111 Ill. 219.

9—Ill. S. Ry. Co. v. Hubbard, 106 Ill. App. 462 (465).

10—Chicago C. Ry. Co. v. Bundy, 210 Ill. 39 (47), 71 N. E. 28; Chi. & A. R. R. Co. v. Byrum, 153 Ill. 131 (134), 38 N. E. 578.

See also C. P. & St. L. Ry. Co. v. Lewis, 48 Ill. App. 274 (280), aff'd 145 Ill. 67, 33 N. E. 960; West Chi. R. R. Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110, aff'g 86 Ill. App. 17.

if they neglect so to do, they are held to be strictly responsible for all consequences which flow from such neglect; that while the carrier is not an insurer for the absolute safety of the passenger, it does, however, in legal contemplation undertake to exercise the highest degree of care to secure safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger if the passenger is at the time of the injury exercising ordinary care for his or her safety, and this care applies alike to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties.¹¹

(1) Negligence, when applied to carriers of passengers, means a failure in the performance of duty imposed by law, for the protection of others, to exercise that high degree of care in acting and refraining from acting which very competent and prudent persons would usually exercise under the same or similar circumstances.¹²

§ 1748. **Carrier not an Insurer against Accidents.** (a) That while the defendant was bound to do all that human care, vigilance and foresight could reasonably do, consistent with the practical operation of the road, in order to prevent injuries to its passengers, still the company does not insure the absolute safety of its passengers; and, in this case, if the jury believe, from the evidence, that the injury complained of was occasioned by an internal or hidden defect in the * * * which a thorough and careful examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight and care, then the defendant is not liable for the injury so occasioned.¹³

(b) The defendant was not an insurer of the personal safety of the plaintiff's wife, Mrs. F., while she was a passenger on the appellant's train, but owed to her the duty to exercise that high degree of care for her reasonable personal safety which a very prudent person would use under the same circumstances about the same matter; and a failure of the defendant, if any, to exercise such degree of care, would be negligence.¹⁴

(c) If you believe, from the evidence, that the injury to the plaintiff in this suit happened to him by mere accident, without any fault on the part of the defendant, or its employes, then the plaintiff cannot recover in this action.

(d) If you believe, from the evidence, that the defendant exercised all reasonably practicable care, diligence and skill, in the con-

11—Chi. & A. R. R. Co. v. Byrum, 153 Ill. 131 (134), 38 N. E. 578.

12—St. L. S. W. Ry. Co. v. Harrison, 32 Tex. Civ. App. 368, 73 S. W. 38.

13—P., C. & H. L. R. R. Co. v. Thompson, 56 Ill. 138; Ingalls v. Biels, 9 Met. 1; Ladd v. New B. Rd. Co., 119 Mass. 412; Taylor v.

G. T. R. D. Co., 48 N. H. 304; McPadden v. N. C. Rd. Co., 44 N. Y. 278; Sherlock v. Alling, 44 Ind. 184; Grand R. & Ind. Rd. Co. v. Boyd, 65 Ind. 526.

14—St. L. S. W. Ry. Co. v. Ferguson, 26 Tex. Civ. App. 460, 64 S. W. 797.

struction, preservation and repairs of its track, and in managing and operating its road, at the time of the accident, and that the accident could not have been prevented by the use of the utmost practicable care, diligence and skill, then the plaintiff cannot recover in this action.

(e) The court instructs you, that while common carriers of passengers are held to the very highest degree of care and prudence which is consistent with the practical operation of their vehicles and the transaction of their business, still they are not absolute insurers of the personal safety of their passengers.

(f) And, in this case, though you may believe, from the evidence, that the plaintiff was injured while a passenger on defendant's cars, still, if you further believe, from the evidence, that the defendant and its servants were not guilty of any negligence which contributed to such injury, then the defendant is not liable in this action.¹⁵

(g) The duty of a carrier is to safely carry passengers. It is true that a carrier is not an insurer of the safety of those whom it undertakes to carry, against all the risks of travel; but nevertheless there rests upon such carrier this general duty of safely carrying.¹⁶

§ 1749. **The Passenger Takes all the Risks Necessarily Incident to the Mode of Conveyance.** (a) The jury are instructed, that plaintiff, as a passenger on the defendant's car, as a matter of law, is presumed to have taken upon himself all the risks necessarily incident to that mode of traveling; and if the jury believe, from the evidence, that without the fault of the defendant, but by inevitable accident, plaintiff was injured, the jury should find for the defendant.

(b) The court instructs you, as a matter of law, that a passenger upon a railroad train takes all the risks attending that mode of travel, except such as are caused or increased by the negligence of the railroad company, or its servants.¹⁷

§ 1750. **Riding on Freight or Mixed Trains—Risks Assumed by Passenger—Series.** (a) The court instructs the jury that the defendant did not assume the absolute safety of plaintiff while a passenger on its train, but it was the duty of the defendant's agents in charge of its train upon which plaintiff was a passenger to exercise the highest degree of care and diligence consistent with the mode of transportation adopted to save him from injury.

(b) If the jury believe, from the evidence, that the agents of defendant in charge of the train upon which plaintiff was a passenger, so negligently operated said train, that plaintiff was, by a sudden and violent jerk not necessary or usual in the operation of said train, thrown upon the floor, and J. S. was thrown upon plaintiff, striking him with his elbow or knee in the side or bowels, thereby causing plaintiff to have rupture or hernia, they will find for plaintiff such reasonable sum in damages as they may believe, from the evidence,

15—G. & C. Union R. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572.
Yarwood, 15 Ill. 468.

17—Grand R. & Ind. Rd. Co.

16—Louisville, etc., R. Co. v. v. Boyd, 65 Ind. 526.

will compensate him for the physical and mental pain, if any, suffered by him by reason of said injury, and for any permanent diminution of power, if any, to earn money by reason of such injury, not exceeding _____ dollars.

(c) The court instructs the jury that it was the duty of the plaintiff to exercise reasonable care to protect himself while a passenger on defendant's train, and although the jury may believe from the evidence that the defendant was negligent, as in instruction No. 1, yet, if they shall further believe, from the evidence, that the plaintiff was himself negligent, and that the injury, if any, to him, would not have occurred, but for such negligence on his part, the law is for the defendant, and the jury will so find.

(d) The riding upon mixed trains composed of freight and passenger cars is unavoidably accompanied with more discomfort and danger than upon the trains devoted exclusively to passengers, and the passenger who accepts carriage upon such a train must be deemed thereby to have assumed the risk of such additional discomfort and danger due to the nature of the train. Now, if you believe, from the evidence, that the train upon which the plaintiff, J., was riding was such a train, and while he was a passenger thereon the car in which he was riding was forced against the one in front so as to cause the injury complained of, yet if the train and cars were properly equipped and were carefully handled, and there was no more jarring or jolting than is usually unavoidable in the handling of such trains, then the jury will find for the defendant.

(e) The court instructs the jury that if they believe, from the evidence, that the plaintiff or S. insisted upon taking the invalid and chair into the baggage car, and attended upon the patient there, and at the time there were other seats and accommodations upon the train for safely carrying the patient and her attendants, and that plaintiff would not have been injured except for his so riding in the baggage car, they will find for the defendant.¹⁸

§ 1751. Liability of Connecting Lines for Accidents on One Another's Lines. (a) The court charges the jury that where two railroad companies unite to run an excursion train over both of their lines, upon terms which make each of them responsible only for accidents occurring on its own line, and tickets are sold by one of them as the agent for both, expressing such limitation of liability, it matters not where, for the convenience of the parties, the point is established for the change of crews running the train, as to the passenger holding one of such tickets the liability is fixed by the point of actual junction of the lines. Before charging you that, I have to explain to you that that would be the law unless part of the line or track of one railway is used in common by both railway companies, in which case the liability is fixed, not by the point of actual junction of the lines,

18—Chesapeake & O. Ry. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145 (146).

but by the time when the control of the train is surrendered by one company and accepted by the other company. That fixes the liability.

(b) That where a railroad company, chartered under the laws of this state, has, under the franchises conferred upon it, built its line and established a depot, and allows another railroad company to run its trains over a part of such line and into such depot, the company owning such line is responsible to the public and passengers for all accidents happening on such trains by negligence. I cannot charge you that, unless the evidence shows that the railway company owning such line had taken control of the train. One railroad company is not to be held responsible for the negligence of another railroad company. Each must bear its own burden. If, therefore, the company which is allowed to use a line is still in control of a train, and injures a passenger by negligence, the railroad company owning the line cannot be held liable for that negligence, but the railroad company controlling the train would be held liable for the negligence.

(c) That where two railroad companies unite to run an excursion train over both of their lines, upon terms which make each of them responsible only for accidents occurring at its own line, and tickets are sold by one of them as the agent of both, expressing such limitation of liability, it matters not whether the train is carried through to its destination by the conductor and train crew employed by the initial company or not. The company upon whose track the train is at the time of the accident, and under whose orders the conductor is running the train, is liable for the accident, and the conductor is to the passengers on such train as the conductor of the company owning the line and issuing the orders for the operating of the train. As to that, gentlemen, I charge you that with this explanation: that the test is not what railroad company owns the line where the accident may have occurred, but what railroad company controls the train, because the railroad line may lease the line or it may be allowed, as a matter of favor, to run its train on the line of another railway, but the railway company controlling the train on the line of another railroad is responsible for the injuries caused by its negligence.¹⁹

TRESPASSERS AND PERSONS NOT PASSENGERS.

§ 1752. Degree of Care Due Trespasser. If you find, from the evidence, that the plaintiff was traveling upon the train in question,

¹⁹—*Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 1, 43 S. E. 307 (322).

"Where two connecting railroad companies unite in running an excursion train, and the initial company uses two miles of the track of the terminal company before surrendering the control of the train to the terminal company, the conductor being an employee of the

initial company, though moving his train for said two miles under orders of the owner of that track, the initial company is liable for negligence resulting in injury to a passenger, until the passenger is safely turned over to the terminal company at the point where the train is surrendered by the one and accepted by the other."

and that for the purpose of avoiding the payment of fare he was riding upon the platform of one of said cars, or other place outside the passenger coach, then the employes of the defendant would have the right to use all force and power necessary to overcome any resistance that might be offered; but they would not have the right to remove him, or push him off, or require him to jump off at a place where it was unsafe to get off, or at a time when the train was running at such rate of speed that it would be unsafe for a person to get off; and if you find that the plaintiff has established, by a preponderance of the evidence, that the brakeman on said train, or other employe thereon, did push the plaintiff off of said train at a place where it was unsafe to jump off, or at a time when the train was running at a speed when it made such act dangerous, and that the plaintiff was injured thereby, then your verdict must be for the plaintiff.²⁰

§ 1753. Care Due Persons Coming to Train to Aid or Assist Passengers. If you believe, from the evidence, that the plaintiff on the day in question did not intend to become a passenger on defendant's railroad, yet, if you believe the plaintiff was in good faith there waiting to see a person out of mere friendship, whom he expected to be a passenger on defendant's railroad, the plaintiff had a right to be upon said platform, although the person whom he expected did not in fact arrive. And if you further believe, from the evidence, that the plaintiff while so waiting and using due care and caution for his own safety, was injured by the defendant's servants' gross negligence or recklessness (if shown by the evidence) in manner and form as charged in plaintiff's declaration, then you should find for the plaintiff.²¹

THE PASSENGER'S RELATION TO CARRIER.

§ 1754. Payment of Fare—As Condition Precedent to Establishing Passenger Relation. (a) You are instructed by the court, if you find, from the evidence, that G. C. P., on the ——— of ———, was on the platform of one of the passenger cars of a train operated by the defendant company, with the intention of riding upon said train without paying any fare, then and in that case he was not a passenger upon defendant's train, and the defendant railroad company as a common carrier owed him no duty.

(b) It is the duty of a person, when traveling upon a railroad from one station to another, to enter the passenger coaches provided for the carrying of passengers, and to remain therein while such train is in motion, and to procure prior to the entering therein a ticket from the agents of said company, or, if such ticket be not purchased, then to pay the conductor on said train the proper and legal fare. A person doing this, and not guilty of misconduct on said train, would be a passenger, and the railroad company would be bound under the law

20—Pledger v. C., B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057.

21—Ill. C. R. R. Co. v. Wall, 53 Ill. App. 588 (590).

to properly care for and attend to the necessary and reasonable conveniences and wants of such passenger, and would be *prima facie* liable for any injury that such passenger received while so traveling. But a person riding on the outside of such passenger train, whether on the platform or some other place without, or on parts of the baggage car, for the purpose of obtaining a ride on such train without the payment of any fare therefor, would not be a passenger upon such train, but would be a trespasser thereon, and such railroad would owe no duty to such person, and the employes of such company would have the right to put such person off the train, and the railroad company would not be liable therefor, unless such removal was done in a reckless, careless, or negligent manner, and the injury, if any, was the result of such negligence.²²

§ 1755. Passenger Relation Need Not Be Specifically Mentioned in Instruction—When Injury “Alleged in Declaration” Sufficient. If the jury believe, from a preponderance of the evidence, that the defendant is guilty of the negligence charged in the declaration, or either count thereof, and that the injury to plaintiff complained of and alleged in the declaration resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care for his own safety before and at the time of the injury, the defendant is liable and the plaintiff is entitled to a verdict.²³

§ 1756. When Relation of Carrier and Passenger Ends. (a) The court instructs the jury that the relation of carrier and passenger continues, where one is a passenger upon the train of a railroad corporation, until the passenger has reached his destination, and has a reasonable opportunity to alight safely from the cars.²⁴

(b) If the jury find, from the evidence, that the plaintiff had taken passage on the defendant's car, and had been safely carried to his place of destination, and there alighted in safety from the defendant's car, and had left the defendant's railway track before receiving the

22—Pledger v. C., B. & Q. R. Co., 69 Neb. 456, 95 N. W. 1057.

23—So. Ry. Co. v. Cullen, 221 Ill. 392 (397).

“In cases of this character, where the declaration states a good cause of action, it would seem to be axiomatic that if the evidence showed the defendant was guilty of the negligence charged in the declaration, that the injury resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care before and at the time of the injury, and had not assumed the risk, there should, as a matter of course, be a verdict against the defendant. Appellant, however, argues that this instruction furnished a test of liability, and that it was erroneous because

it did not require the jury to find, from the evidence, before returning a verdict against the appellant, that the appellee was a passenger and rightfully upon the engine while riding there. It appears from the declaration that the relation of passenger and carrier existed between the parties hereto at the time of the accident, and the negligence charged against the appellant is a failure to exercise the care required by the law for the safety of its passenger. Unless the appellee was a passenger and rightfully upon the engine appellant was not guilty of the negligence charged in the declaration.”

24—Sanders v. So. Ry. Co., 107 Ga. 132, 32 S. E. 840.

injuries complained of, the defendant, under such circumstances, under the pleadings in this case, would not be liable.²⁵

(c) If you believe, from the evidence, that the employes of defendant stopped the train at C. a reasonably sufficient time for a passenger situated as was plaintiff to depart therefrom, and if you should further believe that the plaintiff delayed getting off said train from any cause, and that this delay, if any, was unknown to defendant, then you are charged that his contract relation with defendant ceased at the expiration of such reasonable time, if any, and the defendant could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon plaintiff.²⁶

STATION FACILITIES.

§ 1757. Degree of Care Required as to Station Facilities. (a) You are instructed that it is the duty of a carrier of passengers to provide and keep the landing places and platforms used by it for discharging passengers from its vehicles and all passageways leading to and from such places in a reasonably safe condition for the purposes intended, and for any violation of its duty in this respect which entails injury upon a passenger, without fault on his part, the carrier will be answerable in damages.²⁷

(b) While the law holds a railway company to the highest degree of care as to its cars and appliances, and railroad track, in carrying its passengers, and it would be liable for the slightest negligence in that respect, it is not held to such high degree of care as to its station or its appliances. The degree of care that a railway company is bound to exercise as to its platform and approaches is only ordinary care; hence if the jury find in this case that the defendant has exercised ordinary care as to the safety of the place selected for passengers to alight from its cars, and that such place was reasonably safe, and such a place that a person of ordinary care and prudence would

²⁵—Kennedy v. So. Ry. Co., 59 S. C. 535, 38 S. E. 169 (170).

²⁶—St. L. S. W. Ry. Co. v. Bryant, — Tex. Civ. App. —, 92 S. W. 813.

"As applied to this evidence the special charge refused contained a correct proposition of law and should have been given. In the case of Railway Company v. Martin, — Tex. Civ. App. —, 63 S. W. 1089, under a very similar state of facts, a charge practically identical with the one here refused was approved and the refusal thereof by the trial court constituted one of the errors for which the case was reversed."

²⁷—Hart v. Seattle R. & S. Ry. Co., 37 Wash. 424, 79 Pac. 954.

"We think the instructions as

whole made it clear to the jury that it was the trial court's view that not the highest possible degree, but a reasonable degree of care was required. That at least such was required of appellant in the care of its station platforms is sustained by the following: *Bethman v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. 587; *Jordan v. N. Y. N. H. & H. R. Co.*, 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St., 522; *Missouri Pac. Ry. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; *Wallace v. Wilmington & N. R. Co.* 8 Del. 529, 18 Atl. 818; *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713."

have used, then the defendant would not be liable, and the verdict should be in its favor.²⁸

§ 1758. **Passenger Using Dilapidated or Unsafe Platform.** If you believe, from the testimony, that the platform through which the plaintiff claims to have fallen was in a dilapidated or unsafe condition, which was open and apparent to a reasonably prudent and cautious person, and such person, under the circumstances, and under such opportunity as plaintiff had to know the condition of the platform, would have discovered that such platform was in a dilapidated or unsafe condition, or had holes in it, then you are charged that plaintiff would be presumed to know of such conditions, and know of the holes in the platform, and if, under the circumstances, you believe that plaintiff went upon the platform and was any way negligent in moving about or stepping from the platform, and he was thus hurt by stepping in a hole in the platform, or by a plank therein breaking, and he was thus thrown or fell, and was injured, then plaintiff is not entitled to recover in this case, even though you may believe defendant was negligent.²⁹

ROADBED AND TRACK.

§ 1759. **Liability for Condition of Roadbed and Track.** (a) The court instructs the jury that the duty of the defendant company in engaging to carry passengers for hire is to exercise extraordinary care and diligence; that is, that extreme care and caution which very prudent persons exercise in securing and preserving their own property. It is the duty of the defendant to exercise that care and diligence, not only in the construction of the road and the laying of the rails, but in the maintenance of that road and those rails; and it is the duty of the defendant that extreme care and caution be used in the management of its cars, through its operatives and employes. And if you find that the defendant was negligent in either of these respects, and that negligence was the proximate cause of this derailment and the injury, and the plaintiff could not have avoided the consequences of that negligence by the exercise of ordinary care, the plaintiff would be entitled to recover.³⁰

(b) Carriers of passengers by railroad are bound to use all reasonably practicable precautions, as far as human foresight will go, for the safety of their passengers; and they are answerable to injured passengers for slight neglect to themselves or agents, in respect to the condition of the track, and conduct and management of their trains,

28—Kennedy v. So. Ry. Co., 59 S. C. 535, 38 S. E. 169 (170).

29—Houston, E. & W. T. Ry. Co. v. McCarty, — Tex. —, 89 S. W. 805.

"A man of ordinary care would use more care and caution in walking upon a platform with holes in it, or rotten planks, than one free from these defects, and

although he may have the right still to use the platform, such use must be with care proportioned to the risk arising from its known, or obvious and apparent condition. Penn. Co. v. Marion, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. 330."

30—Macon Cons. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756.

if injury ensues therefrom, and the passengers themselves are without fault.³¹

§ 1760. **Derailment Through Embankment Giving Way—Measure of Care as to Bridges and Culverts.** (a) In this cause, if you believe from all the evidence, that the sleeping car in which plaintiff was a passenger was derailed and overturned as a direct and proximate result of a rain which was so heavy, unusual and extraordinary that it could not have reasonably been expected or anticipated by defendant railroad company, and that such unusual and extraordinary rain was the cause of a portion of defendant's railroad embankment giving way, and the consequent derailment of said sleeping car in which plaintiff was a passenger, and that said accident could not have been prevented by the exercise of the utmost degree of care and vigilance on the part of the defendant, then plaintiff cannot recover.

(b) Defendant railroad company, as a common carrier, does not insure the absolute safety of its passenger, and is not responsible for the direct and violent acts of nature, which could not reasonably have been foreseen and guarded against or prevented by the exercise of a high degree of care, skill and prudence; and if the defendant railroad company maintained its culvert and the railroad embankment at the point where the accident occurred in a good condition, and the same were safe for all emergencies which could reasonably have been anticipated by it, and, at the time of the injury complained of, defendant was in the exercise of the utmost degree of care and prudence both in the matter of the maintenance of said embankment and in the operation of its trains over the same, then said defendant is not liable.

(c) If you find from the testimony that defendant was without negligence in the construction and maintenance of the culvert, and that the injury to plaintiff was the result of an inevitable accident, and such as no human foresight could avert, then the defendant would not be liable, and your verdict must be in favor of the defendant.

(d) The measure of diligence required in the maintenance of bridges and culverts by railroad companies is that the character and size of the stream, the extent and situation of the agricultural land about it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for, so far as the exercise of ordinary foresight, care and skill can accomplish them; but there is no requirement that the recurrence of cyclones, cloudbursts and the like, shall be foreseen or guarded against, though it is known that they have many times happened. And, therefore, if you find, from the proof, that the culvert was of sufficient capacity to carry off safely all ordinary accumulations of water, and that the defendant constructed and maintained the same with due care, and frequently inspected the same, and it appeared to be amply sufficient for all purposes, then the court charges you that the company would not be liable for the injury suffered by the plaintiff from such extraordinary downpour of

31—G. & C. U. Rd. Co. v. Yarwood, 17 Ill. 509; Fuller v. N. Rd. Co., 21 Conn. 557.

rain or cloudburst as overtaxed the capacity of said culvert, and caused a washout in same.³²

§ 1761. Injury to Passenger Through Obstruction Near or on Track. If you find, from the evidence in the case, that the plaintiff was attempting to go upon defendant's coach, and that he was obstructed in the way by other passengers, and that he could not promptly get in the coach, and while he was endeavoring to make his way in the coach, the step he was standing on was knocked off by an obstruction on the track, and you find, from the evidence in the case, that in leaving the step in that condition, and allowing an obstruction upon the track, such as would knock the step from its place, the defendant was not in the exercise of that diligence that the law requires, the plaintiff would have the right to recover.³³

CARS AND APPLIANCES.

§ 1762. Liability as to Cars and Appliances. It is the duty of the railroad company to use properly constructed cars, and all reasonably needful appliances which extreme care and caution would suggest, in order to protect the lives and persons of its passengers; and the failure of a railroad company to furnish a reasonably safe passenger train, reasonably provided with everything necessary to save the passengers against dangers, shall not afford the railroad company any excuse against the duty of extraordinary diligence which the law requires.³⁴

§ 1763. Failure to Properly Heat Car. (a) If you find for the plaintiff on the issue last above submitted, and you further believe that, in consequence of getting cold in said car from W to S, plaintiff and his wife, or either of them, contracted cold, and you believe such cold resulted in sickness to the plaintiff and his wife, or either of them, as alleged by plaintiff, and you believe that the cold and sickness of plaintiff and his wife, or either of them, if any was directly and solely caused by the negligence, if any, of the servants of defendant on its own line, or if you believe the employees of the connecting carriers, or either of them, failed to furnish plaintiff and his wife with a reasonably warm and comfortable car to ride in after they left S, and you believe the plaintiff and his wife were compelled to ride in a cold and uncomfortable car after leaving S, and you believe the servants of the connecting carriers, or either of them, were guilty

32—Ill. C. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202 (205).

33—Georgia C. & N. Ry. Co. v. Watkins, 97 Ga. 381, 24 S. E. 35.

34—Macon, D. & S. R. Co. v. Moore, 99 Ga. 229, 25 S. E. 460 (461).

"The following charge stated the law too strongly against the defendant company: 'A carrier is liable for injuries on its cars,

caused by a sudden jolting of the cars in starting or coming to a stop; and a railroad company is not relieved from liability from reason of its failure to keep all the appliances which extraordinary diligence would require on trains adapted for transporting passengers.'"

of negligence, as that term is hereinbefore defined, in failing to furnish the plaintiff and his wife with a reasonably warm and comfortable car, if you find they so failed, and you believe the negligence, if any, of the connecting carriers, or either of them, was the cause of the sickness of plaintiff and his wife, or either of them, then you will also find for the plaintiff such sum as will now, in cash, compensate plaintiff for the physical pain and mental anguish, if any, that he and his wife, or either of them, suffered and will suffer in consequence of such sickness, if any, and the effect, if any, of plaintiff's sickness upon his ability to labor and earn money, and all necessary and reasonable sums he has paid or incurred for medicine and doctors' bills for himself and his wife in consequence of such sickness.

(b) But if you believe, from the evidence, that the defendant furnished the plaintiff and his wife with a reasonably comfortable car to ride in from W to S, then the defendant performed all the duty it owed to plaintiff, and, if you so believe, your verdict will be for the defendant, or if you believe the defendant did fail to furnish the plaintiff and his wife a reasonably comfortable car from W to S, and was negligent, and that plaintiff and his wife suffered cold from the trip to S, yet you will find for the defendant on the issue of sickness, unless you further believe the negligence, if any, of the defendant, on its own line, contributed the cause, and concurred in causing, the sickness. Or if you believe the negligence, if any, of the connecting carriers alone, was the cause of the sickness, you will find for the defendant on the issue of sickness.³⁵

(c) If you find, from the evidence, that plaintiff and his wife at the time alleged in the petition became and were passengers on one of defendant's passenger trains at T, and that they became and were entitled to be carried or transported to G on said train, and if you further find that during the time they were being carried from T to G, the weather was cold and disagreeable, and that the agents and

35—Missouri, K. & T. Ry. Co. v. Harrison, — Tex. Civ. App. —, 77 S. W. 1036.

"The charge is not subject to the criticism that it is upon the weight of the evidence, in assuming that the appellant furnished the car for the trip. As stated, the uncontroverted testimony was to the effect that the appellant undertook to operate a through train without change of cars from Greenville to Birmingham, Ala. The court was authorized to assume this as an established fact. Nor did the court err in failing to limit the appellant's liability to such injuries as were suffered by appellee and his wife on appellant's line. The appellant could not by contract relieve itself from its negligence in furnishing the defective

car. Its negligence in furnishing the defective car, under the facts stated, was the proximate cause of the injuries to appellee and his wife. While it was not the sole cause, it was the concurring cause—such as might reasonably have been contemplated as involving the result, under the attending circumstances. *Gonzales v. Galveston*, 84 Tex. 7, 19 S. W. 284, 31 Am. St. 17.

In addition to the authorities cited as bearing upon the questions discussed, see *Seale v. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602; *Stone v. Dickinson*, 5 Allen 29, 81 Am. Dec. 727; 1 *Shearman & R. on Neg.*, par. 31; *Jones v. George*, 61 Tex. 353, 48 Am. Rep. 280; *Sutherland on Dam.* (3d ed.), par. 36, p. 113, and section 38, p. 116."

servants in charge of said train failed and neglected to keep the coach in which plaintiff and his wife rode warm and comfortable, but permitted the same to become cold and disagreeable, and not properly heated, if they did, and if you further find that plaintiff and his wife were exposed to cold, and if you further find that in consequence of such exposure, if any, they contracted and took cold, and they were thereby injured as alleged in the petition, and if you further find that the failure of the agents and servants in charge of such trains, if you find there was a failure, to keep the coach, in which plaintiff and his wife rode, warm or comfortable, was negligence, as that term is defined in the first paragraph of this charge, and that such negligence, if any, was the proximate cause of the injury of each of them, if you find that they or either of them were injured, then you will find for the plaintiff, unless you find for the defendant under the further instructions hereinafter given you.³⁶

(d) By proximate cause is meant a cause which operating in natural and ordinary sequence, unbroken by any new cause, produces the event, and without which such event would not have happened. If you believe, from the evidence, that plaintiff or his wife has suffered or is suffering from any physical pain, injury, or disability, and if you believe that plaintiff and his wife were exposed to cold while on defendant's cars and that defendant was negligent, then plaintiff would be entitled to recover only for such pain, injury, or disability as was proximately caused by such exposures, if any, and if any of such pain, injury, or physical disability was proximately caused in any other way than by such exposure on defendant's cars, for such injury, pain, or disability so caused the plaintiff cannot recover and you will so find.³⁷

(e) If you believe, from the evidence, that the passenger coaches constituting the train on which plaintiff's wife was a passenger, when delivered to defendant's connecting carrier, at S, were equipped and supplied with heating apparatus and appliances for making the said cars warm and comfortable, of such character and in such condition that the servants of defendant's connecting carriers could, by the use of a very high degree of care, have made the said coaches or the said coach warm and comfortable, the defendant is not liable in this case for suffering or injuries, if any, which resulted to plaintiff's

36—St. L. S. Ry. Co. v. Haney, — Tex. Civ. App. —, 94 S. W. 386 (387).

"We are unable to see any reversible error in this charge. This paragraph limits a recovery for the injuries received to the time plaintiff and his wife were being carried from Texarkana, Tex., to Greenville, Tex., and, when taken in connection with other paragraphs of the court's

general charge and special charges requested by appellant and given, wherein the jury were specially instructed to consider only the injuries received during the transportation from Texarkana to Greenville, the objections to said paragraph complained of must be held untenable."

37—St. L. S. W. Ry. Co. v. Haney, — Tex. Civ. App. —, 94 S. W. 386 (388).

wife from any cause while she was a passenger of defendant's connecting carriers, and you will so find.³⁸

§ 1764. **Furnishing Filthy or Unfit Car—Rule in Texas as to Measure of Damages.** (a) Now, if you find and believe, from the evidence, that defendant's employes furnished to plaintiff's wife a car to take passage in from Dallas to Grand Saline, which was not lighted, and was filthy and dirty, and that plaintiff's wife's fellow passengers were smoking, drinking whisky, cursing and crowding up against plaintiff's wife; and you further find that the omissions and acts, if any, were negligence, as that term is herein defined; and if you further find that, as the proximate result of said negligence, if any, plaintiff's wife suffered inconvenience, humiliation, fright, alarm and excitement, and was made sick, and suffered physical pain and mental suffering—then you will find for plaintiff such damages, if any, as plaintiff may have suffered by reason of the loss of his wife's services, and such damages, if any, as plaintiff's wife may have suffered; and in estimating the damages, if any, you may take into consideration the loss of time of plaintiff's wife, the inconvenience, fright, alarm and excitement, if any, together with her mental suffering and physical pain while sick, if she was sick, which was the proximate result of the negligence, if any, of defendant's employes in charge of its train, and therefrom you will ascertain and determine what amount of cash money will be a fair and reasonable compensation for such injuries, if any.³⁹

(b) Even though you find, from the evidence, that the train on which the plaintiff took passage was an excursion train, still it was the duty of the railway company to provide sufficient accommodations for the safety and comfort of its passengers; and if they failed to use ordinary care to keep the cars comfortably warm, or to prevent plaintiff's wife from being subjected to noxious influences and misconduct on the part of the fellow passengers on the train, and by reason of such failure, if any, plaintiff's wife and child were made sick, or plaintiff's wife suffered humiliation or mental anguish, and by reason of the sickness of plaintiff's wife and child, if you find they were made sick, plaintiff was compelled to expend money for medical

38—Missouri, K. & T. Ry. Co. v. Foster, — Tex. Civ. App. —, 87 S. W. 879 (881).

"This was a defensive charge, and submitted the reverse of the proposition upon which the plaintiff was authorized to recover. The charge is correct, and was properly submitted."

39—Texas & P. Ry. Co. v. Bratcher, — Tex. Civ. App. —, 78 S. W. 531 (533).

"Nor is the charge subject to the criticism that it sets forth with undue prominence the results which the jury might consider as flowing from the negligence of defendant. The part of the charge

complained of reads, 'That if the jury found, as the proximate result of said negligence, the plaintiff's wife suffered inconvenience, humiliation, fright, alarm, and excitement, and was made sick, and suffered physical pain and mental suffering, then the jury could find for the plaintiff such damages as may have resulted therefrom,' and again repeating the results of such injuries in the part referring to the manner of estimating the damages. It is not contended that the verdict is excessive, and we think it clear that the jury were not prejudiced by this repetition."

services and drugs, then, in that event, plaintiff is entitled to recover.⁴⁰

§ 1765. **Riding on Loaded Freight Cars Belonging to Another Carrier—Duty of Carrier Furnishing Motive Power as to Inspection of Vehicles Used.** The defendant prays the court to rule that if the court and jury shall find that the said S became a passenger on a freight train of the defendant company, and that said freight train was made up partly of loaded freight cars belonging to other companies and received by said defendant to be forwarded over its line, then the said S assumed the risks of all dangers arising from defects in such foreign cars which could not be detected by the defendant by careful inspection of said cars, made with due regard to the exigencies of traffic, provided the defendant used all due care (in the operation of said train) in the running and management of said train, and in all the subsidiary arrangements necessary to the safety of the passenger.⁴¹

§ 1766. **Liability for Defective Coupling.** (a) You are instructed in this case that when the defendant received the plaintiff upon his car as a passenger for hire upon the ——— day of ———, that the defendant was bound to make up its train, couple its cars, and manage and control the same, in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger.

(b) You are therefore instructed that if you find the plaintiff was injured by reason of the negligent acts of the defendant's agents or servants, whereby they used a defective link or pin to couple said cars; that human care, vigilance and foresight could have reasonably discovered such defect; and you further find that the defendant did not contribute to such injury, and was using all reasonable care and caution to avoid said injury,—then your verdict would be for the plaintiff.

(c) On the other hand, you are instructed that the defendant is not required to use the utmost degree of care which the human mind is capable of inventing, but is only required to use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case in question. The defendant was not an insurer against accidents, nor is the defendant compelled to insure the absolute safety of its passengers. What the defendant was required to do was to do all that human care, vigilance and foresight could rea-

40—St. L. S. W. Ry. Co. v. Duck, — Tex. Civ. App. —, 69 S. W. 1027.

41—Western M. R. Co. v. State, 95 Md. 637, 53 Atl. Rep. 969.

"This prayer, as presented, definitely ruled that the deceased assumed the risks of all dangers arising from defects in foreign freight cars when the defects could not be detected or discovered by careful inspection. As such an

inspection is the measure of duty which the company was bound to perform with respect to such cars. It owed no higher duty to the deceased, who was a passenger on the freight train; and when that duty was done, if done, the hazards incident to hidden or latent imperfections, were of course assumed by the passenger on such a train."

sonably do, consistent with the practical operation of the road, in order to prevent injury to the plaintiff, its passenger.⁴²

§ 1767. **Use of Spark-arresters on Engines.** (a) If, from the evidence, you believe that sparks or cinders escaped from defendant's engine, and got into plaintiff's eyes, which caused plaintiff's injuries, but if, from the evidence, you believe that the engine from which the sparks or cinders escaped was equipped with the most approved spark-arrester, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks or cinders, then you are instructed that the *prima facie* case made out by proof of escape of sparks or cinders is rebutted, and, if you so believe, you will find for the defendant; but if you believe, from the evidence, that the defendant failed to equip its engine from which the sparks or cinders escaped that caused plaintiff's injuries with the most approved spark-arrester in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks or cinders, then you are instructed that the *prima facie* case made out by proof of sparks or cinders escaping and causing plaintiff's injuries has not been rebutted.⁴³

(b) If you believe, from the evidence, that said engine was, at the time in question, equipped with the best approved apparatus and appliance then in use for the prevention of the escape of sparks or cinders therefrom, and that the defendant had exercised proper care to keep said appliances and apparatus in reasonably good repair and condition as regards the escape of cinders, then you will find for the defendant, although you may further believe that a cinder was emitted

42—Larkin v. C. & G. W. Ry. Co. 113 Iowa 652, 92 N. W. 891 (893).

43—St. L. S. W. Ry. Co. v. Parks, — Tex. Civ. App. —, 73 S. W. 439 (440).

"It is objected to this part of the charge that it assumes that plaintiff's eyes were injured by sparks or cinders that escaped from the locomotive. We do not think that the charge is obnoxious to the objection when construed in the light of Mo. Pac. Ry. v. Lehmberg, 75 Tex. 61, 12 S. W. 838, and Galveston, H. & S. A. Ry. Co. v. Waldo, — Tex. Civ. App. —, 32 S. W. 783.

"The evidence shows beyond controversy that appellee's eyes were injured in some way, and the charge simply leaves it to the jury to determine whether sparks or cinders escaped from appellant's engine, and got into his eyes and caused his injuries.

"It is also urged as an objection

to the part of the charge last quoted that it requires the jury, before they can find for appellant, to believe from the evidence that the engine was equipped with the most approved spark arrester in use, appellant's contention being that its duty required it 'to exercise ordinary care in selecting the kind of spark arrester or netting to prevent the escape of sparks or cinders from its engines.' It is said by the Supreme Court in M. K. & T. Ry. Co. v. Carter, 95 Tex. 461, 68 S. W. 164:

"The decision of this court establishes that railroad companies must equip their locomotives with the best approved appliances for the prevention of the escape of fire," citing Galveston, H. & S. A. Ry. Co. v. Horne, 69 Tex. 646, 9 S. W. 440, from which the part of the charge under consideration was evidently copied, for the language is identical."

from said engine, and struck the plaintiff in the eye and injured him as alleged in the petition.⁴⁴

SERVANTS.

§ 1768. **Responsibility of Carrier for Negligence or Wrongful Conduct of Servants.** (a) If the plaintiff was a passenger upon defendant's road in one of defendant's coaches, as charged in her complaint, the defendant's obligation was to carry her safely and properly; and, if the defendant intrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured.

(b) A carrier of passengers for pay is responsible for injuries sustained by a passenger through the neglect, recklessness and carelessness of the servants of such carrier, while such servants are engaged in the general scope of their employment, whether the act was or was not authorized by the master.

(c) If plaintiff did not receive the injuries complained of by any contributing act of negligence or fault of her own, but was injured at the time complained of by the carelessness and negligence or fault of the defendant's servants, or one of them, committed in the general scope of employment as such servants or servant, the defendant is liable for such damages as she may have sustained by the injuries thus received.⁴⁵

(d) It is the duty of the defendant to exercise the highest degree of care toward the plaintiff as long as she remained a passenger, and you are instructed that if it is admitted by defendant that she was such passenger, then she is entitled to safe carriage to the end of her destination, and if she, while such passenger, was assaulted by an employe of the defendant, then the defendant is liable for such assault and injuries sustained.⁴⁶

§ 1769. **Negligence in Writing Date on Pass no Excuse for Assault by Conductor.** Even though the jury may find, from the evidence, that

44—M., K. & T. Ry. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106 (1107).

"The jury could not have understood that by proper care the charge meant a higher degree of care than the care due by a carrier to a passenger, and this had been correctly defined. The appellee being a passenger, the appellant owed him that high degree of care to keep its engine and appliances in repair which a very prudent and

cautious person would use under similar circumstances. St. L. S. W. Ry. Co. v. Parks, 97 Tex. 131, 76 S. W. 740. The charge, as a whole, submitted this issue as favorably to appellant as it was entitled to."

45—Louisville, etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572 (582).

46—Garvik v. B., C. R. & N. Ry. Co., 124 Iowa 691, 100 N. W. 498 (499).

the defendant negligently wrote the date on the pass, so that it appeared to expire May 1st, instead of May 10th, they are instructed that negligence in writing the date on said pass is not to be considered by the jury in determining the liability of the railway company in this action.⁴⁷

MANAGEMENT AND OPERATION OF CARS AND VEHICLES.

§ 1770. Duty to Run Trains According to Schedules—Damages—Burden of Proof. (a) The published schedules or time-tables of a railway company are the representations to the public as to the time of departure of its trains and of the periods within which their journeys will be performed. They are public professions, up to which it must use diligence to act, and, if it fail to perform its trips according to them, it will be liable to the passenger, unless it shows that it has made reasonable exertions to do so, and has been prevented by accidents and delays not attributable to its negligence, and in order to exempt itself from liability it must show that it exercised due care to prevent the delay.

(b) A railway company is chargeable with damages due to delay in running its trains according to schedule time, and nothing but accidents resulting from causes which reasonable care could not have provided against will excuse liability to the passenger for damages. If the conduct of the railway company is such as to show a wanton or willful disregard of duty to such passenger, exemplary or punitive damages may be awarded.

(c) Willful acts, for which exemplary damages may be awarded, may be shown by evidence of the recklessly omitting or neglecting to do something, the failure to do which shows gross or utter disregard.

(d) Exemplary or punitive damages are awarded as a punishment to a wrongdoer, and as an example and warning to the wrongdoer and others.

(e) The neglect of a railway company to run its train according to its schedule may be in itself an unlawful act. When an act which is in itself unlawful is committed, the law will presume that damages

47—*St. L. I. M. & S. Ry. Co. v. Harrison*, 76 Ark. 430 (433), 89 S. W. 53 (54).

"This instruction, asked at that time, was an effort on the part of appellant to have the court correct the improper argument of counsel and nulify whatever prejudicial influence it might have had upon the jury. The appellant was clearly entitled to it, for the assault of the conductor on the passenger bearing the pass could never have been contemplated, even as a remote consequence of

any negligence in writing the pass. Such assault certainly could not be considered anywhere within the range of the natural, ordinary and reasonable, or even remotely probable, effect of negligence in making out the pass. *St. L. I. M. & S. Ry. Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226, 86 Am. St. 206; 1 *Suth. on Dam.* 57; *McDonald v. Snelling*, 14 Allen 295, 92 Am. Dec. 768; *Scheffer v. Railway Co.*, 105 U. S. 252, 26 L. Ed. 1070; *M. & St. P. Ry. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256."

follow as a necessary consequence thereof, and no special damages need be proven.

(f) When a railway company has failed to carry a passenger to his destination by the time fixed in its published schedule, the burden is upon the railway company to prove that it has made every proper effort to prevent the delay. If it fail to prove this, it will be liable to the passenger for damages.⁴⁸

§ 1771. **When Delay is Presumptively Negligent.** (a) Where a railway train is delayed by an obstruction on the track, the law presumes that the obstruction on the track is caused by the fault of the railway company, and the burden is upon the railway company to prove that the obstruction on the track was caused by inevitable accident or other causes which could not have been prevented by due care and foresight. If it fail to prove this, it will be liable to the passenger for damages.

(b) Where a delay happens from the breaking down of any of the cars, engines, roadway, or other appliances or equipments under the control of the railway company, or is caused by the mismanagement or misconstruction of something over which the railway company has control, the law presumes that the same was caused by the negligence of the railway company, and the burden is upon the railway company to disprove this presumption, and, if it fail to disprove, it will be liable to the passenger for damages, if damages result therefrom to a passenger.⁴⁹

§ 1772. **Freight Trains Not Required to Stop at Platforms to Receive or Discharge Passengers.** (a) The court instructs the jury that the law does not require of railroad companies that they stop their freight trains, upon which passengers are carried, at the platforms of their passenger depots, for the purpose of receiving passengers, but they have the right to receive passengers on such trains at the usual places adopted for that mode of travel; and you are further instructed that if it appears from the evidence that the plaintiff was entitled to ride upon the train in question, and that it was a freight train, and that he undertook to board the same from the platform of the passenger depot of defendant at F, and failed because the train did not stop at the platform, and it is not shown by the evidence that it was the custom of the defendant to stop that particular train at the said platform for the purpose of receiving passengers, there can be no recovery, and your verdict must be for the defendant.⁵⁰

(b) The court instructs the jury that if you believe, from the evidence, the defendant in this case while the plaintiff was a passenger on its freight train on the day named in the declaration on the arrival of its freight train at the station of K, stopped its caboose reasonably near the platform at said station of K, due regard being had to

48—These six instructions were approved in *Miller v. So. Ry. Co.*, 69 S. C. 116, 48 S. E. 99.

49—*Miller v. So. Ry. Co.*, supra, 50—*Ohio & M. Ry. Co. v. Brown*, 46 Ill. App. 137.

the surrounding situation and location, and stopped a sufficient length of time for the plaintiff to alight in safety in said village of K, and if you further believe, from the evidence, that the plaintiff refused to alight and depart from said car because said car had not reached the depot platform, then you should find the issue for the defendant.⁵¹

§ 1773. **Negligently Starting Train While Passenger is Getting On.** If the jury find, from the evidence, that plaintiff was at the depot in Ft. P, and had a ticket to C, on the road of defendant, and if they find that, when the train came up and stopped, she at once attempted to get aboard the train, and if she was not negligent, as explained to you, and if while she was going up the steps to the ladies' coach, the train was suddenly moved, and if plaintiff was diligent in getting on the train, and was getting on in a reasonable time after the train stopped, and if she was thrown down by the sudden moving of the train, and was injured thereby, then defendant was guilty of negligence, and plaintiff would be entitled to a verdict, if she was guilty of no contributory negligence.⁵²

§ 1774. **No Obligation to Stop Train After Starting to Permit Passenger to Board It.** If the evidence shows that the train had started off and was in motion, then there was no obligation, statutory or otherwise, upon the defendant to cause the train to wait or to be stopped to permit the plaintiff to get on the train.⁵³

§ 1775. **Boarding Train at Place Where Stop is Required by Statute—Effect of Usage.** (a) The court instructs the jury that it is the duty of the jury, in order to ascertain whether the defendants, or either of them, by their or its conduct, invited the public to take passage upon the suburban trains of the defendant, C. & E. I. R. Co., going southward at a place between T and T streets in the city of C, to consider all the evidence in this case in relation to the manner in which persons getting or attempting to get upon any of such trains at that point were treated by the agents and employes of said defendants or either of them.

51—C. & E. I. R. Co. v. Stonecipher, 90 Ill. App. 511 (514).

"In reference to the last instruction cited it is conceded by appellee that passengers on freight trains cannot insist upon being landed at a platform if it is the custom of such freight trains to land them at a safe place reasonably near and convenient to the station. The testimony of appellee shows that she started to get off the train when it first stopped and remained for eighteen minutes, but resumed her seat upon being told by some one, she don't know whom, that it would pull up to the platform. Under the conflict of testimony as to the character of the landing where the caboose first stopped, and its distance from the

platform, if the expectation that it would be pulled up to the platform was the only reason that she did not get off there, and if the landing there was reasonably safe and convenient and was the place where passengers from said freight train going south usually landed, then her reason for not getting off was not a sufficient reason, and if, in consequence, she was carried past the depot, and landed half a mile from it, that fact alone does not entitle her to recover damages."

52—Alabama C. S. R. Co. v. Siniard, 123 Ala. 557, 26 So. 689 (690).

53—Pickett v. So. Ry. Co., 69 S. C. 445, 48 S. E. 466 (469).

"Section 2134 of the Code of

(b) The jury is instructed that, in order to determine whether the plaintiff exercised due care and caution for her own personal safety at the time of her alleged injury, it is their duty to consider all the circumstances at the time and immediately before the plaintiff was struck by the passenger train of the defendant C. & E. I. R. Co., if the evidence shows that she was so struck.

(c) The jury is instructed that, even if they should believe, from the evidence, that the object of the defendant, C. & E. I. R. Co., in stopping its south-bound suburban trains at a point between T and T streets in C was to comply with the statutes of this state with reference to stopping trains for railroad crossings, yet if the jury further believe, from the evidence, that the defendant, C. & E. I. R. Co., had been in the habit for years of permitting passengers to board its trains at said point and taking fares from them and otherwise treating them as passengers, this evidence should be considered, together with all the evidence introduced in the case, in order to determine whether the stopping of said trains was made exclusively for the purpose of complying with the statute above referred to.⁵⁴

§ 1776. **Duty to Give Notice of Arrival at Stations.** You are instructed that it was the duty of the defendant to give plaintiff reasonably sufficient notice of the approach and arrival of the train at C, and to afford him a reasonable opportunity to get off the train; that upon the arrival of said train at C, it was the duty of the plaintiff to alight from the train at said station. If, therefore, you find, from the evidence, that the employes of defendant in charge of said train gave notice of the approach and arrival of said train at C in the usual manner, and that the notice of such approach was given in a manner reasonably calculated to inform plaintiff of the arrival of said train at said station; and if you further believe, from the evidence, that said train remained at said station a sufficient length of time to enable plaintiff to alight therefrom, and that he failed to do so,—then the plaintiff would not be entitled to recover, and you should find a verdict for the defendant.⁵⁵

Laws is as follows: "Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains for a time sufficient to receive and let off passengers." It will thus be seen that the statute has made provision for persons desiring to board the train. The railroad company owes no duty to a belated passenger to stop its train in any other manner than that required by the statute. *Creech v. Ry. Co.*, 66 S. C. 528, 45 S. E. 86.

"A contrary doctrine would tend to disarrange the schedules of the

railroad company, and thus enhance the danger to the traveling public. It was, therefore, error to refuse the request."

54—*C. & W. I. R. R. Co. v. Doan*, 93 Ill. App. 247 (251), *aff'd* 195 Ill. 168, 62 N. E. 826.

"Taken apart from each other and from the other evidence in the case, the above instructions are not free from criticism; but when read in connection with the other instructions in the case, as should always be done, we are of the opinion that as a whole they could not have misled the jury."

55—*St. L. & S. W. Ry. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090.

§ 1777. Duty to Announce Stations—Passenger Negligently Failing to Hear Announcement. Gentlemen of the jury, you are instructed that it is the duty of a passenger on a railroad train to use his senses, and take notice of the usual announcement of stations, and if, by reason of his negligence, the passenger fails to hear notice given of the arrival of the train at his place or destination, and remains on the train, and is carried beyond, the fault is the passenger's, and the carrier is not liable therefor. If, therefore, you believe, from the evidence, that defendant's servants in charge of the train gave the usual announcements of stations as the train approached C and if, by reason of plaintiff's negligence, he failed to hear such announcement, the plaintiff remained on the train and was carried beyond, the fault was the plaintiff's, and the defendant is not liable therefore, and you should return a verdict in its favor.⁵⁶

§ 1778. Effect of Conductor's Promise to Come for Passenger at Destination—Carrying Passenger Past Destination. (a) The jury are instructed that, if the conductor had promised to come to her when the train reached B, she had a right to rely on that promise, and that he would come, and she was not, under those circumstances, obliged to take notice of the fact that the train had got to B, and she was not obliged to listen at or depend upon the call of the brakeman when the train reached B as a passenger would be required to do if the passenger had no assurance at that time from the conductor.

(b) And so, though the train got to B and stopped here, and though the brakeman and conductor may have—the brakeman may have—called out "B," thereby giving notice to the passengers of the fact the train was at B, then if she, relying upon his promise to come to her at that time, if he did make such promise, failed to hear the brakeman call out the station of B, why, she would be entitled to recover, because, if the conductor promised to come to her at B, she had a right to rely on that promise, and wait in her seat until he came, and she was not obliged to listen to the brakeman or listen at the call of the station, but might simply expect him to come and do what he promised to do.⁵⁷

§ 1779. Duty to Stop a Reasonable Time for Passengers to Alight. (a) A railroad company carrying passengers for hire has not discharged its duty, or relieved itself from liability, to them, till it stopped at the end of their journey a reasonable time for them to get off the train in safety.⁵⁸

(b) The court instructs the jury that it was the duty of the defendant company to stop its train at B station, on the occasion in question, a reasonably sufficient length of time to enable plaintiff's wife to alight therefrom in safety, and a failure on the part of de-

56—St. L. & S. W. Ry. Co. v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090.

57—Louisville & N. R. Co. v. Quick, 125 Ala. 553, 28 So. 14 (16).
58—Louisville, etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572.

fendant's employes in charge of its train to use that high degree of care to discharge such duty which very prudent and competent persons would usually have exercised under the circumstances, would be negligence of the defendant company, for which it would be liable to the plaintiff for any injuries to his wife as the evidence may show was the approximate and direct result of such negligence, provided that plaintiff's wife was at such time not herself guilty of contributory negligence.⁵⁹

§ 1780. Degree of Care Required of Carrier While Passengers Are Alighting. It is the duty of a railway company carrying passengers to exercise a high degree of care to enable its passengers to alight from its cars in safety—the degree of care required is such as very prudent, careful and competent persons would exercise under similar circumstances—and a failure to exercise such care constitutes negligence.⁶⁰

§ 1781. Starting Train While Passenger is in Act of Alighting. (a) If you find, from the evidence, that when the train on which plaintiff's wife was riding reached P she used reasonable diligence, situated and circumstanced as she was, to get off said train, and if said train did not stop at P long enough for her to have alighted therefrom in safety, and if while she was endeavoring to get off said train, it was started, and if, by reason thereof, or if by reason of the negligence of the parties operating said train in failing to assist her to get off—if you find that such failure was negligence—she was caused to fall and be injured without fault or negligence on her part, then you will find for plaintiff.⁶¹

59—*St. L. S. Ry. Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38.

"It correctly defines the appellant's duty, and states the circumstances under which the carrier would be liable, and leaves it for the jury to determine whether the circumstances existed. The appellant's duty to Mrs. H. did not terminate until she had alighted from the train. *Railway v. Miller*, 79 Tex. 79, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. 308."

60—*M., K. & T. Ry. Co. v. Wolf*, — Tex. Civ. App. —, 89 S. W. 778.

"By appropriate propositions under the first assignment, it is insisted that the high degree of care required of appellant in the first paragraph of the court's charge is applicable only to those cases where the passenger has entrusted himself wholly to the custody of the carrier, as his bailee, in short, and not to a case like this, where the passenger is in the act of alighting from the carrier's train. Yet, if we accept the principle of the law contended for, which appears to have some

support in the authorities, we think it has no application to the present case, since undeniably a passenger, while in the act of alighting from a railway coach, is quite fully committed to the care of the carrier and is not at all free to select his means and avenues of exit. *Tex. & Pac. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. 308; *Gulf, Colorado & Santa Fe Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Houston & Tex. Cent. R. R. v. Dotson*, 15 Tex. Civ. App. 80, 38 S. W. 644; *Tex. Mid. R. R. Co. v. Brown*, — Tex. Civ. App. —, 53 S. W. 44; *M. K. & T. Ry. Co. of Tex. v. Scarborough*, — Tex. Civ. App. —, 51 S. W. 356; *M. & T. Ry. Co. of Tex. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94."

61—*C. R. I. & T. Ry. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77 (73).
"Our Supreme Court, in the case of *T. & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, approves a charge quite similar to the above clause of the

(b) If you believe from the evidence that on the ———, plaintiff with his father and mother, were passengers on one of the defendant's trains, bound for the station of D; and if you further believe that as soon as the train stopped at D the plaintiff and his father arose from their seats, and proceeded at once to leave said train; and if you further believe that while attempting to alight from the train, the plaintiff reached the steps of the car; and if you further believe that while plaintiff was on the steps of the car (if you find he was) the servants of the defendant in charge of the train suddenly started the train; and if you further believe the servants in charge of said train failed to stop the same a reasonable length of time for the passengers to get off without injury to themselves; and if you further believe that the sudden starting of the train (if you find it was suddenly started) threw the plaintiff from the car steps to the platform below; and if you further believe that the plaintiff fell on his side, and was injured, as alleged; and if you further believe the plaintiff and his father, in attempting to alight from said train (if you find they did) used such haste and caution as persons of ordinary prudence would have exercised under the same circumstances; and if you further believe the servants in charge of said train were guilty of negligence in starting the train under the circumstances (if you find they suddenly started the same); and if you further believe the plaintiff's injuries, or any part of them, are the direct and proximate result of the negligence of the defendant,—then, in that event, you will find for the plaintiff; but unless you so believe you will find for the defendant.⁶²

§ 1782. **Fall While Alighting Must Be Due to Negligence of Carrier, or His Servants, to Render Carrier Liable.** The court instructs the jury that unless you find, from the evidence, that plaintiff's wife was injured by falling while attempting to alight from said train, and that such fall was caused by the negligence of the defendant's employes in charge of said train, you will find for the defendant. If her injury, if she was injured, was produced by any other cause than by falling while attempting to get off said train, you will find for defendant.⁶³

§ 1783. **Getting Off Train While in Motion—Obeying Directions of Sleeping Car Porter.** (a) The court instructs the jury that if you believe, from the evidence, that the plaintiff was a through passenger from St. L., Mo., to N. Y. City in the State of New York, by way of B, in said State of New York, and that on ———, the through sleep-

court's charge in this case. We think the court announced a correct proposition of law, particularly as applied to the facts of this case. . . . It must certainly be held as a matter of law to be the duty of a railway company receiving passengers for transportation to give them such reasonable time

as will enable them to alight at their destination under the usual and ordinary circumstances."

62—St. Louis S. W. Ry. Co. v. Byers, — Tex. Civ. App. —, 70 S. W. 558 (559).

63—Chicago, R. I. & T. Ry. Co. v. Armes, 32 Tex. Civ. App. 32, 74 S. W. 77 (78).

ing car from St. L. to N. Y. City on which plaintiff was being carried as such passenger, reached the E S Station at B, in the progress of said journey to the city of N. Y., and that said station was then managed and controlled by defendant; and if you further believe from the evidence that said car arrived at said B station at 6:30 p. m. of said day on track No. 6, and was to leave said station on the way to N. Y. at 6:50 p. m. over defendant's main line, the N. Y. C. & H. R. R., and that plaintiff during said interval of time between 6:30 and 6:50 p. m. visited the restaurant in said station to obtain refreshments, and upon his return to the train shed of said station, before 6:45 p. m. discovered that the said sleeping car on which he had been traveling as a passenger, as aforesaid, was no longer standing upon said track No. 6, on which plaintiff had left it, and that plaintiff did not know where said sleeping car was, and thereupon endeavored to find the said car, and in so doing observed a train headed towards the east upon track No. 4 in said station, and that said train contained several sleeping cars and had the general appearance of a through train, and that, on asking the porter on one of said sleeping cars of said train, plaintiff was told by him that said train was the train for N. Y., and that plaintiff thereupon and in consequence of said statement of the porter got on said train, believing it to be the train of which said sleeping car on which he rode from St. L. was a part, and that afterwards plaintiff was informed by said porter that said train was the West Shore train and that he then was directed by said porter to jump off, and that plaintiff then stepped to the platform adjacent to track No. 4 of said station from the step of said sleeping car of said West Shore train while the latter was in motion and in so doing plaintiff slipped upon said platform and fell underneath said train and was run over, whereby he received personal injury in the loss of part of his leg; and if you further find that said injury was so received by plaintiff as a direct consequence of negligence on the part of defendant, as defined in other instructions, and that plaintiff was not guilty of any want of ordinary care on his part contributing to his said injury, in so stepping from said West Shore train,—then your verdict should be for the plaintiff.⁶⁴

§ 1784. Obeying Directions of Conductor in Alighting from Train.

(a) A passenger is warranted in obeying the direction of the ser-

⁶⁴—Newcomb v. N. Y. C. & H. R. R. Co., 182 Mo. 687, 81 S. W. 1069 (1076).

"The failure to direct the plaintiff to his proper train left him to wander in search of it, and in his search he fell in with the porter, who gave him misdirection. If there had been no porter on the platform, and plaintiff had boarded the car to inquire, the consequence in legal effect would not have been different. The proximate cause of his boarding the wrong train

was the neglect of the defendant to point out the right train to him. And the instruction does not place the negligence on the misdirection of the porter, but describes the situation and the catastrophe, and then says that if it was caused by the negligence of defendant as defined in other instructions the defendant was liable. The other instructions referred to limit the negligence to the allegations in the petition."

vants and agents of the carrier, when given within the scope of their duty, unless such obedience leads to a known peril which a prudent person would not encounter.

(b) If, in this case, the jury believe, from a fair preponderance of the evidence, that the plaintiff obeyed the defendant's conductor in charge of the train upon which she was a passenger, in getting off the train, and if she was not then apprised of any peril that she would encounter thereby, she would not be guilty of contributing to any injuries received by her in thus alighting from the train.⁶⁵

§ 1785. Conductor Pulling Passenger from Train While in Motion. If the fact be that the defendant's conductor, having charge of the train upon which plaintiff was a passenger, seized hold of her while the train was in motion and was moving on, and pulled her from the platform of the coach by the exercise of physical force, and thereby caused her to strike the ground or other hard substance below, whereby she was injured, she would not be guilty of contributing to injuries received thereby.⁶⁶

§ 1786. Effect of Agreement with Conductor to Check Speed of Train in Order that Passenger Might Alight. (a) The court instructs the jury that if the plaintiff was on the train under an arrangement with the conductor, as alleged, he was rightfully on the train, and it was the duty of the conductor to use reasonable diligence and care to carry out the agreement, and to afford plaintiff an opportunity to safely alight, provided he himself should exercise reasonable care in the choosing of the occasion and in the doing of the act. Such arrangement would not bind the conductor to make the exit of the plaintiff safe, but only by reducing the speed of the train, if it was going too fast, to give plaintiff what reasonably appeared to the conductor a chance to get off in safety, in the use of ordinary care on plaintiff's part.⁶⁷

(b) If you believe, from the evidence, that plaintiff was on the train with the knowledge of the conductor, under an agreement that he should ride as far as about the schoolhouse; that the train would then go at such a rate as that he might safely alight, provided he acted with ordinary care in so doing; and that the train did not at

65—Louisville, etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572.

66—Louisville, etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572.

67—St. L. S. W. Ry. Co. v. High-note, — Tex. Civ. App. —, 84 S. W. 365 (366).

"The objection urged to the charge is that 'it required the conductor to use reasonable diligence and care to carry out the agreement, and to afford H. an opportunity to alight in safety, and at the same time allowed H. to choose the time and place in departing from the train. The

charge does not apply to the evidence and is confusing and misleading.' Under the agreement, we think the charge not objectionable. The agreement was that the train was to slow up at a certain place, and when it did slow up at that place appellee was justified in believing that it was the occasion contemplated by the agreement for him to alight, and if he used proper care in doing so he did all that was required of him, and it was the conductor's duty to use care to see that the train was slowed up."

that place go at such speed as to afford him a reasonable opportunity to safely alight, in the use of ordinary care, but was going faster than was agreed, and at a rate that made it unsafe to alight; that the conductor knew, or ought, in the exercise of ordinary care, to have so known; and that the plaintiff, in the use of ordinary care, reasonably believing that the train had been checked in speed, and was, under an agreement, going slow enough for him safely to get off, and reasonably believing that he could get off with safety, alighted from the train, using ordinary care in so doing, and that by reason of the fact that the train was moving too fast for him to safely alight, and faster than it had been agreed it should, he, in alighting, fell and was thereby injured—you will find for the plaintiff.⁶⁸

§ 1787. Failure to Warn Passenger of Danger in Alighting. The jury are instructed that if they believe, from the evidence, that the plaintiff was a passenger, as alleged; that the night was dark and rainy; that the brakeman called the station and opened the doors; that the train came to a full stop; that thereupon plaintiff went on the platform where the brakeman was standing, as if to get off, and that the brakeman failed to warn him of danger, and to inform him that the train had not reached the station, and that plaintiff, on account of the darkness, did not and could not discover that the car was not at the platform, and that, exercising ordinary care, he attempted to leave the train; and that by the starting thereof he was thrown or fell, and was injured,—they would be warranted in finding negligence on the part of the defendant.⁶⁹

§ 1788. Stopping at Suitable Place for Passenger to Alight. (a) If the jury believe, from the evidence, that the defendant stopped their train for passengers to alight at W station at a place which

68—*St. L. S. W. Ry. Co. v. High-note*, supra.

"The objections urged to this charge are (1) that it makes appellant liable if the conductor knew, or ought to have known in the use of ordinary care, that the train was going faster than was safe, and faster than was agreed upon, at the time appellee departed therefrom, whether he knew, or by the use of reasonable care ought to have known, that appellee intended to depart at the time he did depart, or knew when he did depart from the train; (2) that it is on the weight of the evidence, and assumes that the train was moving too fast for appellee to safely alight at the time he departed therefrom; (3) that it is upon the weight of the evidence, and assumes that the rate of speed was faster than had been agreed upon between the conductor and O'Neil at the time appellee, High-note, departed from the train.

We are of the opinion that there is no merit in the second and third objections. As to the first objection, we are of the opinion that it is not well taken. It was the duty of the conductor to use ordinary care to have the train running at that point at such a rate of speed as that the appellee could have, with the use of ordinary care, alighted in safety, and if he failed to use that care, and the appellee alighted, believing that it was running sufficiently slow, and used ordinary care in so doing, he was entitled to recover."

69—*Devine v. Chicago, M. & St. P. R. Co.*, 100 Iowa 692, 69 N. W. 1042 (1043).

"The matters recited in the above paragraph of the charge are all alleged as circumstances which made it negligence to stop the train, and invite or permit passengers to then leave it."

was unsafe and dangerous for passengers to alight, and that the plaintiff was told or encouraged to get off at such place, and, while so doing, she was injured, then the defendant would be liable, and the verdict should be for the plaintiff, if she did not contribute to the accident by the want of ordinary care,—by the failure to observe ordinary care.⁷⁰

(b) If the jury believe, from the evidence, that the plaintiff alighted from defendant's car at the place described in the complaint, but that the place where plaintiff alighted was, considering the circumstances, a suitable place and a place of reasonable safety for passengers to alight, and such as a person of ordinary care might select for such purpose, then the defendant would have discharged its duty under the law, and could not, under the pleadings of this case, be held liable to the plaintiff for injury accidentally occurring to the plaintiff while attempting to pass to the car on the connecting road.⁷¹

§ 1789. **Furnishing Passenger Safe Means for Alighting.** (a) The court instructs the jury that a passenger who has paid his fare is entitled to be carried safely to the place of his destination (that is, the place to which he has paid his fare), and must be furnished at said place safe means of exit and landing; and if the train is stopped, and he is directed by the agents in charge of the train to get out at said place, he has the right to rely on their direction, and can presume that the place is safe for his exit, unless the danger thereof is open and apparent to him.⁷²

(b) If you believe, from the evidence, that the box upon which plaintiff stepped or attempted to step in alighting from defendant's train was an unsafe device to be used for so alighting, by reason of its size or position, or the character of the ground upon which it rested; and if you further believe that by reason of said box being unsafe to use as such device, the plaintiff in descending from the steps of defendant's car, fell and was injured; and if you further believe from the evidence that the defendant's servants were guilty of negligence in failing to furnish plaintiff a safe means for alighting from said train, or if you believe that defendant's servants upon said train were guilty of negligence in failing to furnish plaintiff personal assistance necessary to prevent her from falling; and if you further believe, from the evidence, that such negligence, if any, of defendant's servants was the proximate cause of plaintiff's injuries, if any, then you will find for the plaintiff against the defendant such sum of money as damages as you believe, from the evidence, will reasonably and fairly compensate plaintiff for the bodily and mental pain, if any, reasonably necessary medical expenses, if any, loss of time from her business, if any, and diminished capacity to pursue her occupation in the

70—*Brodie v. Carolina M. Ry. Co.*, 46 S. C. 203, 24 S. E. 180 (182). 72—*Kennedy v. Southern Ry. Co.*, 59 S. C. 535, 38 S. E. 169 (170).

71—*Kennedy v. So. Ry. Co.*, 59 S. C. 535, 38 S. E. 169 (170).

future, if any, which you believe, from the evidence, the plaintiff has sustained or incurred by reason of said injuries, if any.

(c) You are further instructed that while the plaintiff was a passenger on defendant's train, the defendant owed to her the duty to exercise that high degree of care for her personal safety that a very prudent person would exercise under the same circumstances, and a failure, if any, to use such care would be negligence in the sense that the word "negligence" is used in the foregoing portions of this charge. The burden is upon the plaintiff to make out her case by a preponderance of the evidence, and if she has not done so, you will find for the defendant.

(d) If you believe, from the evidence, that defendant's employes in charge of said train exercised that high degree of care for the personal safety of plaintiff in alighting from said train which very cautious and prudent persons would have exercised under the same circumstances, then you will find that they were not guilty of negligence; and if you so find you will return a verdict for the defendant.⁷³

§ 1790. Helping Passengers to Alight. The jury are instructed that, whether or not the failure of the parties in charge of said train to assist plaintiff's wife to get off said train constituted negligence is a question of fact to be determined by you under the circumstances, taking into consideration the failure on her part to ask for such assistance.⁷⁴

§ 1791. Injury to Passenger by Having Dress Stepped on While Alighting. If you find that while plaintiff's wife was alighting from the car she stepped upon her dress and was thereby caused to fall and be injured, or if some persons behind her stepped upon her dress and thereby caused her to fall and be injured, you will find for defendant. But you are instructed that the plaintiff would be entitled to recover if the injury to his wife, if she was injured, was caused by the negligence of defendant without negligence on her part contributing to it, and if you so find it will make no difference if the negligence of defendant was contributed to by the act of some fellow passenger.⁷⁵

§ 1792. Stopping Train a Reasonable Time for Refreshments. If you believe and find, from the evidence, that while the plaintiff was a passenger from D to A, said train stopped at M Station, on its line of road, and that the plaintiff alighted from said train to procure a lunch at said station, and that it was usual and customary for such trains to

73—Missouri, K. & T. Ry. Co. v. White, 22 Tex. 424, 55 S. W. 593.

74—Chl. R. I. & T. Ry. Co. v. Armes, 32 Tex. Civ. App. 32, 74 S. W. 77 (78).

75—M., K. & T. Ry. Co. v. Wolf, — Tex. Civ. App. —, 89 S. W. 778. "There is no merit in the criticism of the court's charge. It is immaterial that appellee's petition

did not allege that the negligence of a fellow passenger contributed to his wife's injury, as it is also immaterial that there was no evidence of negligence upon the part of any fellow passenger in stepping on her dress, since the charge under consideration does not require that the act of a fellow passenger be negligence. We under-

allow passengers to get lunch at said station, and if you further believe, from the evidence, that while plaintiff was eating his lunch the signal was given for passengers to board the said train, and thereafter a reasonably sufficient time was not given by the operatives of said train to enable plaintiff to get on before the same was put in motion, and that by reason thereof plaintiff was thrown down and injured, as alleged in his petition, or in either of the ways therein alleged, and that such failure, if any, to give such time to plaintiff to board the train was negligence, and but for such negligence, if any, plaintiff would not have been injured, or if you believe and find, from the evidence, that after said train was put in motion the plaintiff attempted to board the same, and while so doing the servants and employes of the defendant in charge of and operating said train, caused the same to give a sudden jerk, thereby throwing plaintiff down and injuring him in the manner or in either of the ways alleged in his petition, and that the causing of said train to give such sudden jerk was negligence, and that but for such negligence, if any, plaintiff would not have been injured, then, in either such case, if you so find, you will find for the plaintiff such sum as will actually compensate him for the damage, if any, sustained by reason of such injuries, unless you find for the defendant under the instructions hereinafter given you.⁷⁶

§ 1793. **Duty as to Operation of Stock Trains Carrying Passengers.** The court instructs you that railroad companies have a legal right to operate stock trains and to carry passengers upon them; and in so doing they are required to use only such equipment as is suitable for the safe operation of a stock train. They are not required to have such a train equipped with appliances such as are useful and necessary in handling passenger trains; and in operating such stock trains they are not required to start, move or stop them with the same degree of care for the safety or convenience of the passengers thereon as is exacted from them in the management of passenger trains. And if you believe, from the evidence in this case, that the plaintiff was injured while riding upon a stock train operated by one or both of the defendants, or while it was upon the track of one or both of the defendants, and if you further believe, from the evidence, that such train was then properly equipped for use as such stock train, and that the defendant who was then moving the said train, started, moved and stopped the train as prudently and carefully as such a train so equipped could be started, moved and stopped, then you should find both defendants not guilty.⁷⁷

§ 1794. **Injury to Stockman by Jerking or Jolting Car While Properly Tending His Stock.** If you believe, from the evidence, that the

stand that appellant would be liable, if its negligence concurred with the act of a fellow passenger, irrespective of whether or not that act be negligence, and irrespective

of whether or not the same was pleaded."

76—Texas & P. Ry. Co. v. Gray, — Tex. Civ. App. —, 71 S. W. 316.

77—Penn. Co. v. Greso, 102 Ill. App. 252 (256).

plaintiff R. was riding in the stock car in which his horses and cattle and goods were being transported over defendant's road, and that while the train was stationary, his cattle being down, and needing his attention, he at the time, in a prudent and careful manner, attempted to or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed.⁷⁸

§ 1795. Injury to Passenger Through Collision. If you believe, from the evidence, that the plaintiff was a passenger on board the cars of the defendant, in the month of ——— last, and that those cars came in collision with another train of cars, by and through the negligence of the defendant's agents or servants, as charged in the declaration, and that by reason of such negligence the plaintiff was injured and sustained damage, and also that he was himself using all reasonable care and caution to avoid such injury, then you should find a verdict for the plaintiff, and assess his damages.⁷⁹

§ 1796. Collision Prima Facie Negligence. If you believe, from the evidence, that the plaintiff was injured by the overturning of the car in which he was a passenger (or by a collision of the cars, etc.), and was thereby injured, without any fault upon his part, he thereby makes out a *prima facie* case of negligence against the company, and places upon it the burden of proving, by a preponderance of evidence, that the accident resulted from a cause which could not have been foreseen or prevented by the exercise of all reasonable care, vigilance and foresight on behalf of the company.⁸⁰

§ 1797. Derailment of Car Prima Facie Negligence. The court instructs you that where a railway car is thrown from the track, and the passenger for hire is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the onus is on the company to show, by a preponderance of the evidence, that it was not negligent in any of these respects.⁸¹

§ 1798. Care Due Passenger While Train Is Being Switched. (a) In determining the question of liability of the defendant in this case you will confine yourselves to a consideration of the following questions, to-wit: (1) Did the defendant, by and through its servants, discover the presence of the plaintiff in one of the defendant's coaches after the same had been put in motion by the switch engine at P.? (2) If the defendant did so discover the presence of the plaintiff, then

78—Texas and P. Railway v. Thompson, 56 Ill. 138; Lemon v. Reeder, 170 U. S. 530 (535), 18 Sup. Ct. 705.

79—C., B. & Q. R. R. v. George, 19 Ill. 510.

80—P. C. & H. L. R. R. Co. v.

Chanslor, 68 Mo. 340.

81—P. P. & J. R. R. Co. v. Reynolds, 88 Ill. 418; Fairchild v. Cal. Stage Co., 13 Cal 599.

did the defendant thereafter exercise ordinary care to avoid injuring him? (3) Did the failure of the defendant, if any, to exercise ordinary care to avoid injuring the plaintiff, directly and immediately result in the injuries sustained by the plaintiff? (4) Was the plaintiff guilty of contributory negligence?

(b) If, from the evidence, you believe that after the defendant's coaches were put in motion by the switch engine at P. the defendant, by and through any of its servants, to whom it had intrusted the duty and authority of directing and controlling the movements of its trains while the same was being switched, discovered the presence of the plaintiff in one of said coaches while being so moved by the switch engine, and, having so discovered the plaintiff therein, if such was the fact, failed to exercise ordinary care with reference to his safety, and that such failure, if any, to exercise ordinary care, directly and immediately, resulted in the injuries sustained by the plaintiff, then you will find for the plaintiff, unless you believe that he was guilty of contributory negligence as hereinafter defined.⁸²

PROTECTION OF PASSENGER BY CARRIER.

§ 1799. Duty of Conductor to Protect Female Passenger from Vulgarity and Obscenity. If you believe, from the evidence, that plaintiff was with other passengers on the train; that the other pas-

⁸²—*Gulf, C. & S. F. Ry. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653 (655).

"In a case where such duty exists, the failure to use ordinary care resulting in damages, an action for negligent injury may be maintained and a recovery had for all of the consequences of which such failure was the proximate cause. The jury, in passing upon and determining the question whether or not the appellant had exercised ordinary care after discovering the plaintiff in the car, doubtless concluded that the facts introduced upon the trial and as set out in our findings were sufficient to indicate that the appellant had been guilty of negligence in the manner as stated in the findings of fact. In submitting the degree of care or duty resting upon appellant in its conduct towards appellee, the charge of the court was very conservative, for the facts in the record strongly indicate that the appellee, at the time he received his injuries, had not lost his status as a passenger; and, if such was the case, of course the appellant was burdened with a higher degree of care in its conduct towards him than ordinary

care. There is evidence in the record that immediately upon the arrival of the train at Purcell, or a very few minutes thereafter, it was put in motion under the direction of the switch crew, and that there were coaches attached to that train in which the appellee was entitled to ride, if he had been promptly notified of their existence. It might be true that he was given a reasonable opportunity to leave the particular coach that he was occupying, but in view of his right of continuous transportation he was not required to leave the train, and had the right to ride in one of the coaches that was going through to Newton, Kan. The facts and circumstances indicating that he was entitled to protection as a passenger are much stronger in his favor than were the facts in the case of *Texas & C. Rd. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895, where, after a review of authorities, it was held that one who had left the train and the depot platform was entitled to protection as a passenger. Our information is that a writ of error was denied by the Supreme Court in that case."

sengers, in her presence and hearing, in the same coach with her, uttered profane, vulgar and obscene words, and sang obscene songs; that the conductor was present, and knew of the presence of plaintiff and of the using and singing of said words and songs by the passengers, and did not restrain nor endeavor to prevent them from so doing; that the use of the words and songs alarmed and frightened the plaintiff, and caused her shame, humiliation and distress of mind; and if you further find that the words and songs were, in their nature, calculated and likely, under the circumstances, to produce alarm, fright, shame, and distress of mind in plaintiff, and that persons of ordinary prudence and judgment, acting in a capacity similar to that of the conductor, under like circumstances, would have commonly anticipated or perceived such a result to plaintiff—you will find for her in such sum as you deem just pecuniary compensation for the alarm, fright, shame, and humiliation and distress of mind caused as aforesaid.⁸³

CONTRIBUTORY NEGLIGENCE.

§ 1800. Contributory Negligence of Passenger. (a) It is the duty of every person to use such care and caution as a person of ordinary prudence and caution would commonly exercise under like circumstances to avoid injury to himself; and the degree of care required is always proportionate to the degree of danger indicated by the facts and circumstances of the case, or that which might reasonably have been foreseen by a person of ordinary prudence and a failure to

83—St. L. S. Ry. Co. v. Wright, — Tex. Civ. App. —, 84 S. W. 270 (271).

"It is insisted that this charge is on the weight of evidence, and assumes that profane, vulgar, and obscene words were used, and vulgar and obscene songs were sung, by passengers on appellant's train, in the presence of appellee. The specific part of the charge against which this contention is directed is 'that the conductor was present, and knew of the presence of plaintiff and of the using and singing of said words and songs by the passengers.' The charge is not subject to the criticism made. In the first part of the paragraph the jury were instructed, in effect, that they must believe from the evidence that profane, vulgar, and obscene language was uttered, and vulgar songs were sung. The charge does not assume this fact.

Again it is insisted that the charge does not confine the jury to a consideration of the evidence in determining the compensation to which the plaintiff would be

entitled in the event the jury should find for her, and leaves the jury free to determine the amount of the pecuniary compensation regardless of the evidence in the case. The first part of the paragraph required the jury to find the language was used and the songs sung, and that the use of the words and songs alarmed and frightened plaintiff, and caused her humiliation and distress of mind. The charge authorized the jury to give compensation for the alarm and fright, shame and humiliation and distress of mind, caused as aforesaid. Thus the jury were required to find first that the words were used and the songs sung, and that thereby plaintiff was alarmed and frightened, and caused shame, humiliation, and distress of mind; and, if these facts are found in the affirmative, then they are told that they may find for her pecuniary compensation for such alarm, fright, shame, and humiliation and distress of mind."

exercise such care is negligence. By contributory negligence is meant some negligent act or omission on the part of the plaintiff which, concurring or co-operating with some negligent act or omission on the part of the defendant, is the proximate cause of the injuries complained of by plaintiff.

(b) If you believe, from the evidence, that plaintiff himself was guilty of contributory negligence proximately contributing to his injuries, as contributory negligence has been heretofore explained and defined, you will find for the defendant, even though you should believe that the negligence of the defendant, its servants or employes, contributed to cause plaintiff's injuries. . . . In determining . . . as to whether or not plaintiff was guilty of negligence in being upon or near defendant's track, or in his conduct while upon or near defendant's track, you should consider all the facts and circumstances in evidence which tend to throw light upon this question.⁸⁴

§ 1801. Ordinary Care and Prudence Required of Passenger. (a) The court instructs the jury the plaintiff, as a passenger, was not required by law to exercise extraordinary care or manifest the highest degree of prudence to avoid injury. All the law required of him while traveling as a passenger was that he should exercise ordinary care and prudence for his safety, such as ordinarily careful persons would exercise under the same circumstances as those shown in evidence.⁸⁵

(b) "Ordinary care and caution," as used in this charge, is that degree of care and caution that a person of ordinary prudence is accustomed to use under like or similar circumstances.⁸⁶

(c) The plaintiff, as a passenger, was not required by law to exercise extraordinary care, or manifest the highest degree of pru-

84—St. Louis S. W. Ry. Co. v. Cassaday, 92 Tex. 525, 50 S. W. 125 (126).

"We do not consider that this charge does any more than to define contributory negligence, and inform the jury that, if plaintiff was guilty of such negligence, he could not recover, and that, in determining whether he was so guilty, they should look to all the circumstances in evidence. It does not undertake to apply the law to the very facts of the case, as we have held a party is entitled to have done if he requests a proper charge. *Mo. K. & T. Ry. Co. v. McGlamory*, 89 Tex. 639, 35 S. W. 1058; *Gulf, C. & S. F. Ry. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902."

85—*W. C. St. R. Co. v. McNulty*, 166 Ill. 203 (205), 46 N. E. 784, aff'g 64 Ill. App. 549.

"It is said that the two sentences of the instruction are in conflict

with each other if taken in a general sense, while, if taken in a special sense, they are erroneous, because they pronounce a conclusion from the evidence which the jury may lawfully determine. This criticism is too refined. The obvious and unmistakeable meaning of the instructions is that all the care that was required of the plaintiff was ordinary care, which is such a degree of care as ordinarily careful persons would exercise under similar circumstances. A like instruction was approved by this court in *C. & A. R. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406."

86—*St. Louis S. W. Ry. Co. v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010.

"Courts are not required to use the exact language of the books in defining such terms to the jury, though it would be wiser and safer to follow established defini-

dence to avoid injury. All the law required of him while traveling as a passenger was that he should exercise ordinary care and prudence.

(d) By ordinary care the law means such a degree of care, under the circumstances and in the situation in which plaintiff was placed, so far as that may be shown by the evidence, as an ordinary prudent man would exercise under like circumstances and in the same situation to avoid apparent danger.

(e) If the jury believe, from the evidence, that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration, or in either one of the counts thereof, then you should find the defendant guilty.⁸⁷

§ 1802. Riding Upon Engine Rightfully at Invitation of Conductor. (a) The court instructs the jury that if they believe, from the evidence, that ——— deceased was the husband of the plaintiff in this suit, and that the said ——— was rightfully upon the defendant's engine by invitation and direction of the conductor and manager of the same, and he was using ordinary care for his safety and was, by and through the carelessness and negligence of the defendant's servants in running and handling the said engine, thrown from the said engine to the ground and run over by a car and injured, from which injuries the said ——— afterwards died, then the jury will find for the plaintiff, and assess her damages at such sum as they believe, from the evidence, she has sustained, not exceeding \$——.

(b) The court instructs the jury that, if they believe, from the evidence, that ———, the deceased, was rightfully on the defendant's engine as alleged in the declaration in this case, and that while he was on said engine he was using ordinary care on his part for his safety and was, by and through the carelessness and negligence of the defendant's servants in running and handling said engine, thrown from said engine and injured, from which said injuries the said ——— died, then the jury should find for the plaintiff and give her such damages as they deem a fair and just compensation with respect to the pecuniary injuries resulting from such death to the wife and next of kin of the said deceased, not exceeding \$——.⁸⁸

§ 1803. Alighting from Train Encumbered by Grips and Valises. But if you find, from the evidence, that as plaintiff attempted to alight from said train he carried a grip and valise on his back and

tions. We think, however, there can be no valid objection to the definition given by the court. There can be no practical difference between what a person of ordinary prudence would ordinarily do, or usually do, and what

such person is accustomed to do under similar circumstances."

87—C. & A. R. R. Co. v. Fisher, 38 Ill. App. 33 (39 and 40), *aff'd* 141 Ill. 614, 31 N. E. 406.

88—L. S. & M. S. Ry. Co. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510.

in his hand, and if you further find that an ordinarily prudent person, situated and circumstanced as plaintiff was, would not have attempted to alight from said train incumbered with said grip and valise, and if you further find that in attempting to so alight, if he did, he failed to exercise that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances, and that such failure, if any, caused or contributed to his injury, or if you find that as plaintiff was coming down the steps he stumbled and started to fall, and he was caught by the defendant's servant, and was prevented from falling, then, in either event, you will find for the defendant.⁸⁹

§ 1804. Passenger Stumbling or Falling While Alighting. If the plaintiff stumbled or fell while he was in the act of alighting from the train, and was injured in consequence to any extent, and he was caused to fall for any reason except the moving of the footstool by the porter, then he is not entitled to recover, and you should return a verdict for the defendant.⁹⁰

§ 1805. Boarding Moving Train. The court instructs the jury that even if defendant's train was not stopped a sufficient length of time to enable plaintiff to get aboard said train safely, and if plaintiff attempted to get aboard of said train while in motion, and was thrown from the train because of said attempt to get aboard the train while in motion, and was thereby injured, then she was guilty of contributory negligence, and cannot recover in this case.⁹¹

§ 1806. Getting Off Moving Train. (a) If the jury believe, from the evidence, that the plaintiff left the car of the defendant, C. T. T. R. R. Co., while the same was in motion, and if they further believe from the evidence that he knew of the proximity of the tracks of the C. B. & Q. R. R. Co., they must take these facts into consideration in determining whether the plaintiff was exercising due care and caution for his own safety.⁹²

(b) The jury are instructed that if you believe from the evidence before you in this case that the deceased, G. C., left or attempted to leave the defendant's train on which he was riding before the train reached the accustomed place for stopping at said station, and while the said train was still in motion, and that in doing so, if he did, he failed to exercise that degree of care and prudence which an ordinarily careful and prudent person would have exercised under the same or similar circumstances, and that such failure, if any, contributed to cause the injuries to the deceased which resulted in his death, then you are instructed that the plaintiff cannot recover, and if you so find you will return a verdict for the defendant, even though you should find

89—*St. L. S. Ry. Co. v. Johnson*,
—*Tex. Civ. App.* —, 94 S. W. 163.

90—*St. L. S. W. Ry. Co. v. Johnson*, —*Tex.* —, 97 S. W. 1039.

91—*Pence v. Wabash R. Co.*, 116
Iowa 279, 90 N. W. 59.

92—*C. T. T. R. R. Co. v. Schmelling*, 197 Ill. 619 (625), 64 N. E. 714,
aff'g 99 Ill. App. 577.

from the evidence that the employes of defendant negligently failed to stop said train at said station as charged by plaintiff.⁹³

(c) If the speed of the train was too fast for a person of ordinary prudence to undertake to alight, and if plaintiff did not know nor believe it was going too fast for him safely to alight, his want of knowledge or belief did not excuse his act, unless he used ordinary care in the judging and determining, and did in fact reasonably believe that the train had been slowed up for him to get off and that its speed was such that he could safely do so. If he believed the train was going beyond the point of his agreed destination, that was no justification for his attempt to get off while the train was going at a rate that a person of ordinary prudence would have perceived to be unsafe.⁹⁴

(d) If you find that said train did not stop long enough at P. to enable plaintiff's wife, in her condition and circumstances, to get off in safety, and if, when she was trying to get off, the train started, and if while it was moving she undertook to get off and was injured, and if in so trying to get off a moving train she was herself guilty of a want of ordinary care as defined to you hereinafter, then you will find for the defendant.

(e) If said train stopped long enough for plaintiff's wife to have gotten off safely, circumstances, and conditioned as she was, and if she failed to use reasonable diligence to get off, and unnecessarily and negligently remained upon the train until it started and then undertook to get off, and in attempting to get off fell and was injured, you will find for defendant.

(f) It was the duty of plaintiff's wife to exercise ordinary care for her own safety. Ordinary care means such care as an ordinarily prudent and careful person, similarly situated and circumstanced, as plaintiff's wife was, would have exercised, and a failure to exercise such care would be negligence.

93—Galveston, H. & S. A. Ry. Co. v. De Castillo, — Tex. Civ. App. —, 83 S. W. 25 (26).

"It gave a correct enunciation of the law as applied to appellant's theory of the case, and supplied a clear omission in the charge of the court. That charge was abstractly correct, but it failed to define contributory negligence and render it clear under what circumstances deceased should be found guilty of contributory negligence. St. L. & S. F. R. Co. v. Traweck, 84 Tex. 65, 19 S. W. 370; Missouri, K. & T. R. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905. The last case cited is very similar to this."

94—St. Louis, S. W. Ry. Co. v. Highnote, — Tex. Civ. App. —, 84 S. W. 365 (367).

"The objection to this charge is that it left it to appellee's determination and judgment as to the speed of the train, and his belief

as to its being slowed up for him to depart therefrom, and not to that of the conductor. The testimony shows that before appellee alighted he saw Martin alight and the effect it had upon him. He then went back into the train, pulled the bell cord, and then walked out on the steps of the platform, where he remained until the train had reached its slowest speed. He pulled the bell cord to notify the trainmen of the agreement, and when he pulled the cord the whistle of the engine immediately sounded and the train began to slow up. Under these facts it was a question whether or not he used ordinary care in acting as he did. We do not think it was incumbent upon him, under the circumstances, to obtain the views of the conductor as to the propriety of his alighting at that point."

(g) If you find from the evidence that plaintiff's wife, in attempting to get off said train, failed to exercise ordinary care for her own safety, and thereby contributed to her fall, or if she was guilty of negligence (that is, if she failed to exercise ordinary care) by attempting to get off said train while it was in motion, if she did so, under the circumstances surrounding her, and if she thereby contributed to her fall—then you will find for the defendant, even though you should find that the defendant was guilty of all the negligences charged against it.⁹⁵

§ 1807. Jumping Off Moving Train After Sufficient Time to Alight Has Been Given. If the jury believe from the evidence that the employes of the defendant, in operating the train on which the plaintiff was riding as a passenger, announced the station of A. prior to the train reaching said station; and if you find from the evidence that said train was stopped a sufficient length of time for passengers to get off, and the plaintiff failed to do so, without the fault of the employes in charge of said train, and the conductor did not know and had no reason to believe that she was still on the train in the act of getting off, and gave the signal for the train to start, and that after the train started, she stepped off or jumped off the train while it was in motion, and was injured—then you are charged that she cannot recover, and if you so find you will return a verdict for the defendant.⁹⁶

§ 1808. Effect of Direction of Carrier's Servant to Passenger to Get Off Moving Train. If the plaintiff having stepped upon the first step of one of the cars of train in question, and before getting into the car, attempted to get off the same whether the train was in motion or not, and fell while attempting to get off, or just after getting off, and received the injuries complained of from such fall, then the defendant is not liable for such injuries, unless she was directed to get off by an employe of the defendant in charge of the operation of said train, and obedience to such direction would not lead her into any apparent danger such as the ordinarily prudent person would not assume.⁹⁷

§ 1809. Effect of Direction of Carriers' Servant to Passenger Not to Get Off Moving Train. If the jury believe from the evidence that as soon as the conductor saw the plaintiff coming out of the car, apparently to get off the train, after the same had started to depart from the station, he told her not to get off or try to get off, but wait and he would stop the train so she could get off, and she heard him, but, disregarding what he told her, proceeded to get off the train while the same was in motion and before the conductor had time to bring the same to a full stop, and in stepping or jumping

⁹⁵—C. R. I. & P. Ry. Co. v. Co., 36 Tex. Civ. App. 94, 80 S. W. Armes, 32 Tex. Civ. App. 32, 74 S. 1023 (1024).
⁹⁶—Pence v. Wabash R. Co., 116 W. Rep. 77.

⁹⁷—Harris v. Gulf, C. & S. F. Ry. Iowa 279, 90 N. W. 59.

off the train, if she did, was hurt, then she cannot recover, and if you so find, you will return a verdict for the defendant.⁹⁸

§ 1810. **Effect of Carrier's Discovery of Passenger's Peril in Time to Avoid Consequences of Passenger's Contributory Negligence.** The court instructs the jury that, even though it should believe from the evidence that the plaintiff was guilty of contributory negligence in getting off of said car, and even though they should believe from the evidence that her negligence contributed to the accident, yet if they further believe from the evidence that the conductor, after he discovered the plaintiff's peril, by the exercise of proper care and caution could have avoided the mischief which happened, and failed to do so, the plaintiff's negligence will not excuse the defendant, and the plaintiff is entitled to recover.⁹⁹

§ 1811. **Jumping from the Cars Negligence, When.** If the jury believe, from the evidence, that the plaintiff leaped from the cars, at the time of the injury, under circumstances that would not have justified such an act on the part of an ordinarily careful and prudent man, and that the injury was caused by such jumping, and that if he had remained on the car no injury would have happened, then the plaintiff cannot recover in this suit.¹⁰⁰

§ 1812. **Jumping From Moving Train When Suddenly Placed in a Perilous Position by Carrier.** (a) Although you may believe, from the evidence, that the plaintiff jumped or stepped from the train in question after it was in motion, whereby she received the injuries complained of, yet if you further believe, from the evidence, that while the plaintiff was descending the steps of said train the same was suddenly, carelessly and without warning to her set in motion by the defendant, and that the plaintiff was thereby placed in a perilous position, then it is for you to determine, from the evidence, whether the plaintiff acted as a reasonably prudent person would have done under like circumstances; and if you believe, from the evidence, that under the surrounding circumstances the plaintiff was not guilty of negligence, but acted as a reasonably prudent person would have done under like circumstances, then the fact of her so stepping or jumping from said train while the same was in motion will not prevent the plaintiff from recovering in this case.¹

(b) If the jury shall find, as a matter of fact, that the negligence of the defendant placed the deceased S in a state of peril, and he had at that time a reasonable ground for supposing he would be injured

98—Harris v. Gulf, etc., Ry. Co., 36 Tex. Civ. App. 94, 80 S. W. 1023.

99—Richmond Passenger & Power Co. v. Allen, 101 Va. 200, 43 S. E. 356.

100—Lucas v. Taunton, etc., Rd. Co., 6 Gray 64; Damont v. N. O. etc., Rd. Co., 9 La. Ann. 441.

1—C. & E. I. R. R. Co. v. Stortment, 190 Ill. 42 (45), 60 N. E. 104, aff'g 90 Ill. App. 585.

"We see no error in this instruction. If a person while in the exercise of due care for his own safety be placed in a perilous position by the wrongful act of another, if his conduct in attempting to extricate himself from that peril is that of a reasonably prudent person, acting in view of such peril, he may recover, if injured."

by remaining on the train, then the plaintiffs are entitled to recover, although the jury may find, as a matter of fact, that the jumping of the deceased S increased the peril or caused his death, and although they may find that he would probably have sustained little or no injury if he remained on the car.²

(c) The court instructs the jury, that the fact, if proved, that the plaintiff jumped from the cars to the ground, while said cars were in motion, and thus sustained the injury complained of, will not alone deprive him of his right to a recovery against defendant, if the jury further believe, from the evidence, that an accident had occurred to the train, which resulted from any want of reasonable care and caution on the part of the defendant, and that the plaintiff had reasonable ground to believe, and did believe, that his life or limb was in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him. The question is not so much whether there was, in point of fact, any danger in remaining on the cars, as whether the plaintiff reasonably apprehended danger, and so leaped from the cars to escape it.³

§ 1813. Contributory Negligence of Shipper of Live Stock in Riding on Engine. You are charged that if you believe, from the evidence, that the engine of the train was a more dangerous place to ride than the caboose thereof, and that the plaintiff, at the time he went upon the engine prior to the wreck, or while he was upon said engine prior to said wreck, knew that he was violating a rule of the railway company, or that the said engine was a more dangerous and hazardous place to ride than the caboose, or by the use of such care on his part as was reasonably to be expected of a boy of his age and mental development would have known said facts, or either of them, and that he voluntarily went on said engine or remained there, then he would be guilty of negligence, and you will find for the defendants.⁴

§ 1814. Jumping from Train on Seeing Another Train Approaching. (a) If you find, from the testimony, that the defendant's passenger train, upon which this plaintiff was a passenger, was stopped upon the main track of defendant's line of railway by reason of a freight train obstructing said track, and that while said passenger train was so stopped upon said main track another freight train approached said passenger train from the rear, in such close proximity thereto as to make it reasonably appear to this plaintiff that there was imminent danger of there being a collision between said passenger train and said approaching freight train; and you further find that by reason of the manner in which said trains were operated this plaintiff had, under all the circumstances, reasonable grounds for

2—Western Maryland R. Co. v. State, 95 Md. 637, 53 Atl. 969 (1907).

3—Buell v. N. Y. Cent. R. R. Co., 31 N. Y. 314; Galena & C. Rd. Co. v. Yarwood, 17 Ill. 509; S. W. Rd. Co. v. Paulk, 24 Ga. 356; Ingalls v.

Bills, 9 Met. 1; Ry. Co. v. Aspell, 23 Penn. St. 147.

4—Missouri, K. & T. Ry. Co. of Texas v. Avis, — Tex. Civ. App. —, 91 S. W. 877 (1878).

believing, and did actually believe, that there was great danger of a collision of said trains, and that if he remained upon said passenger train he was in imminent danger of losing his life or receiving great bodily injury, and, so believing, that this plaintiff left his seat and went upon the platform of defendant's passenger coach, and that while plaintiff was attempting to alight from said train the passenger train was suddenly started, and that this plaintiff was thereby thrown or fell to the ground and injured, as alleged in his petition; and you further find that in operating its trains in such manner as to make it reasonably appear to plaintiff that there was imminent danger of a collision between the passenger train on which plaintiff was riding and the approaching freight train, if you find they were so operated, and in allowing said passenger train to move suddenly forward as plaintiff attempted to alight from said train, if you find it was so moved, defendant company was guilty of negligence, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any; and you further find that plaintiff was not guilty of any negligence that either caused or contributed to his injury, if any—then you will find for plaintiff. By "reasonable grounds," as used in this charge, is meant such a condition of apparent danger as would ordinarily cause an ordinarily prudent and considerate person to become apprehensive of danger to himself under like circumstances and conditions.

(b) If, however, you find that the defendant company used that high degree of care that a very cautious, competent and prudent person would have used under similar circumstances to prevent any collision between defendant's passenger train and an approaching freight train, and that its said trains were operated in such a manner that an ordinarily prudent person, under all the circumstances, would not have had reasonable grounds for believing that there was imminent danger of a collision of said trains, and that he was in imminent danger of losing his life or receiving great injury if he remained upon said train, and that plaintiff's endeavor to get off of said train at said time and place either caused or contributed to his injury, if any, then you are charged that plaintiff cannot recover, and you will find by your verdict. Or if you find that plaintiff was guilty of any negligence in going upon said platform or in getting off of said train, and that such negligence, if any, either caused or contributed to his said injury, if any, then your verdict must be for defendant, and you will so find. "Negligence," as applied to plaintiff herein, means a failure to use that degree of care that would be exercised by an ordinarily prudent person under similar circumstances; and, as applied to the defendant herein, means a failure to use that high degree of care that would be exercised by a very cautious, competent and prudent person under similar circumstances.⁵

5—Williams v. Galveston, etc., Ry. Co., 34 Tex. Civ. App. 145, 78 S. W. 45 (47).

§ 1815. Live Stock Shipper Remaining in Car with Stock When He Knows His Position Is Perilous. If you believe, from the evidence, that plaintiff saw the approach of the engine and cars, and that they were about to strike against the one in which his hogs were contained, and if you further believe, from the evidence, that the plaintiff was in a position he knew to be perilous to his safety from such contact, then he would not be justified or authorized in law to take the risk of remaining in or on the car to prevent his hogs from escaping.⁶

§ 1816. Standing on Platform of Car. If the jury believe, from the evidence, that the plaintiff had an opportunity to take a seat in the car at A, and that he voluntarily and negligently abandoned his opportunity to take such a seat there, and voluntarily and negligently took a position on the platform steps of the car, and maintained such position until he reached P, and if the jury further believe, from the evidence, that the plaintiff before reaching P could by the exercise of ordinary care have found sufficient standing room inside the car, and that he would there have been safer, then the plaintiff can not recover, and the jury should find for the defendant.⁷

§ 1817. Passing from Car to Car While Train Is in Motion. The jury are instructed that they must find for the defendant unless they shall believe, from the evidence, that the defendant was guilty of negligence. If they so believe, they must find for the plaintiff, unless they further believe, from the evidence, that the plaintiff was guilty of contributory negligence on his part; and, if they believe, from the evidence, that the plaintiff was guilty of contributory negligence, they must find for the defendant. The jury are instructed that if they believe, from the evidence, that the plaintiff, after getting on the car he first entered, was unable to find a seat therein, by reason of its crowded condition; that he was told by the conductor of the train that he might find a seat in the forward car; that he went forward after receiving such suggestion, and attempted to pass from the car to the next one; that, when he got out on the platform, he did not remain there, but attempted to pass into the next car, with reasonable promptness; that, while so passing he exercised reasonable care and caution under the circumstances; that, while so passing, he was thrown from the car by reason of the defendant's train being run over the switch and along the curve mentioned in the declaration at a dangerous rate of speed,—they must find for the plaintiff. The burden of proving these facts is upon the plaintiff. But if the jury shall believe that he did not receive any such suggestion from the conductor, or that if he received it, in passing from one car to the other, or in loitering upon the platform, or in the selection of the time when he undertook to so cross the platform in any other par-

⁶—I. C. R. R. Co. v. Anderson, 134 Ill. 294 (297), 56 N. E. 331, aff'g 81 Ill. App. 137.

⁷—Chicago & A. R. R. Co. v. Fisher, 38 Ill. App. 33 (42), aff'd 141 Ill. 614, 31 N. E. 406.

ticular, he did not exercise such care and caution as a reasonably prudent man, under all the circumstances should have exercised for his own protection, they should find for the defendant.⁸

§ 1818. Duty of Passenger to Mitigate Injuries as Far as Possible. It was the duty of plaintiff to exercise such care as a person of ordinary prudence would have exercised under similar circumstances to facilitate the cure of his injuries, and he cannot recover for any injury which by the use of such care he could have avoided.⁹

RULES AND REGULATIONS OF CARRIER.

§ 1819. Right to Prescribe Rules. The jury are instructed, that a railroad company has a right to require of its passengers the observance of all reasonable rules, calculated to insure the comfort,

⁸—*Chesapeake & O. Ry. Co. v. Clowes*, 93 Va. 189, 24 S. E. Rep. 833 (835).

The above instruction has been changed from that given by the trial court by omitting the words "at an unusually rapid rate of speed" and inserting the words "at a dangerous rate of speed." This change was made to conform to the following opinion of the court:

"The instructions given by the court state the law correctly as to the effect upon the plaintiff's right to recover of his attempt to pass from one car to the other, in order to find a seat. The jury are told that if the plaintiff was unable to find a seat in the car which he first entered, and he was informed by the conductor that he might find a seat in the forward car, and, in attempting to pass to the next car, he exercised reasonable care and caution, those circumstances do not constitute contributory negligence; and in this there is no error. But, while these circumstances do not show contributory negligence on the part of the plaintiff, it remains for him to show negligence on the part of the defendant, to entitle him to recover; and it is to that clause of the instruction which points out the negligence of the defendant to which, we think, exception can justly be taken. The instruction says that 'if the jury believe that, while so passing, he was thrown from the car, by reason of the defendant's train being run over the switch and along the curve mentioned in the declaration at unusually rapid rate of speed, they must find for the plaintiff.' In other words, this instruction

contains two propositions, the first being that certain acts upon the part of the plaintiff did not constitute contributory negligence; secondly, that running over the switch and curve at an 'unusually rapid rate of speed' constituted negligence upon the part of the defendant. In this, we think, there was error. We cannot say, as a matter of law, that the mere rate of speed is negligence, although it may be unusual. It is true that 'negligence' is a relative term; that what may be negligence under one condition of facts would not only not be negligence, but highest prudence, under a different condition of facts. The question for the jury always is, was the act, taken in connection with all of its attending circumstances, negligent? Without doubt, a rate of speed may be dangerous, taken in connection with other circumstances; as, for instance, the condition of the track, which would be entirely safe under other circumstances. The degree of curvature may be such as to render more than a given rate of speed dangerous, and a dangerous rate of speed is negligence. If, therefore, the instruction had said that the defendant's train was being run over the switch and along the curve mentioned in the declaration at 'dangerous rate of speed,' we should have held the instruction to be altogether proper, but we cannot hold that what is unusual is therefore dangerous. We think that the circuit court erred in this respect in its instruction."

⁹—*Gulf, C. & S. F. Ry. Co. v. Denson*, — Tex. Civ. App. —, 72 S. W. 70.

convenience, good order and behavior of all persons on the train, and to secure the proper conduct of its business; and if a passenger wantonly disregards any such reasonable rule, the obligation to carry him farther ceases, and the company may expel him from the train at any regular station, using no more force than may be necessary for that purpose.¹⁰

§ 1820. **Carrier May Set Apart Separate Cars for Ladies.** The court further instructs you, that whatever rules tend to the comfort, order and safety of the passengers on a railroad, the companies are authorized to make and enforce; but such rules must be reasonable and uniform. A rule setting apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced.¹¹

§ 1821. **When Carrier May Refuse to Receive Intoxicated Persons as Passengers.** A railroad company may refuse to receive as a passenger, a person who is so intoxicated as to be disgusting, offensive, disagreeable or annoying to the other passengers, generally, so long as he continues in that condition, though he may have purchased a ticket—though a slight intoxication, such as would not seriously affect the conduct of the passenger, would not justify a railroad company in refusing to receive and carry one as a passenger who had purchased his ticket.¹²

TICKETS.

§ 1822. **When Representations of Ticket Agent Are Binding on Carrier.** A railway company is bound by the representations of its ticket agent to the purchaser of a ticket, provided, the representations were made at the time of the sale of the ticket.¹³

§ 1823. **Requiring Higher Fare When Paid on Train.** (a) There is no question that railroad companies may make such regulations as I have charged you, provided passengers are given convenient place and sufficient opportunity to procure tickets previous to boarding the train to become passengers, and such regulations would not be unreasonable, nor oppressive, nor open to the objection that it makes the fare charged higher than the rate allowed by law, which in this state, by statutory provision, is three cents per mile. Now, you have heard the testimony as to the station here at N, and you must say, from the testimony, whether or not the defendant, on the — day of May, —, had provided or built convenient places for those intending to become passengers on their passenger trains to procure

10—Sandford v. Eighth Ave., etc., Rd. Co., 23 N. Y. 343; I. C. Rd. Co. v. Whitmore, 43 Ill. 420; Crawford v. Cincinnati, etc., Rd. Co., 26 Ohio St. 580; State v. Chovin, 7 Ia. 204; Shelton v. Lake Shore, etc., Rd. Co., 29 Ohio St. 214.

11—C. & N. W. Rd. Co. v. Williams, 55 Ill. 185; Bass v. Chi. & N. W. Rd. Co., 36 Wis. 450; Com. v. Power, 7 Met. 596.

12—Pittsburg, etc., Rd. Co. v. Van Dyne, 57 Ind. 576.

13—Miller v. Southern Ry. Co., 69 S. C. 116, 48 S. E. 99.

tickets for their journey, and there was sufficient opportunity afforded the plaintiff, on the occasion referred to, to procure his ticket before boarding defendant's passenger train for Helena. These are questions for you. Such regulation is conducive, says the law, to the rapid, orderly and convenient dispatch of the conductor's part in the collection of fares, and thus leaving him free for the performance of his other duties in connection with stops at stations, the entrance and exit of passengers, and the whole supervision of the safety and comfort of those under his care. There may be circumstances which would render the enforcement of such regulation unreasonable,—as where the passengers boarded the train at a station where no tickets were sold, where the office provided by the railroad company for the sale of tickets was closed, or where the agent had lost the key, as in one of the illustrations that counsel referred to, and in consequence could not furnish the passenger with a ticket; but, ordinarily, I would say, such regulations are not only reasonable but valid. Now, you are to say, from the testimony, whether or not any reasons for the non-enforcement of the regulation in this case existed, or if there is any other valid reason proved which would exempt the plaintiff from the enforcement of the regulation against him on the occasion of which he complains. I say you are to take that into consideration, and you are to find the testimony applicable to it, and determine that question. If there was, that enforcement of the rule against him would have been wrong, and his ejection under the circumstances would have been unlawful.

(b) If the plaintiff boarded the passenger train of the defendant at N (and that is a question for you) without a ticket, having had opportunity to procure a ticket, and when called upon to pay his fare refused to pay the fare, he became a trespasser on the defendant's train ab initio (that is, from the beginning), and the conductor had the right to put him off; for the conductor may put off a passenger who refuses to pay the fare for transportation at any point on the defendant's road in a proper place and in a proper manner (that is, at any place where the passenger would not be injured or in danger), and to use just so much force as was necessary for the purpose of doing it, but no more. So, if the conductor on this occasion, if the plaintiff boarded the passenger car of the defendant at N, having had an opportunity to procure a ticket, and did not do so, and when his fare and the excess required of passengers who get on passenger cars of the defendant at stations where tickets were sold, was demanded by the conductor, the plaintiff refused to pay it, the conductor had the right, under the regulations of the company, if you are satisfied, from the testimony, that such regulations existed, and that such were the circumstances as I have stated (these are the facts which you must determine), to put the plaintiff off, and to use so much force as was necessary for the purpose of doing it. The facts, as I say, must be found by you from the testimony; must not be what you think about it, but you are to take the testimony as the witnesses

have given it to you, and you must determine it on that. You must, in determining all facts, be governed by the preponderance of the evidence, as I have told you.¹⁴

§ 1824. **Validation of Reduced Rate Round-Trip Tickets at Destination by Identification and Stamping.** The jury are instructed that a condition in a round-trip railroad ticket, sold at a reduced rate of fare, that the purchaser will identify himself to the satisfaction of the agent of the company at the point of destination, and sign the same and have it stamped, is a reasonable condition, and the purchaser of such a ticket is not entitled to return on such a ticket until it is so signed and stamped.¹⁵

§ 1825. **Effect of Purchaser Signing a Round-Trip Ticket.** The jury are instructed that a person who intends traveling on a railroad train, and purchases a round-trip ticket at a reduced rate of fare, and signs the contract printed upon its face, is bound by all of its reasonable provisions, whether she had actually read the same or not, and she is presumed to know the same.¹⁶

LIMITATION OF LIABILITY.

§ 1826. **Limitation of Liability—Existence of Contracts a Question of Fact for the Jury.** I will say to you that it takes two to make a contract; that is, there must be two contracting parties. There may be more than two contracting parties, but there must be one on one side and one on the other; and there is no contract unless and until their minds meet. They must come together on some proposition, and on the proposition about which the contract is to be made. The minds must meet. They must agree; must come together and discuss the matter; a week, a day; no matter how long; discuss the matter about which they shall contract. There will be no contract until the minds meet, come together; and there will be no binding contract if there is misrepresentation or fraud, because that vitiates everything. But it is for you to say whether there was a contract between these parties, plaintiff and the railroad company, by the agent of the railroad or otherwise. You must say whether there was a contract, then you must say what the contract was. That is a matter of fact for you. I have nothing to say about that.¹⁷

EJECTION OF PASSENGERS.

§ 1827. **Carrier May Eject Person Refusing to Produce a Ticket or Pay His Fare.** (a) A railroad company has a right to prescribe reasonable rules for the government of its employes in the conduct

14—Kibley v. Southern Ry. Co., 62 S. C. 252, 40 S. E. 556.

15—Daniels v. Florida Cent. R. Co., 62 S. C. 1, 39 S. E. 762.

16—Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1, 39 S. E. 762.

17—Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1, 39 S. E. 762.

of its business upon its trains, and passengers may be required to conform to such rules, and a rule requiring a conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand is a reasonable one. Whether, in this case, the defendant had such a rule and whether the plaintiff did refuse to produce a ticket or pay his fare on demand, etc., etc., are all questions of fact to be determined by the jury by a preponderance of the evidence.¹⁸

(b) A conductor or agent on a railroad train has a right to expel a passenger for the non-payment of his fare or his refusal to deliver his ticket within a reasonable time, but he has no right to use any more force than is reasonably necessary for that purpose; and in this case, even if you find that the plaintiff refused to pay his fare or surrender his ticket, the agent of the company had no right to use unnecessary force or violence toward the plaintiff, and if you should find that he did use more force than was reasonably necessary, you should find for the plaintiff.

(c) It is not sufficient that passenger has a ticket in his possession but he must offer to surrender it, and actually tender it to the proper conductor when demanded, to entitle the passenger to the rights of a passenger.¹⁹

(d) The jury are instructed that it is the right of a railroad company to expel a passenger who is found upon one of its trains who fails to present a valid ticket for her passage or to pay her fare. I charge you that is the law, as I understand it. If the ticket is wrong, the conductor must go according to the rules of the company, which has to carry the public and at certain times has a great duty imposed upon it; and, if he has to put off a passenger because the ticket is wrong, the conductor must do that. The railroad may be liable for issuing the wrong ticket, but not for putting her off.²⁰

(e) If the jury believe, from the evidence, that the defendant's conductor demanded of plaintiff her ticket, and that on said demand being made the plaintiff failed, or refused, to produce her ticket or pay her fare, then said conductor had the right to eject her from the train, using no more force than was necessary to eject her from the

18—*Crawford v. Rd. Co.*, 26 Ohio St. 580; *Toledo, W. & W. Rd. Co. v. Wright*, 68 Ind. 586.

19—*Terre Haute & I. R. Co. v. Pritchard*, 37 Ind. App. 420, 76 N. E. 1070.

"It is contended that the giving of the first instruction was error because, 'upon a theory not set up in the pleadings nor within the evidence in the cause'; that the complaint proceeds upon the theory that the plaintiff was rightfully upon appellant's train, and was wrongfully ejected; that the instruction is on the theory that he was wrongfully on defendant's train and was properly ejected, ex-

cept that excessive force was used. "Appellee testified that he had the ticket in his possession, but was unable to find it upon demand; that he offered to pay his fare. The conductor of appellant's train testified that the plaintiff refused to give a ticket, or to pay his fare. These instructions we think are pertinent to the pleadings and within the evidence. Some fault is found with other instructions; but, considered together, they fairly present the law, and were not prejudicial to appellant."

20—*Daniels v. Florida C. & P. R. Co.*, 62 S. C. 1, 39 S. E. 762.

train; and unless you believe, from the evidence, he used more force than was necessary to eject her from the train, or that he was rude, insulting, rough or boisterous in manner towards her, you should find for defendant.

(f) If you believe, from the evidence, that defendant's conductor in charge of its train was insulting in his manner, words, or tone towards plaintiff, or that he rudely and roughly grabbed her by the arm, while she was sitting in her seat, then you may, in addition to compensatory damages, award her punitive damages in any sum you may deem proper, not exceeding in all more than \$3,000.²¹

§ 1828. Carrier May Eject Passenger Using Abusive or Obscene Language. The court further instructs you, that the use of grossly profane and abusive or obscene language, by a passenger in a railway car where there are ladies, is such a breach of decorum, no matter if it is provoked, as will work a forfeiture of his rights to be carried as a passenger, and the conductor has a right to cause him to be expelled from the cars, using no more force than is necessary for that purpose.²²

§ 1829. Right of Conductor to Eject Passenger Using Obscene or Abusive Language—Rule in Alabama. Under the law in this state, the conductor of a railroad train is a police officer, and not only has the right, but it is his duty, to keep order on the train on which he is conductor, and to eject all persons who use obscene or abusive language in the presence and hearing of the passengers.²³

§ 1830. Injuries to Passenger Brought on by Refusal to Leave Train When Ordered by Conductor. (a) It is not necessary that a person claiming to be, or actually being, a passenger on a train of a railroad company, should forcibly resist an attempt of the conductor to remove him therefrom in order to entitle such person to maintain an action against the company for a wrongful ejection. So in this case, if you believe, from the evidence, that the conductor of the train in question demanded the fare from the plaintiff, and that the plaintiff refused to pay the same, or to produce a ticket entitling him to passage on that train, and that the conductor then told plaintiff he must leave the train, and that plaintiff refused to leave the same, then he cannot recover for any injury he may have sustained while being put off the train, except for such injuries, if any, which were caused by the use of unreasonable force by the servant or servants of the defendant—if you believe such unreasonable force was used.

(b) When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare and leaving the train on the command of the conductor; and had he done so he would have received no personal injuries, and

21—Louisville & N. R. Co. v. Griffin, 68 Ill. 499; Vinton v. Mid-Fowler, 29 Ky. Law Rep. 905, 96 dlex, 11 Allen 304.
S. W. 568 (570).

22—C., B. & Q. R. R. Co. v. L. Ry., 137 Ala. 495, 34 So. 617.

23—Moore v. Nashville C. & St.

might then have brought his action and recovered, as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he can not recover for an injury which he voluntarily brought upon himself.²⁴

§ 1831. Ejection of Passenger from Train While in Motion. If the jury believe, from the weight of the evidence, that A. B., the plaintiff in this suit, was on defendant's passenger train on defendant's railroad, on or about the ——— day of ———, and that plaintiff, while using due care for his personal safety, was forcibly ejected from said train by the brakeman thereon, employed on said train, while said train was in motion, as alleged in the declaration, or any count thereof, then the jury should find the defendant guilty, and assess the plaintiff's damages at whatever you find he has sustained by reason of injuries received thereby.²⁵

BAGGAGE.

§ 1832. Liability for Baggage. The jury are instructed, that a common carrier of passengers, by receiving the baggage of a traveler who has engaged his passage, becomes immediately responsible for its safe delivery at the place of destination, and nothing but the act of God or the public enemies will excuse a non-delivery.

The court instructs you that the term baggage includes a reasonable amount of money in a trunk, intended for traveling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, instruction, amusement or protection.²⁶

§ 1833. What Term "Baggage" Does Not Extend to. (a) The court instructs you, that the term baggage does not extend to money, merchandise, or other valuables which are designed for purposes of business, and not for the traveling expenses, personal use, comfort, instruction, amusement or protection of the passenger.

(b) You are instructed, that while the implied undertaking of a common carrier to insure the safe delivery of baggage as against everything but the act of God, and the public enemies, does not extend to the contents of a trunk consisting of merchandise, money or other valuables, which are designed for the purposes of trade or business; still the common carrier, if he takes charge of such property for the purpose of transporting, assumes the relation to it of an ordinary bailee, and is bound to take such care of it, as men of ordinary care

24—C. & E. I. R. R. Co. v. Casazza, 83 Ill. App. 421 (427).

25—St. L. A. & T. H. R. R. Co. v. Reagan, 52 Ill. App. 488 (489).

26—Weeks v. N. Y., etc., R. R. Co., 16 N. Y. Sup. Ct. 669; Hutchings v. Western, etc., R. R. Co., 25 Ga. 63; Dexter v. Syracuse, etc.,

Rd. Co., 42 N. Y. 326; Parmlee v. Fischer, 22 Ill. 212; Porter v. Hildebrand, 14 Penn. St. 129; Hannibal, etc., Rd. Co. v. Swift, 12 Wallace 262; Gleason v. Goodrich T. Co., 32 Wis. 85; Toledo, etc., v. Hammond, 23 Ind. 379.

and prudence would usually take of their own property under the same circumstances.²⁷

§ 1834. If a Trunk Contains Articles of Special Value, Carrier Should be Notified. The court instructs the jury, that a traveler who presents to a carrier of passengers, a trunk or valise, such as is commonly used for the transportation of wearing apparel, represents by implication, that it contains only such articles as are necessary for his comfort and convenience on the journey, and if it, in fact, contains merchandise, jewelry or other valuables, and the fact is not mentioned, the traveler is guilty of such a legal fraud as to absolve the carrier from the extraordinary liability of insurer.²⁸

§ 1835. Carrier Not Bound to Inquire as to Contents of Trunk.

(a) The court instructs you, that a carrier of passengers is not bound to inquire as to the contents of a trunk, delivered to it as ordinary baggage, such as travelers usually carry, even if the same is of considerable weight, but the carrier may rely upon the representation, arising by implication, that it contains nothing more than baggage.

(b) The court instructs you, that where a person, under the pretense of having baggage transported, places in the hands of the agents of a railroad company, merchandise, jewelry and other valuables, without notifying them of its character and value, he practices a fraud upon the company, which will prevent his recovery in case of loss, except it occurs through gross negligence of the company.²⁹

§ 1836. Baggage—Liability of Carrier for Terminates, When. The court instructs the jury, that the responsibility of a railroad company, as a common carrier, for the baggage of a passenger, terminates on the expiration of a reasonable time for the passenger to come or send for the baggage, after the arrival of the train at the passenger's place of destination. After such reasonable time, the company may store the baggage in its warehouse, and it will then hold it as a warehouseman only.³⁰

SLEEPING CAR COMPANIES.

§ 1837. Care Due Property of Passenger by Sleeping Car Company.

It is the duty of a sleeping car company to exercise reasonable diligence in looking after the person and property of passengers on its car while they are asleep.³¹

§ 1838. Liability of Sleeping Car Company for Theft of Passenger's Diamond. (a) If the jury believe, from the evidence, that the

27—Penn. Co. v. Miller, 35 Ohio St. 541; Wood v. Devine, 13 Ill. 746.

28—Smith et al. v. B. & M. Ry. Co., 44 N. H. 325; Magnin v. Dinsmore, 62 N. Y. 35.

29—Mich. Cent. R. R. Co. v. Carrow, 73 Ill. 348; Whitmore v. Steamboat, etc., 20 Mo. 513; Doyle v. Kiser, 6 Ind. 242.

30—Chicago, etc., R. R. Co. v. Boyce, 73 Ill. 510; Mote v. Chicago, etc., Rd. Co., 27 Ia. 22; Louisville, etc., Rd. Co. v. Mahn, 8 Bust. 184; Ross v. Mo. Rd. Co., 4 Mo. App. 582.

31—Pullman P. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

diamond ring alleged to have been lost or stolen was not in a condition that it could have been worn, for the use, convenience, or ornament of plaintiff, on said trip, they cannot find against defendant on account of its loss.

(b) The court charges the jury that unless the ring alleged to have been lost by plaintiff was in such condition that it could be of service to plaintiff for his personal use, comfort, convenience, or ornament on said trip, they cannot find against defendant for its loss under the evidence in this case.

(c) Under the evidence in this case there can be no recovery for the value of the diamond ring that was lost by the plaintiff, unless the jury believe, from the evidence, that the diamond ring, the value of which is sued for, was in such condition at the beginning and during the journey made by the plaintiff that the same could be used or worn by him, they cannot find against the defendant for any damages for its loss.³²

BURDEN OF PROOF.

§ 1839. Rule in Georgia as to Burden of Proof When Fact that Plaintiff Was a Passenger Is Shown. (a) The burden is on the plaintiff to establish the truth of the allegations in the declaration by a preponderance of the testimony,—that is to say, in a case of this character, it is incumbent upon the plaintiff to establish the fact that he was a passenger upon the car and was injured; and when he has established that by a preponderance of the evidence, or made it appear by any admissions in the pleadings satisfactory to you, as to the fact that he was a passenger and was injured, or established it by evidence to a reasonable and moral certainty, then the law shifts the burden, and it is incumbent upon the defendant to establish, by a preponderance of the evidence, one of two facts,—either that it was without negligence, or that the plaintiff could have avoided the consequence of the negligence by the exercise of ordinary care.³³

(b) The effect of the plea, gentlemen, is to put the burden of proof on the plaintiff, the party bringing the suit, to show to your satisfaction, by a legal preponderance of the evidence in the case, that the allegations he makes are true.

(c) If you believe the plaintiff was a passenger of the defendant, then the law would raise a presumption against the defendant com-

32—Pullman P. Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53.

33—Macon Cons. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756.

Such instructions as the one above are good in Georgia and several other states, but would be erroneous in many jurisdictions. The

mere fact that a person is injured while a passenger without any reference as to how he was injured furnishes no ground for a presumption of negligence. See in this connection Western Maryland R. Co. v. State, 95 Md. 637, 53 Atl. 969. (Editor.)

pany that it was negligent, and the burden would be on the defendant to rebut that presumption by showing it was not negligent, or that the plaintiff, by the exercise of ordinary care on his part, could have avoided the consequences to himself of the defendant's negligence, if that appears.⁸⁴

§ 1840. **Burden of Proof Where Negligence Is Shown in Construction, Operation or Maintenance of Rolling Stock or Roadbed.** If you find that the plaintiff has shown conditions existing at the time and place of the accident, either in the rolling stock or track involved, and in use at the time and place thereof, in some respect as complained of, from which the jury may find or infer that the defendant was negligent in some manner as claimed, then the burden is cast upon the defendant of proving that such conditions or circumstances were not the cause of the alleged accident, and that it was not negligent in any manner as claimed in the construction, operation or maintenance of the rolling stock or roadbed at the time and place of the alleged accident.⁸⁵

§ 1841. **Burden of Proof as to Conditions in Passenger's Tickets.** The jury are instructed that where a railroad company issues tickets with special conditions, the burden of proof is upon it to show what were those special conditions, where they are relied upon to relieve the railroad from liability.⁸⁶

ELEVATORS.

§ 1842. **Injury to Passenger Through Fall of Elevator.** The court instructs the jury that if they believe, from the evidence in this case,

34—Freeman v. Collins Park & B. Ry. Co., 117 Ga. 78, 43 S. E. 411.

35—Cronk v. Wabash R. Co., 123 Iowa 349, 98 N. W. 884 (1886).

"It is said that if the jury found the roadbed or rolling stock defective in any one of the ten or twelve particulars alleged, this cast the burden of the proof upon the defendant to show that it was not negligent, not only as to that one, but as to all of the specifications contained in the petition. It was not incumbent upon the plaintiff, however, in the first instance, to prove any of these defects. Upon proof that the injury of plaintiff resulted from the derailment of the train, the proof shifted and was cast upon the defendant to show that the accident was not occasioned by any negligence on its part. Whittlesey v. Railway, 90 N. W. 516; Smith v. Railway, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550. But appellant insists that, even though it then proved the efficient cause of the accident, under this instruction it

was bound to go further, and exculpate itself from every other charge of negligence stated in the petition. If the cause were proven, then the derailment could not have been occasioned by something else, and therefore in establishing the cause, and its freedom from negligence, the defendant necessarily proved that the derailment did not result from some other cause. Moreover the instructions must be read together, and the jury was distinctly advised in the third paragraph, that in order to find for plaintiff it must appear not only that he was injured, but that 'the defendant was negligent in some one or more of the particulars charged in the petition, and that such negligence was the direct cause of the injury.' While the instruction was not as specific as might have been wished, we are satisfied that the jury was not misled thereby."

36—Daniels v. Florida Central & P. R. Co., 62 S. C. 1, 39 S. E. 762 (763).

that the plaintiff on or about ———, was rightfully in an elevator in the possession of and operated by the defendant, and situated in the defendant's building, for the purpose of being carried thereby from one of the upper floors of defendant's said building to the ground floor thereof; and if you further believe, from the evidence, that while the plaintiff was so in such elevator, and in the exercise of reasonable and ordinary care on his part, said elevator, owing to the negligent and faulty construction thereof, or owing to the negligence and carelessness on the part of the servants of the defendant in operating the same, fell; and if you further believe, from the evidence, that the injury to the plaintiff complained of was caused by the fall of such elevator, then your verdict should be for the complainant.³⁷

Degree of Care of Hotel Keeper toward Servants Riding on Passenger Elevator. (b) The court instructs the jury that the plaintiff was not in the position of a passenger upon the elevator in question, and that the plaintiff was not in the position of a guest of the hotel in boarding and riding upon the elevator in question, and that the defendant did not owe to the plaintiff that highest degree of care which would be owing to a passenger or guest of the hotel, but that the test of the duty of the defendant toward the plaintiff was a test of ordinary care on the part of his servant in charge of the elevator.³⁸

37—Hartford Deposit Co. v. Solitt, 172 Ill. 222 (224), aff'g 70 Ill. App. 166, 50 N. E. 178, 64 Am. St. Rep. 35.

"The evidence introduced on the trial on the part of the plaintiff showed that the elevator fell, and showed the injury to the plaintiff, and tended to show that the elevator was overloaded."

38—Walsh Ex'r v. Cullen, 235 Ill. 91 (1908). "The law makes no distinction between an undertaking to carry passengers in buildings by means of elevators and an undertaking to carry them upon the streets, highways, or railroads, and the same obligation to exercise care and skill applies in each case. This has been held to be the law with respect to an elevator in an apartment house occupied for residence purpose (Hodges v. Percival, 132 Ill. 53); elevators in buildings occupied for business purposes (Springer v. Ford, 189 Ill. 430; Beidler v. Bradshaw, 200 Ill. 435); and elevators supplied for the use of tenants in office buildings (Hartford Deposit Co. v. Solitt, 172

Ill. 222; Masonic Fraternity Ass'n v. Collins, 210 Ill. 482). The relation of master and servant, creates very different duties, and as before stated, the proprietor of an elevator does not occupy the position of a carrier of passengers as to his own employees. * * * The plaintiff was returning to her room for the purpose of resuming her work in the morning, and there was no evidence under which she could be held a passenger while being in the elevator. The court erred in refusing to give the instruction."

It is manifest from the above that an instruction on behalf of the plaintiff in substantially the following form would be approved:

The court instructs the jury that a master who provides a passenger elevator for the use of his servants, or who permits his servants to ride upon a passenger elevator provided for passengers, should exercise ordinary care in the operation of such elevator, so as to make the same reasonably safe for such servants while so using such elevator.

CHAPTER LXIX.

NEGLIGENCE—RAILROADS.

See Erroneous Instructions, same chapter head, Vol. III.

MACHINERY AND APPLIANCES.

- § 1843. Duty to furnish safe machinery.
- § 1844. Liability of railroad for malicious use of appliances by servants.
- § 1845. Negligence to put car in motion without proper appliances for stopping it.

TRACK AND ROAD BED.

- § 1846. Maintenance of track in good condition when duty imposed by statute.
- § 1847. Turntable as attraction for children.

OPERATION AND MANAGEMENT OF TRAINS.

- § 1848. Rate of speed.
- § 1849. Backing engine, tender foremost, not of itself negligence.
- § 1850. Backing train without light or flagman.
- § 1851. Duty of railroad company to use reasonable care to avoid injuring person on track.
- § 1852. Degree of care due towards child on track.
- § 1853. Duty toward helpless person on track.
- § 1854. Failure to keep a proper lookout on down grade.
- § 1855. Care due by servants of railway company to avoid a collision.

TRESPASSERS.

- § 1856. Liability as to trespassers.
- § 1857. Willful and wanton misconduct toward trespasser—What amounts to.
- § 1858. Injury to trespasser while getting on moving train.
- § 1859. When person crossing track is not a trespasser.

LICENSEES.

- § 1860. Duty to maintain lookout as to licensees on track.

- § 1861. Temporary revocation of license to public to cross track at certain point.

INJURIES AT HIGHWAY CROSSINGS.

- § 1862. Highway crossings must be put in safe condition.
- § 1863. Reasonable care required at highway crossings.
- § 1864. Necessity of greater caution when large number of persons use crossing daily.
- § 1865. Other persons crossing track in safety before accident not evidence of safety.
- § 1866. Defendant guilty of negligence as charged in the declaration.
- § 1867. Rights and liabilities of railroad companies and travelers are equal and mutual.
- § 1868. Owing to force and momentum train has preference in crossing point.
- § 1869. Measuring the distance and time it would take to cross—Assuming risk.
- § 1870. Reasonable warning should be given by train in approaching highway crossings.
- § 1871. Engineer and fireman bound to use reasonable care.
- § 1872. Elements to be taken into consideration — Sparsely settled and populous districts.
- § 1873. Engineer not bound to neglect his usual and ordinary duties to keep extraordinary lookout for danger ahead.
- § 1874. Liability of railroad for frightening horses—Negligence, and wanton defined.
- § 1875. Frightening horses through usual and ordinary noise.
- § 1876. Frightening horses through negligent unloading of cinders.

- § 1877. Company must not suffer tall weeds or brush to obstruct the view of the track.
- § 1878. Obstructing view of track at crossing by line of box cars.
- § 1879. Duty to observe ordinances of municipalities.
- § 1880. Running train at greater speed than that allowed by ordinance—Negligence per se.
- § 1881. Speed of train when no ordinance exists.
- § 1882. Duty to ring bell—Duty of person crossing tracks.
- § 1883. Person may assume that ordinance as to ringing bell will be obeyed.
- § 1884. When failure to ring bell is excused.
- § 1885. Failure to sound whistle or to ring bell not negligence per se.
- § 1886. Whistle need not be blown continuously.
- § 1887. Blowing whistle at insufficient distance while going at a dangerous rate.
- § 1888. When suit based on failure to give signals, recovery must be for such omission.
- § 1889. No duty ordinarily to give signals at private crossings.
- § 1890. But duty to give warning at crossing made public by customary use.
- § 1891. No absolute duty to maintain gates or flagman at crossing.
- § 1892. When flagman reasonably necessary for safety at crossing.
- § 1893. Open gates as an invitation to cross.
- § 1894. Backing cars up after gate is opened.
- § 1895. When "kicking" car amounts to willful negligence while person is crossing track.
- § 1896. Failure of defendant's servants to avoid threatened injury when possible.
- § 1897. Ordinary care towards watchman at crossing.
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- § 1899. Reasonable and ordinary care only required in switching.
- § 1900. Right to raise and lower track—Duty of public authorities as to approaches thereto.
- § 1901. Injury to person at crossing by employe operating hand car for his own private use.
- § 1902. Care required of travelers.
- § 1903. High rate of speed will not excuse want of ordinary care.
- § 1904. Failure to have gate keeper required by ordinance will not excuse traveler from using ordinary care.
- § 1905. Failure to give signals does not excuse traveler from using ordinary care.
- § 1906. Flagman's signal to cross will not excuse want of ordinary care.
- § 1907. Voluntarily crossing over to a place of danger.
- § 1908. Track itself is a proclamation of danger.
- § 1909. Person must use his faculties in proportion to the known danger.
- § 1910. Duty of person crossing tracks to stop, look and listen.
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- § 1917. Looking out of glass at back of buggy only—Contributory negligence defined.
- § 1918. When contributory negligence cannot be imputed from fact that gates were down.
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- § 1922. Failure of driver of vehicle to turn in seat on sounding of whistle or ringing of bell.
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- § 1924. Failure to heed watchman's signal to stop.
- § 1925. Right of railroad company's servants to assume that driver of vehicle will remain at a safe distance.
- § 1926. Driving over tracks with lines hanging loose.
- § 1927. Injury through team being unmanageable.
- § 1928. Negligence per se in traveler.
- § 1929. Conduct in presence of sudden danger.
- § 1930. Jury may consider surrounding circumstances.
- § 1931. Imputed negligence—Parent and child.
- § 1932. When negligence of driver of plaintiff's vehicle in crossing track will prevent recovery.
- § 1933. Proof of death at crossing must correspond with plaintiff's allegation that it occurred there.
- § 1934. Violation of ordinances—Negligence may be inferred from injury at crossing.
- § 1935. Fact that deceased was killed by cars of defendant insufficient, standing alone, to justify verdict for plaintiff.
- § 1936. When no eye witness to killing of person by railroad train presumption of due care by deceased usually exists.
- § 1937. Railroad company's duty in crossing tracks of another railroad.
- § 1938. Liability of railroad and street car companies for repair of tracks at crossing.

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- § 1939. Duty toward shipper loading car.
- § 1940. Liability for injury to consignee while unloading car.
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- § 1945. Plaintiff must exercise ordinary care.
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- § 1948. Contributory negligence of children.
- § 1949. Eye-witness as to care and caution of party injured not essential.
- § 1950. Contributory negligence of person injured at crossing.
- § 1951. Person crossing track knowing that cars were shifted at that point.
- § 1952. Standing on track—Duty to look and listen.
- § 1953. Contributory negligence — Failure of plaintiff to discover approaching train.
- § 1954. Knowledge of the deceased of the presence of one engine at crossing and the approach of another engine.
- § 1955. Contributory negligence — Driving across track in a careless or indifferent manner.
- § 1956. Contributory negligence — Riding upon locomotive.
- § 1957. Riding on coal car without consent of defendant's employees.
- § 1958. Contributory negligence of plaintiff no defense if defendant could have avoided injury after discovering plaintiff's peril.
- § 1959. Attendant circumstances determine whether unconscious person is guilty of contributory negligence.
- § 1960. Failure of law to regulate speed does not authorize wanton, reckless and dangerous rate of speed—What will not amount to wanton misconduct.
- § 1961. Rule that burden of proof as to contributory negligence is on defendant.

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- § 1962. Failure to comply with law negligence per se.
- § 1963. Company must exercise reasonable care.
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- § 1965. Stock unlawfully running at large.
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- § 1967. Cattle guards.
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- § 1970. Duty of railroad to fence track is also for benefit of children.

ACTIONS FOR KILLING LIVE STOCK.

- § 1971. Actions for killing live stock—Care due in operation of trains.
- § 1972. Highest duty of engineer of passenger train is to his passengers—Series.
- § 1973. Duty to avoid injury after discovering dangerous position of live stock.
- § 1974. Injury to stock at crossing.
- § 1975. Elements of liability for killing of heifer.
- § 1976. Failure to keep a proper lookout for horses on track negligence.
- § 1977. Railroad company not liable for injury to horse on track where reasonable care used.
- § 1978. Animals coming on track so suddenly that accident cannot be prevented.
- § 1979. Failure of engineer to see animals on track when he should, under the circumstances.
- § 1980. Horse injured in flangeway—Duty of railroad in constructing road across the street—Series.
- § 1981. Injury to animal on track—Burden of proof as to negligence.
- § 1982. Running extra train, or train not on schedule time, not negligence as to live stock.
- § 1983. Burden of proof as to place of injury of live stock is on plaintiff.
- § 1984. Neglect to ring the bell, etc., prima facie evidence of negligence.
- § 1985. Burden of proof as to ringing bell.
- § 1986. Must exercise reasonable care and watchfulness to avoid injuring stock.
- § 1987. Speed through cities and villages.

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- § 1988. Prima facie negligence.

- § 1989. But not conclusive evidence of negligence.
- § 1990. No recovery against railroad when origin of fire left to guess or conjecture.
- § 1991. Rule that burden of proof is on plaintiff to show negligence on defendant in starting fire.
- § 1992. Rule in Texas as to instruction of juries in actions for injuries by fire.
- § 1993. Statutory rule in South Carolina.
- § 1994. Elements constituting negligence in injuries by fire.
- § 1995. Heavy grade requiring engines to be worked hard and to emit sparks.
- § 1996. Running engine past cotton compress or yard—Series.
- § 1997. Reasonable care required to prevent spread of fire.
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- § 1999. Effect of failure to use most approved apparatus to prevent escape of fire or to use ordinary care in preventing escape of sparks.
- § 2000. Dry weeds and grass.
- § 2001. Damages to turf from which grass is burned.
- § 2002. Degree of care required of land owner.
- § 2003. Effect of plaintiff's building being defendant's right of way.
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- § 2005. Obstructing highways by leaving cars standing on track.

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- § 2006. Dedication of lands for use by railroads.

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- § 2007. When switch presumed to be permanent—Measure of damages for removal.
- § 2008. Establishment of "necessary" plantation roads under terms of statute.
- § 2009. Less degree of care required at farm crossings than at public crossings.
- § 2010. Injuries to stock at farm crossings.
- § 2011. Defective bridge over farm crossing—Duty of railroad company to repair it.

MACHINERY AND APPLIANCES.

§ 1843. **Duty to Furnish Safe Machinery.** The court instructs the jury that it is the duty of railroad companies to use all reasonable means and efforts to furnish good and well constructed machinery, adapted to the purposes of its use, of good material, and of the kind that is found to be safest when applied to use; and while they are not required to seek and apply every new invention, they must adopt such as are found, by experience, to combine the greatest safety with practical use.¹

§ 1844. **Liability of Railroad for Malicious Use of Appliances by Servants.** You are instructed that if the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton or malicious purposes, to the injury of others, the company is liable for such injuries.²

§ 1845. **Negligence to Put Car in Motion Without Proper Appliances for Stopping It.** The court instructs the jury that it is negligent for persons engaged in using cars on a railroad track to put a car in motion where it may do injury to others, without making any provision for stopping it, or examining to see whether any person is on or about other cars on the same track, with which the one put in motion may collide; and if injury results therefrom to one who is guilty of no negligence himself, he will be entitled to recover for such injury.³

TRACK AND ROAD BED.

§ 1846. **Maintenance of Track in Good Condition—Duty Imposed by Statute.** It was the duty of the defendant railroad company to maintain its track along T. street in the city of A., in such condition that it would be reasonably safe for persons traveling along or across said street on horseback or otherwise to cross said track at any point in said street.⁴

§ 1847. **Turntable as Attraction for Children.** If you find and believe from the evidence that the defendant's turntable, in its construction and place where situated, was not especially and unusually

1—St. Louis, etc., Rd. Co. v. Valirius, 56 Ind. 511; Wedgewood v. Chicago, etc., Rd. Co., 41 Wis. 478; Pittsburgh R. R. Co. v. Nelson, 51 Ind. 150; Porter v. Hannibal, etc., Rd. Co., 60 Mo. 160; T., W. & W. Ry. v. Fredericks, 71 Ill. 294.

2—C. B. & Q. Rd. Co. v. Dickson, 63 Ill. 151.

3—Noble v. Cunningham, 74 Ill. 51; Quackenbush v. Chi. & N. W. R. R. Co., 73 Ia. 458, 35 N. W. 523.

4—Inter. & G. N. R. Co. v. Had-dox, 36 Tex. Civ. App. 385, 81 S. W. 1036.

"Article 4426, Rev. St. of Tex. 1895, reads as follows: 'Such corporation (meaning a railroad corporation) shall have the right to construct its road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of said railway shall intersect or touch. But such corporation shall restore the stream, water course, street, highway, plank road, turnpike or canal thus intersected or touched to its former state, or to such state as not to

calculated to attract to it children of immature judgment, as a place of amusement and a thing to use as a plaything, then you will find for the defendant as against both plaintiffs.⁵

OPERATION AND MANAGEMENT OF TRAINS.

§ 1848. Rate of Speed. (a) The court instructs the jury that the fact that the defendant's train was running at a greater rate of speed than ten miles an hour will not of itself alone make it liable for the death of this boy, unless the fact that the train was running at a rate of speed in excess of the ordinary rate at the time the boy was struck by the driving rod of the engine as it passed by him on the crossing, was the direct and proximate cause of the accident.⁶

(b) The court instructs the jury that the mere violation of a city ordinance regulating the rate of speed of a train through a city, or the rules of the railroad company with reference to the management of its trains, does not of itself amount to a willful and wanton misconduct.⁷

§ 1849. Backing Engine, Tender Foremost, not of Itself Negligence. The jury are instructed that the fact that the engine of the train was backing, tender foremost, hauling the train behind the engine, is no evidence of negligence upon the part of the defendant, and is not so charged in the declaration.⁸

unnecessarily impair its usefulness, and shall keep such crossing in repair.' The charge given is not literally in the language of the article of the statute quoted, but the court must have had in mind this provision of the law in giving the charge complained of. The charge instructs the jury that it was the duty of the railway company to maintain its track along the public street in a reasonably safe condition for persons traveling on or across the same. The language of the statute is that said street shall be restored 'to its former state, or to such state as to not unnecessarily impair its usefulness.' The failure of the railway company to keep the street in a reasonably safe condition for persons who may be entitled to use the same would, to some extent, unnecessarily impair its usefulness. The primary object of streets in a city is to furnish a passageway, in the interest of the public, to and from different points in the city. They are designed to be used by the public for the purposes of travel, and whatever might unnecessarily impair their usefulness for such purpose, by permit-

ting obstructions to remain in the same of a nature described in the plaintiff's petition, and shown by the evidence in this case, would create a condition that would make the use of the street not reasonably safe for persons traveling across the same. The charge submitted substantially embraced the requirements of the law, and, if the duty was statutory, as is the case here, it would be no defense if the appellant had exercised ordinary care to maintain its tracks along the street in a proper condition."

5—*Denison & P. S. Ry. Co. v. Harlan*, — Tex. Civ. App. —, 87 S. W. 732 (734).

6—*C. & N. W. Ry. Co. v. Jamieson*, 112 Ill. App. 69 (76).

7—*I. C. R. R. Co. v. Leiner*, 202 Ill. 624, aff'g 103 Ill. App. 438, 67 N. E. 398.

8—*Battishill v. Humphrey*, 64 Mich. 494, 31 N. W. 894 (903).

"This request was refused and no reference made to it in the charge of the court. There was error in this refusal, as the charge was proper, and should have been given. The engine being reversed, might call for greater vigilance upon the part of the train hands in looking

§ 1850. Backing Train Without Light or Flagman. If the train was backing under the shed without displaying the light from the front end of the leading car, and without having a flagman stationed thereon, and was backing without due care, and the intestate knew it, and placed himself in a position of danger, his negligence was the proximate cause of the injury (he had the last chance to avoid the injury); and, this being so, he, and not the defendant, would be responsible for his death. On the contrary, if P. was standing on or near the track, he was not called upon to look out for a backing train which displayed no light and had no flagman, if you should so find, on the front of the leading car, for it was the duty of the defendant, as before explained, to display the light, and have a flagman at his post, he not being bound to expect a violation of duty. If, therefore, he (P.) was standing on or near the track, and the defendant backed its train under the shed without the light on the front end of the leading car, or, in a conspicuous place thereon, or without a flagman thereon, and if the jury should further find that P. did not discover the train in time to escape, then the defendant was negligent, and such negligence was the cause of the injury.⁹

§ 1851. Duty of Railway Company to Use Reasonable Care to Avoid Injuring Person on Track. The court instructs the jury that it is the duty of the employes of a railway company operating its train to use reasonable care to discover and to avoid injuring persons who may be upon its track, the degree of such care being such as a person of ordinary prudence and caution would commonly exercise under like circumstances, and varying as the known probability of danger may vary along the different portions of the route over which trains are run; and a failure to use such care by its employes is negligence upon the part of such company, for which it is liable in damages for any injury resulting from such negligence, unless such liability is defeated by contributory negligence on the part of the person injured.¹⁰

§ 1852. Degree of Care Due Towards Child on Track. As to the degree of care and circumspection required of A., whose age is alleged to have been 11 years when the accident happened, I instruct you that a child of tender years is not held in the same degree of accountability as an adult man, but the question of his intelligence and mental capacity must be left for your determination from all the facts and circumstances in evidence before you.¹¹

out, but of itself was no evidence of negligence."

9—Purnell v. R. & G. R. Co., 122 N. C. 832, 29 S. E. 953 (1955).

10—H. & T. C. R. Co. v. Harvin, — Tex. Civ. App. —, 54 S. W. 629 (631).

"This charge was copied from one in the case of Tex. & P. R. Co.

v. Phillips, — Tex. Civ. App. —, 37 S. W. 621. That was a case of similar facts to this, and the court, referring to several decisions of our supreme court, approved the charge as correct."

11—Texas & P. Ry. Co. v. Ball, — Tex. Civ. App. —, 85 S. W. 456.

§ 1853. Duty Toward Helpless Person on Track. (a) The court instructs the jury that the law is different as to a dumb animal and a human being, because of the intelligence of a human being. If a human being is upon or near a track, and apparently in possession of his senses, the engineer is justified in assuming that such person will use his faculties for his own safety and get out of the way.

(b) But if a person on or near enough to the track to be in danger is down, and in such a condition as to indicate that he is helpless, then it becomes the duty of the engineer to take notice of this apparently helpless condition, if he sees him in time, or could have seen him in time in the exercise of due care.¹²

§ 1854. Failure to Keep a Proper Lookout on Down Grade. (a) If you believe from the evidence that B. had charge or control of the car, which ran over and injured the plaintiff, and that B., while letting said car down grade, was guilty of negligence in failing to keep a proper and sufficient lookout upon the track in front of the car, and that such failure was the proximate cause of the injury complained of, you must find for the plaintiff, unless you further believe from the evidence that the plaintiff was guilty of negligence that proximately contributed to his injury.

(b) If you believe from the evidence that B. had charge or control of the car which ran over and injured the plaintiff, and that B. negligently failed to stop said car or to take proper precautions to prevent the same from running over the plaintiff, and that such failure was the proximate cause of the injury complained of, you must find for the plaintiff unless you further believe from the evidence that the plaintiff was guilty of negligence that proximately contributed to his injury.¹³

§ 1855. Care Due by Servants of Railway Company to Avoid a Collision. The court instructs the jury that if you believe, from the evidence in this case, that the servants of the defendant discovered the slack car, by which the deceased was killed, in motion, and discovered that a collision was probable, in time to have stopped their train and prevented such collision by the exercise of ordinary care and diligence, and if the jury believe, from the evidence, that the defendant's servants did not use ordinary care and diligence, and that such want of ordinary care and diligence caused the death of B. while he was in the exercise of due care and caution for his own safety, then you should find the defendant guilty, and assess the

12—*Stewart v. No. Carolina R. Co.*, 136 N. C. 385, 48 S. E. 793 (795).

"The plaintiff excepted to that part of the charge. He contends that the instruction made the liability of the defendant in this case to depend on whether the intestate was actually down, and leaving the jury under the impression

that, unless they found the intestate was actually down, they should answer the third issue—the last clear chance, as it is called—'NO.' The exception was too technical to be sustained. The jury could not have been misled by it."

13—*L. & N. R. Co. v. Thornton*, 117 Ala. 274, 23 So. 778 (779).

plaintiff's damages in such sum, if any, as you believe the evidence warrants.¹⁴

TRESPASSERS.

§ 1856. **Liability as to Trespassers.** (a) The court instructs the jury that the plaintiff in this case is not entitled to recover, unless you believe from the preponderances of the evidence in the case that the servants of the defendant in charge of the trains in question, or some of them in charge of said trains, were at the time guilty of willful and wanton misconduct, and that such willful and wanton misconduct resulted in, and was the cause of the death of said W.¹⁵

(b) The jury are instructed that if it appears from the evidence in this case that the plaintiff was a trespasser upon the track or bridge of the defendant receiver at the time he was struck and injured, then said defendant receiver was not required, and the law did not impose any duty whatever upon his engineer, to discover the plaintiff's presence upon the same, but only required him after he discovered the plaintiff and had knowledge that he was in a perilous position to exercise reasonable care and prudence to avoid collision, and if it further appears that the engineer did exercise such care and prudence and did everything within his power to prevent the train from colliding with the plaintiff after he discovered him, then your verdict must be for the defendants.

(c) The jury are instructed that the defendants are liable in this case only if the engineer failed to exercise ordinary care to prevent the injury after he became aware of the danger to which the plaintiff was exposed; and by ordinary care is meant such care as would be ordinarily used by a prudent person performing like services under similar circumstances.¹⁶

§ 1857. **Willful and Wanton Misconduct toward Trespassers—What Amounts to.** (a) The court instructs the jury that what is meant by willful and wanton misconduct is such conduct as amounts

14—C. & A. R. R. Co. v. Anderson, 166 Ill. 572 (573), aff'g 67 Ill. App. 386, 46 N. E. 1125.

The instruction given in the above case used the words "proper precautions and reasonable care." This the court says was technically inaccurate, as all the defendant's servants were required to exercise was ordinary care. The court, however held that the difference between the words used and those which ought to have been used was so slight that the jury were not misled.

15—I. C. R. R. Co. v. Leiner, 202 Ill. 624, aff'g 103 Ill. App. 438, 67 N. E. 398, 95 Am. St. 266.

16—Pierce v. Waters, 164 Ill. 560 (563), 45 N. E. 1068.

"The above instructions were given on behalf of the defendant, and two instructions were given on behalf of the plaintiff, and they each lay down the same rule as to the defendant's liability stated in the foregoing instructions, and correctly announce the law as held in I. C. R. R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684, and W. R. R. Co. v. Jones, 163 Ill. 167, 45 N. E. 50. Moreover, it is well settled that the defendants having asked the court to instruct the jury as they did cannot now be heard to question the correctness of the instructions given on behalf of the plaintiff to the same effect. (Cons. Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162)."

to an intentional wrong, or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such manner as shows that they had an utter disregard for the safety and lives of other persons.¹⁷

(b) In order that plaintiff may recover, it is not necessary that the jury believe that in kicking, knocking or shoving the plaintiff from the car (if the jury believe from the evidence he was so kicked, knocked or shoved) the conductor actually desired to injure plaintiff.

(c) It is not necessary for plaintiff to prove in order to recover that defendant or defendant's agent had any actual desire to injure him.

(d) If the jury believe from the evidence that the plaintiff wantonly and recklessly or intentionally caused plaintiff's injuries as stated in the complaint, then the jury must find for plaintiff.¹⁸

(e) Wantonness or willfulness is such gross want of care and regard for the rights of others as show a disregard of consequences or a willingness to inflict an injury.

(f) You are instructed that willful or wanton conduct, whereby one may be injured, does not necessarily mean ill-will or malice towards the person injured, but it may consist in such lack of care for the safety of the person injured, known to be in imminent peril, as implies an utter disregard of consequences or a willingness to inflict injury upon such person.

(g) You are instructed that the words willful and wanton as used in this case, do not necessarily imply malice or ill-will, but may mean such gross or willful negligence as to indicate a total disregard of consequences and indifference to the safety of others.¹⁹

§ 1858. Injury to Trespasser While Getting on Moving Train. (a) The jury are instructed as a matter of law that if you shall find from the evidence that the injury to the plaintiff was caused by an attempt on his part to climb upon the train in question while the same was in motion, then he is not entitled to recover and your verdict should be for the defendant.

(b) If the jury shall find from the evidence that at the time of the accident, the defendant did not have stationed at ——— street crossing any flagman, and that this crossing was a place of danger, and that it was the duty of the defendant, at the time in question, to have stationed at his crossing a flagman, but the injury to plaintiff was caused by his attempting to climb upon the defendant's train while the train was in motion, then you are instructed to disregard the evidence as to failure to station a flagman at such crossing, or as to the speed of the train, and that the plaintiff cannot recover, and your verdict should be for the defendant.²⁰

17—I. C. R. R. Co. v. Leiner, 202 Ill. 624, aff'g 103 Ill. App. 438, 67 N. E. 398, 95 Am. St. 266.
18—Highland Ave. & B. R. Co. v. Robinson, 125 Ala. 483, 28 So. 28 (29).

19—C. C. & St. L. R. Co. v. Ricker, 116 Ill. App. 428.
20—C. W. I. R. R. Co. v. Roath, 35 Ill. App. 349 (351).

§ 1859. **When Person Crossing Track Is Not a Trespasser.** If you believe from the evidence that at the place where A. was struck by the defendant's engine a pathway crossed said railroad track, which had been commonly used by the public for a long period of time prior to said accident without objection on the defendant's part, and said A. was crossing said track on said pathway when he was struck, then the said A. would not be a trespasser in walking across said track.²¹

LICENSEES.

§ 1860. **Duty to Maintain Lookout for Licensees on Track.** (a) You have heard a great deal about "lookout." What does that mean—the duty of the railroad to keep a lookout? That means this: Take all the facts and circumstances under consideration; would a man of ordinary prudence and reason be expected to keep a lookout under those circumstances; in other words, take into consideration the character of the country, take into consideration the surrounding circumstances, and ask yourself the question, would ordinary care and foresight and prudence require a reasonable lookout to be kept under those circumstances? Suppose a reasonable lookout had been kept, was it negligence in not seeing this particular man; would an engineer of ordinary foresight, ordinary reason and prudence, if he had been keeping a reasonable lookout, have discovered the presence of this man if he was upon the track, in time to have stopped the train and thereby avoid the injury? In determining that take into consideration the surrounding circumstances; take a man of ordinary firmness and reason, a man who has other duties to perform, and say whether or not such a man, by the exercise of ordinary firmness and reason, would have discovered this man upon the track, if he was there, in time to have stopped his train and thereby avoid collision?

(b) If the jury find from the evidence that the deceased, ———, was killed by a train on defendant's railroad, and at such time he was in apparently helpless condition; and if they further find that at the place of such killing, the public, by the permission of the railway company, had been accustomed without objection from the defendant to travel for more than twenty years—then it would not excuse the defendant simply to show that their agent in charge of said train did not see the deceased in time to avoid the killing, for under such circumstances it may be the duty of the defendant to keep a reasonable outlook at such places to discover any apparently helpless person who may be upon the track.

(c) If persons have long been accustomed to use the track of a company for a passageway at certain localities, the company is charged with notice of such usage, and is under obligation to exer-

cise reasonable care in keeping lookout at such places, among other things, for apparently helpless persons.²²

§ 1861. **Temporary Revocation of License to Public to Cross Track at Certain Point.** (a) You are instructed that if you should find from the evidence that the general public with the knowledge of the railway company had been using certain spaces between the tracks from L. street to G. avenue as driveways and footways at and prior to the time of the accident in question yet such finding would not authorize plaintiff's child to be at any other place or places than those named, or to be under defendant's cars or south of its cars between the rails of the scale track; and if you find from the evidence that it was under the defendant's cars or at or near the south end of them, between the rails of the scale track, at and just prior to its injury, and the defendant's employes did not see it in time to prevent the accident, then it was a trespasser and plaintiff is not entitled to recover, and your verdict must be for defendant.

(b) You are instructed that at and just prior to the time of the accident in question defendant was in the actual use and occupancy of its scale tracks, where its cars were standing, and that such use and occupancy, while it lasted, amounted to a suspension and revocation of any right, if such you find there was or had been, in the public to cross said track when so occupied; and if you find from the evidence that plaintiff's child attempted to do so by crawling under defendant's cars, and was killed, while so doing, by the movement of the cars, defendant would not be liable and your verdict should be for the defendant.²³

INJURIES AT HIGHWAY CROSSINGS.

§ 1862. **Highway Crossings Must Be Put in Safe Condition.** By the law of this State, every corporation owning or operating a railroad in this State, is required to construct reasonably safe crossings at all points where it intersects a public highway; and it is liable for all injuries resulting from neglect of this duty, if the party injured is guilty of no negligence contributing to such injury.²⁴

22—Sentell v. So. Ry. Co., 70 S. C. 183, 49 S. E. 215.

"We think, under the authority of Jones v. Railroad, 61 S. C. 556, 39 S. E. 758, the presiding judge was correct in charging the jury as to a licensee. The trend of the testimony was to show that for more than 20 years the railroad company had acquiesced in the use of the walk alongside of its track, and certainly had not forbidden its use by pedestrians; also the feet of the intestate were on the path of that walkway when he was stricken by the train of defendant, though it is true he was seated on a cross-tie of the track. In Jones v. R. R. Co., supra, she was walking on the trestle, and yet the charge of the

circuit court called the attention of the jury to the fact that under the consent, either express or implied, she was there as a licensee. We do not think the presiding judge erred in speaking of a lookout by telling the jury what it meant, and under what circumstances a defendant should exercise this duty. Did not ordinary care require this duty of defendant in its acquiescence in the use of its track by pedestrians? Again, we refer to the extracts we have made from the case of Jones v. R. R., supra."

23—Wagner v. C. & N. W. Ry. Co., 122 Iowa 360, 98 N. W. 141 (143).

24—Farley v. The C., R. I. & P. Rd. Co., 42 Ia. 234

§ 1863. Reasonable Care Required at Highway Crossings. (a) The jury are instructed that, although a person may be improperly or unlawfully upon a railroad track, that fact alone will not discharge the company or its employes from the observance of reasonable care; and if such a person is run over by the train, and killed or injured, the company will be responsible, if its employes could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness.²⁵

(b) If the jury believe, from the evidence, that the defendant constructed a highway crossing at the point in question, and that, taking into account the location, nature of the ground and all the surroundings of the place, the crossing was constructed in such a manner as to render it easy to approach and cross by travelers and teams on the highway, without danger to persons using reasonable and ordinary care, then the defendant did all that was required of it in making the crossing, and would not be guilty of negligence, as regards the manner of constructing the crossing.²⁶

(c) It was the duty of the railway company to use ordinary care to prevent an injury to plaintiff. By ordinary care is meant such care as an ordinarily prudent person would have used under like circumstances.²⁷

§ 1864. Necessity of Greater Caution When Large Number of Persons Use Crossing Daily. If you find from the evidence that the crossing upon which the deceased was killed was a public highway, and had been used as such for a long number of years prior to the accident, and if you further find that a large number of teams and persons passed over said crossing each day, and at all hours of the day, then I charge you that it was the duty of the engineer of the train, when approaching the crossing, to have been on the lookout for teams and persons on the crossing, or in such close proximity thereto, as to be in danger of colliding with the train, then to use all reasonable care and diligence, and make use of all the appliances at his command to have the train under control, and stop, if necessary, to avoid a collision with an injury to such team or persons; and if you further find that the engineer was negligent in not keeping such a lookout, and in not discovering the peril of the deceased in time to have avoided the accident, and that he did or could have discovered

25—Isabel v. Hannival, etc., Rd. Co., 60 Mo. 475.

26—Ind., St. L. Rd. v. Stout, 53 Ind. 143.

27—Galveston, H. & S. A. Ry. Co. v. Vollrath, — Tex. Civ. App. —, 89 S. W. 279 (282).

"That charge is attacked on the ground that it assumes that the railway company injured appellee and also assumed that it was guilty of negligence. The charge is not open to the criticisms stated in the

assignments of error. The existence of no fact is assumed therein. The court merely charged a general duty that the railway company owed to appellee, and the clause should be read and construed in connection with the other portions of the charge. It cannot be logically contended that the railway company was not under any obligations to use ordinary care to prevent injury to persons on its track at a public crossing."

him, and the peril he was in, in time to avoid the collision, if he had been on the lookout, then I charge you that the defendant is liable for the killing of O., and the plaintiffs are entitled to recover in this action.²⁸

§ 1865. Other Persons Crossing Track in Safety Before Accident Not Evidence of Safety. The fact, if it is a fact, that other people passed over this walk that day, is not evidence, and cannot be considered by you as evidence, that it was a safe place in which to pass. You will determine that question from the evidence in this case, and not from what some other person has done or may have done.²⁹

§ 1866. Defendant Guilty of Negligence as Charged in the Declaration. The court instructs the jury, that if they believe, from the evidence, that the plaintiff's intestate, while exercising ordinary care to avoid injury, was killed by the negligence of defendant, as charged in the declaration, then you can find for the plaintiff.³⁰

§ 1867. Rights and Liabilities of Railroad Companies and Travelers Are Equal and Mutual. (a) The court instructs the jury that railroad companies, under their charters, have the same rights to

28—Olson v. Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

29—Sosnofski v. L. S. & M. S. Ry. Co., 134 Mich. 72 (76), 95 N. W. 1077 (1078).

30—L. S. & M. S. Ry. Co. v. Hes-
sions, 150 Ill. 546 (554), 37 N. E. 905.

"It is objected that thereby the jury were left to consider the case, as charged in the declaration, while there was no evidence before the jury to prove the negligence alleged in one or more of the counts thereof. It is hardly to be supposed that the jury would understand the instruction to authorize them to consider negligence charged in the counts of the declaration, not proved. They were to believe, from the evidence, that the intestate was killed by the negligence of the defendant, as charged, and were expressly told, in very many instructions, that they must form their judgment from the evidence. Moreover, by the instructions given on behalf of the defendant, the jury were told there could be no recovery under the first and sixth counts of the plaintiff's declaration.

"It is also urged that the instruction is faulty because it tells the jury that if the deceased was in the exercise of ordinary care, at the time, etc., to avoid injury, that will suffice, instead of requiring that they should find that he was in the exercise of ordinary care in

entering upon the railroad tracks, etc. The instruction, we think, is not subject to the criticism. (C. & A. R. R. Co. v. Fisher, 141 Ill. 625, 31 N. E. 406; L. S. & M. S. R. R. Co. v. Johnson, 135 Ill. 641, 26 N. E. 510; McNulty v. Lockridge, 137 Ill. 270, 27 N. E. 452.) Be this as it may, in the fourth and fifth instructions on behalf of the defendant the correct rule was given, and they were told that, to entitle the plaintiff to recover, the jury must believe, from a preponderance of the evidence, that the deceased, at the time of and just prior to his receiving the injury, was in the exercise of due and ordinary care for his safety. In cases of this kind, where the party injured has been struck by a moving train while upon or attempting to cross railway tracks, it has been repeatedly held to be error to limit the requirement that he should be in the exercise of ordinary care, to the exact time of the injury. (I. C. R. R. Co. v. Weldon, 52 Ill. 290; C. M. & St. P. R. R. Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028.) The question of whether he exercised ordinary care in going upon the track is always necessarily involved. But in view of the instructions given, the first general and the others specific, as to what should be considered, the jury could not have been misled."

use that portion of the public highway over which their track passes as the public have to use the same highway. Their rights and those of the public, as to the use of the highway at such point of intersection, are mutual and reciprocal; and, in the exercise of such rights, both the company and those using the highway must have due regard for the safety of others, and use every reasonable effort to avoid injury to others.³¹

(b) The court instructs the jury that both the deceased and the railway company have an equal right to cross the street at the point where the accident happened, and that the law imposes on both parties the duty of using reasonable and prudent precaution to avoid accident and danger; and while it was incumbent upon the railroad company in running its train on the occasion referred to, to give the required signal by ringing the bell or sounding the whistle eighty rods before reaching the crossing, it was also the duty of the deceased to look out for the approach of the train and to observe all reasonable precautions before attempting to cross the track.³²

§ 1868. **Owing to Force and Momentum Train Has Preference in Crossing First.** (a) You are instructed that if a railroad crosses a common road on the same level or practically so, those traveling on either have a legal right to pass over the point of crossing, and to require reasonable care and caution of those traveling on the other road to avoid a collision; and that, while a passing train from its force and momentum will have the preference in crossing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass, and such warning must be reasonable and timely, taking into consideration the location, situation and surroundings existing at such crossing.³³

(b) Because of the character and momentum of the defendant's train, the law would not require it to stop its train and give precedence to Mrs. M., who was on foot, to make the crossing first. It was the duty of Mrs. M. to wait for the train to pass before she attempted to cross, and if she could, by the exercise of due diligence, have discovered the approach of defendant's train, and if she attempted to cross in front of defendant's train knowing of its approach, or if by the exercise of due diligence she could have discovered its approach, she would be the author of her own misfortunes, and could not recover in this action, unless the jury should believe from the evidence that, upon the manifestation of Mrs. M.'s peril, those who controlled defendant's train failed to use the diligence to prevent the injury, or that they wantonly or intentionally injured her.³⁴

31—Ind. & St. L. R. Co. v. Stables, 62 Ill. 313; Penn. R. Co. v. Heileman, 49 Penn. St. 60; Cleveland, etc., R. Co. v. Terry, 8 Ohio St. 570.

32—L. N. A. & C. Ry. Co. v.

Patchen, 167 Ill. 204 (212), aff'g 66 Ill. App. 206, 47 N. E. 368.

33—C. C. C. & St. L. Ry. Co. v. Baker, 106 Ill. App. 500 (504).

34—Memphis & C. R. Co. v. Martin, 117 Ala. 367, 23 So. 231 (235).

§ 1869. **Measuring the Distance and Time It Would Take to Cross—Assuming Risk.** If the jury believe from the evidence that Mrs. M. approached the railroad crossing, wishing to cross, and that she saw or heard the train approaching and that she for herself measured the distance and time it would take to cross, then I charge you that she assumed the risk, and her administrator cannot hold the railroad company responsible, unless Mrs. M.'s intention was apparent to the employes of defendant operating the train, and after her perilous intention and conduct became apparent, by the exercise of due care and diligence, the injury could have been avoided.³⁵

§ 1870. **Reasonable Warning Should Be Given by Train in Approaching Highway Crossings.** The jury are instructed that if a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require reasonable care and caution of those traveling on the other road to avoid a collision; that while a passing train, from its force and momentum, will have the preference in crossing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass, and such warning must be reasonable and timely, so far as the circumstances will reasonably admit of.³⁶

§ 1871. **Engineer and Fireman Bound to Use Reasonable Care.** (a) If the jury believe from the evidence that the injury complained of was occasioned by a collision between the team and wagon of the plaintiff and a locomotive engine of the defendant, on a public road, at a place where such road crossed the railroad of the defendant, and that

"This charge requested by the defendant should have been given. This charge in effect is the same as that approved in the case of *Gothard v. Ala. Ga. So. R. R. Co.*, 67 Ala. 114."

35—*Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231.

We are of the opinion that this charge requested by the defendant asserted a correct proposition of law and should have been given. We find no conflict in the evidence that after the deceased crossed the side track and before reaching the main track upon which the train was approaching there was nothing to obstruct the view for some distance. There was evidence also tending to show that deceased just before stepping on the main track, halted and looked towards the train, and that the train at that time was in sight or within hearing and approaching, and that she started to run across the track. These facts are sufficiently predicated in the charge. In the case of *Highland Ave. & B. R. R. Co. v. Sampson*, 91 Ala. 564, we used the

following language: "A person wishing to cross the track of a railroad at a public crossing, or any place where trains are not required to stop, and sees a train approaching, and who for himself measures the distance and time it will take to cross, and acting upon his own judgment, undertakes to cross, assumes the risk, and if injured, cannot hold the railroad responsible, unless his intention was apparent to the employees of defendant operating the train, and after such perilous intention and conduct became apparent, by the exercise of due care and reasonable diligence, the injury could have been avoided." The same principle is asserted in the case of *Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 272, and in *Glass v. M. & C. R. R. Co.*, 94 Ala. 590. To the same effect are the following cases: *Railroad v. Houston*, 95 U. S. 697, *Schofield v. Railroad*, 114 U. S. 614, *Gothard v. Ala. G. Southern R. R. Co.*, 67 Ala. 114.

36—*C., B. & Q. R. Co. v. Lee*, 87 Ill. 454.

the plaintiff used ordinary care and caution to avoid a collision, and that the collision was owing to the negligent, careless and unskillful manner in which the servants of the defendant managed the locomotive and train of cars attached, as charged in the declaration, then the jury should find a verdict for the plaintiff.

(b) The court further instructs the jury, that if they believe, from the evidence, that the engineer or fireman on the locomotive which struck the wagon of the deceased, and caused his death—if they believe, from the evidence, his death was so caused—could, by the exercise of reasonable care and watchfulness, have seen the deceased in time to have stopped said engine, and avoided the injury, without danger to themselves or train, then the railroad company is liable for the want of such care and watchfulness, and the injury occasioned thereby; provided, the jury further believe, from the evidence, that the deceased was, at the time, exercising all reasonable care and caution to avoid the injury.³⁷

(c) The court instructs the jury that it was the duty of defendant's servants, in the running and handling of said east-bound engine and train of cars, to have exercised that degree of care and prudence which an ordinarily careful and prudent person, engaged in like business, would have exercised under like circumstances, and a failure to exercise such a degree of care and prudence would render the defendant guilty of negligence in that respect.³⁸

§ 1872. Elements to Be Taken into Consideration—Sparsely Settled and Populous Districts. The court instructs the jury that, in determining the question as to whether the defendant's servants and employes were guilty of negligence in the present case, the jury are authorized to and should take into consideration the place at which the accident occurred, the manner in which the trains were being propelled, the number of dwelling houses in that vicinity, their distance from the track, and the probability of pedestrians being on the track at that time and place, if any. What would be ordinary care and prudence in running a train of cars in a sparsely-populated locality might be negligence in a more populous district, and it is for the jury to determine, in view of all the facts and circumstances of the case, whether defendant's servants did exercise ordinary care and prudence in the management of said train at the time and place mentioned in the evidence in this case.³⁹

§ 1873. Engineer Not Bound to Neglect His Usual and Ordinary Duties to Keep Extraordinary Lookout for Danger Ahead. The defendant's servants in this case were not bound to use extraordinary care or extraordinary means to prevent accidents. They were only bound to use what in that peculiar business is ordinary care and dili-

³⁷—*Chi. & A. Rd. Co. v. Murray*, 62 Ill. 326.

³⁸—*Schmitt v. Mo. Pac. Ry. Co.*, 160 Mo. 43, 60 S. W. 1043.

³⁹—*Schmitt v. Mo. Pac. Ry. Co.*, supra.

gence, and the paramount duty of the employes on the train was the protection of the passengers, the property in the train and the train itself. If you believe, from the evidence, that in the usual and ordinary management of the train for the safety of the passengers and property, the engineer had to perform other duties besides watching the track ahead, such as gauging his steam, watching his time table, examining his machinery, watching for the station signals, then he had a lawful right to perform these duties, and he was not bound to neglect them in order to watch the track ahead while performing his duties. And if the jury find, from the evidence, that the engineer in charge of the engine was attending to any or all of these duties at the time of the accident, and that for this reason the stock was not discovered in time to save them by using ordinary means to stop the train, then the defendant is not liable.⁴⁰

§ 1874. Liability of Railroad for Frightening Horses—Negligence, and Wanton Defined. (a) The court instructs the jury that a railroad company is not liable when an injury results from horses being frightened from the noise or appearance of the train, when due and proper care in the management of the train is used. If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about, in the loss of the horses, defendant would be liable. Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. An act is wantonly done when it is needless for any rightful purpose, and manifests a reckless indifference to the rights and interests of another.⁴¹

(b) The defendant had a legal right to use its road, engine and cars upon its tracks in the usual course of business, or in any other manner, so far as the rights of the plaintiff in this case are concerned, provided, in doing so they do not negligently, needlessly and wantonly increase the danger to the plaintiff in passing from a publicly traveled highway across its track.

(c) If the defendant's servants while said engine was standing still knew, or would have known by the exercise of reasonable and ordinary care, which would have ordinarily been used by ordinarily prudent men under like circumstances, that the plaintiff was either upon the track of its railway, or just passing off the same, then the defendant had no right uselessly or needlessly to blow the whistle of the engine, or cause any other noise likely to frighten or cause plaintiff's team to run away.

(d) If at the time plaintiff entered upon the track of the railroad, the engine was standing still, and if defendant's servants in charge of the engine knew of that fact, or if they would have known such

40—Cincinnati & Z. R. Co. v. D. R. Co., 121 N. C. 519, 27 S. E. Smith, 22 Ohio St. 227.

41—Everett v. Receivers of R. &

991.

fact by the use of ordinary care and prudence, then defendant would be required to use care and prudence and refrain from making a noise from the blowing of the whistle in a manner calculated to frighten the team driven by plaintiff, or cause them to run away; and if the said defendant's servants did so cause the whistle to be blown, under such circumstances, while plaintiff was acting prudently in attempting to cross said railroad track, and if such noise caused by the blowing of the whistle was the cause of the runaway, producing the injuries complained of, or some of them, then defendant would be liable to the extent of the injuries caused by such wrongful conduct on the part of the defendant's said servants.⁴²

(e) If the jury believe, from the evidence, that the plaintiff on the day and at the place in question and immediately before and at the time of the accident in question was in the exercise of the care and caution for his own safety which a reasonably prudent and careful man under the same circumstances would have exercised; and if the jury further believe, from the evidence, that the engineer or fireman of the engine in question saw the plaintiff's position at the head of his team within thirty feet of the track over which said engine was then passing, and then negligently or wantonly caused the whistle of said engine to be sounded in a short, sharp, shrill and unusual manner, and the steam to escape from said engine in a reckless and negligent manner; and if the jury further believe, from the evidence, that the sounding of said whistle as aforesaid or escaping of said steam as aforesaid frightened the team of the plaintiff so that said team thereupon ran away and injured said plaintiff, then the plaintiff should recover.⁴³

§ 1875. Frightening Horses Through Usual and Ordinary Noise. If you believe that the plaintiff was injured by reason of the defendant's engine emitting a noise as described in the plaintiff's pleadings, and frightening his horse, but if you further believe that such noise was not occasioned by the engineer, or by any of defendant's employes, working its engine, but that it was occasioned merely by the escape of steam through a proper, usual and necessary apparatus for the escape of an excess of steam, and that such noise was usual and incident to the use of its engine while under the proper amount of steam, and used in its ordinary manner, then you will find for the defendant, provided you believe that such noise was the sole cause of the plaintiff's injury.⁴⁴

42—C. R. I. & P. Ry. Co. v. Parks, 59 Kas. 709, 54 Pac. 1052 (1054).

43—C. B. & Q. R. Co. v. Yorty, 158 Ill. 321 (324), aff'g 56 Ill. App. 242, 42 N. E. 64.

"The instruction stated the law less favorably to appellee than it might with perfect propriety have done, for in order to create liability in appellant it was not necessary

that the engineer, who, it seems to be assumed, blew the whistle, should have seen appellee. The fact that he saw the men and teams at work on the east side of the track was sufficient to warn him against making any unusual or unnecessary noise."

44—Galveston H. & S. A. Ry. Co. v. Simon, — Tex. Civ. App. —, 54 S. W. 309 (311).

§ 1876. Frightening Horses Through Negligent Unloading of Cinders. (a) The court instructs the jury that, to justify a verdict for the plaintiff, you must be satisfied from the weight of affirmative evidence that cinders were negligently unloaded and in such a manner as was calculated to frighten horses crossing the railroad, and, unless you so believe, your verdict should be not guilty.

(b) The court instructs the jury that, unless you believe, from the evidence, that the plaintiff has shown by a preponderance of the evidence that she was exercising the care and caution of an ordinary prudent woman at the time immediately preceding the accident, you should find the defendant not guilty.

(c) The defendant railroad company cannot be found guilty in this case unless you believe, from the evidence, that the plaintiff was injured in consequence of the negligence of the defendant.⁴⁵

§ 1877. Company Must Not Suffer Tall Weeds or Brush to Obstruct the View of the Track. The court instructs the jury that it is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way, so as materially to obstruct the view of the track or approaching trains by persons about to cross the track; and, in this case, if the jury believe, from the evidence, that the defendant permitted and suffered brush and tall weeds to grow upon its right of way, so as to obstruct materially the view of the track and of approaching trains by persons about to cross the railroad on the crossing in question, and that but for such obstruction the injury in question would not have happened, then the company is liable, in this case, unless the jury further believe, from the evidence, that the plaintiff's own negligence directly contributed to the injury.⁴⁶

§ 1878. Obstructing View of Track at Crossing by Line of Box Cars. It was the duty of the defendant's lessee to use signals in approaching the crossing; and if the jury believe from the evidence that defendant's lessee was running its train at a greater rate of speed than eight miles an hour, and failed to ring its bell or blow its whistle as it approached the crossing, and a line of box cars was standing on the side track so as to obstruct the sight and interfere with the hearing, and that its failure to give the signals under the circumstances was the proximate cause of the injury, then you should answer the second issue, "No."⁴⁷

§ 1879. Duty to Observe Ordinances of Municipalities. I charge you that the duty of railroad companies includes the observance of the reasonable ordinances of the city, which have been properly promulgated. It is necessary for them to take all reasonable care under

45—I. C. R. Co. v. Griffin, 84 Ill. App. 152 (158), aff'd 184 Ill. 9, 56 N. E. 337.

46—O'Mara v. Hudson R. R. Co., 38 N. Y. 445; Artz v. C., etc., Rd. Co., 34 Ia. 153; Ind., etc., R. Co. v.

Keeley, 23 Ind. 133; Tabor v. Mo. V. R. Co., 46 Mo. 353; I. & St. L. R. Co. v. Smith, 78 Ill. 112.

47—Norton v. N. C. R. Co., 122 N. C. 910, 29 S. E. 886 (889).

the common law, and it is necessary to observe an ordinance, if such ordinance of the city has been properly promulgated.⁴⁸

§ 1880. Running Train at Greater Speed Than That Allowed by Ordinance—Negligence Per Se. (a) The court instructs the jury that if you believe from the evidence that at the time the deceased, J., was struck and killed by defendant's train of cars, such engine and cars were being run at a greater rate of speed than ten miles in the corporate limits of the city of W., and that by reason of such running of cars the said J. was struck and killed without negligence on his part, contributing to his death, then you should find for the plaintiff in the sum of not exceeding \$——.⁴⁹

(b) If you find from the evidence that the view of the approaching train was obstructed by buildings, trees, and cars on defendant's railroad at such crossing to a traveler on such street from the north, and at the time of the injury a valid ordinance of the city of W. was in force limiting the rate of speed of defendant's trains to five miles an hour in said city, and that the train which injured plaintiff was at the time of the injury running at the rate of ten or fifteen miles an hour, then the defendant was guilty of negligence; and if you find that such negligence produced the plaintiff's injury without any negligence on the plaintiff's part which contributed to the injury, then your verdict should be for the plaintiff.⁵⁰

§ 1881. Speed of Train When No Ordinance Exists. (a) In the absence of any proof of an ordinance limiting the speed of a railroad train through a city or village, the railroad company would have a right to run its trains through any such village or city at any rate of speed it thought proper, consistent with the safety of its train and passengers, and of persons rightfully upon its right of way at road crossings, who were exercising ordinary care in crossing the railroad. And any person without ordinary care crossing such railroad, and receiving any injury for the want of such care, could not recover therefor on account of such speed alone.⁵¹

48—*Brasington v. So. Bound R. Co.*, 62 S. C. 325, 40 S. E. 665 (668), 89 Am. St. 905.

49—*Jackson v. K. C. Ft. S. & M. R. Co.*, 157 Mo. 621, 58 S. W. 32 (34), 80 Am. St. 650.

50—*Penn. Co. v. Horton*, 132 Ind. 189, 31 N. E. 45 (47).

"This instruction contained a correct enunciation of the law relating to what it took to establish actionable negligence on the part of the defendant. It is negligence per se to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence, without being himself guilty of contributory negligence, he may recover damages for such injury. *Railroad Co. v. Mathias*,

50 Ind. 65; *Penn. Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Penn. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136. The instruction does nothing more than inform the jury of the law upon this subject, leaving it to the other and subsequent charges to direct their attention to the subject of contributory negligence. We discover no infirmity in this instruction."

51—*Partlow v. I. C. R. Co.* 150 Ill. 321 (324), 37 N. E. 663.

"We perceive no substantial objection to this instruction. The village had passed no ordinance on the subject, and in the absence of all instruction on the part of the municipality, by ordinance, the railroad company might properly

(b) The defendant had the right to run the train at the time and place of this collision at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration however all the circumstances surrounding that crossing affecting the traveling public, and having a due regard for the safety of the public using the crossing.⁵²

(c) The general statutes of our State do not regulate the rate of speed that a railroad company shall run its cars; yet the failure of the law to regulate the rate of speed does not authorize a railroad company to run its train at a wanton, reckless, and dangerous rate of speed over a public crossing in an incorporated town or village, a point where the people cross and recross the public crossing in numbers and frequently.⁵³

§ 1882. Duty to Ring Bell—Duty of Person Crossing Tracks.

(a) The court instructs the jury that it was the duty of the defendant's servants in charge of said east-bound engine and train of cars, while running or moving within the limits of the City of B., to cause the bell on the engine thereof to be constantly sounded; and, if you believe from the evidence that the bell on the engine of the train in question was not constantly sounded while said train was running or moving within said limits, then you should find that the defendant was guilty of negligence in that respect.⁵⁴

(b) It is the duty of an engineer in charge of a running train to give some signal of its approach to the crossing of a public street or

determine for itself the rate of speed, consistent with the safety of its train and passengers, and those who had occasion to cross the railroad track in traveling on the highway. As to the last clause of the instruction, the rule is so well settled that a person cannot recover for an injury unless in the exercise of ordinary care, that it will not be necessary to cite cases in its support."

52—*N. Y. C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130 (132).

"In *Cleveland C. & C. R. R. Co. v. Elliott*, 4 Ohio St. 474-476, this court held that "The paramount duty of the conductor of a train is to watch over the safety of the persons and property in his charge. The same is true of an engineer. His paramount and first duty is to watch over and guard the safety of the persons and property in his charge, and that is most effectually done by keeping a strict outlook ahead upon the track so as to see any obstruction at the earliest moment, and thus be prepared to avert danger to his train. * * * His duty being to look ahead, it cannot

be his duty to look at the same time to the sides. If, however, while looking ahead his eye takes in a person approaching the track at a crossing or elsewhere, he is then bound to use ordinary care to prevent injury, his first care, however, being for the safety of his passengers and property on board for transportation. He may presume that such persons will keep away from the track until the train passes, but when it become evident that the person cannot or will not keep away from the track, then he must do all he can to prevent injury. * * * It has often been held by courts that when a person suddenly finds himself in a position of imminent peril or danger, he cannot be held to a strict account as to the course of conduct to be by him pursued to avoid injury. *R. R. Co. v. Iron Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Elliott R. R., para. 1173*; *Penn. R. R. Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. 700."

53—*Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231 (238).

54—*Schmitt v. Mo. Pac. Ry. Co.*, 160 Mo. 43, 60 S. W. 1043.

highway over a railroad track; and when he fails to do so the railroad company is deemed negligent, and answerable for any injury due to such omission of duty.⁵⁵

(c) The statute requires every railroad corporation to cause a bell of at least thirty pounds to be rung or a steam whistle to be sounded at the distance of at least eighty rods before a public highway is reached by a train or locomotive and kept on ringing or being sounded until the highway is reached, and when this is done the railroad company has discharged its duty imposed by the statute, whether such signal is heard or not. The statute does not require the giving of such signals of the approach of a train so as to enable others absolutely to ascertain its approach or avoid being injured. If the railroad company has such bell on its engine attached to the train as the statute requires, and it is rung in the manner required, then so far as the giving of the signals before a train reaches a public highway crossing is concerned, the company is without blame, whether the signal so given is observed or heeded or not by any one attempting to cross the railway track on a public highway.⁵⁶

(d) It was the duty of the company to give proper warning at a proper place of the approach of the passenger train. If the company through its servants performed that duty on this occasion in the usual way, by blowing a whistle or ringing a bell, or both, depending upon circumstances, plaintiff cannot recover. The plaintiff, in order to show the company was neglectful in this particular, testified he listened, and that neither a bell was rung nor a whistle blown. Two witnesses, docking bosses, I think, testified that they were at the top of the lookout breaker and saw most of the occurrence; that the whistle did not blow. The last witness said he did not remember that the bell rang, and, if it had rung, he would remember it. The other said he was not sure, would not say whether the bell rang or not. There may have been other witnesses, but I call your attention to these because it appears to be they were in a position to hear and see. Upon the side of the defendant many witnesses have been called—persons who were upon the passenger train, workmen upon other trains, and some persons who stood by—who testified just as positively the whistle was blown and the bell rang. The engineer testified he started the bell, an automatic bell, ringing, as I remember it, very near Kingston. This is a question of fact, a question as to the credibility of the witnesses, and you are the judges of these facts and of the credibility of these men. It is not my province and I have no right to interfere where it is your duty to decide. You are to judge of the men from any apparent interest or bias they may have shown or have in the case, from their appearance, their manner of testifying. Size them up generally as they appeared before you in the witness stand, and, as you listened to the testimony, then decide upon their credibility. Believe them all, if you can. If you cannot, then give

⁵⁵—Norton v. N. C. R. R. Co., 122 N. C. 910, 29 S. E. 886 (889).

⁵⁶—Cox v. C. & N. W. Ry. Co., 92 Ill. App. 15 (19.)

credit to those whom you think are entitled to credit. If you decide, as testified to by several witnesses upon the part of the defendant, that the whistle on the passenger locomotive was blown at or near the signal post, which was in the neighborhood of 1,000 feet below the crossing, the defendant did its whole duty, and however unfortunate it may have been for P., he cannot recover in this action.⁵⁷

(e) The jury are instructed that it was the duty of defendant and the employes in charge of the engine and train that struck and killed L., to sound the engine whistle or ring the engine bell at a point not less than 50 rods east of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that the location of the crossing at which L. was killed, and the amount of public travel thereon, and the buildings or other structures of the defendant company in proximity to the crossing, obstructed the view and hearing of approaching trains, and that, for these reasons, the crossing was unusually dangerous to travelers, and that the sounding of the whistle and ringing the bell as directed was not sufficient to give reasonable notice of the approach of trains to the traveling public at said crossing, and this was known to defendant, or by exercise of ordinary care, could have been known by it, then it was the further duty of the defendant, and the persons in charge of its train, to use such other means to prevent injury to travelers at said crossing as, in the exercise of a reasonable judgment by ordinarily prudent persons operating the railroad, might be considered necessary, and if the jury believe from the evidence that the defendant and the employes in charge of the train that struck L. failed to discharge the duty imposed by ringing the bell or sounding the whistle, as herein set out, or to provide the other methods herein set out, if considered necessary for the reasons herein stated, by the persons operating the said road, and further believe that deceased lost his life by the negligence and carelessness of defendant and said employes, if any has been proven, then they should find for plaintiff, unless they believe the state of facts existed that are set out in instruction No. 3 (regarding contributory negligence).

(f) The jury are instructed that it was the duty of L. in crossing the tracks of defendant at the place he was killed, to take such care for his own safety as a reasonably prudent man would have exercised under circumstances similar to those proven in this case, who

57—*Pyne v. Delaware L. & W. R. Co.*, 212 Pa. 142, 61 Atl. 817.

"Did the degree of care required vary under the facts of this case? We think it did. If so, it was for the jury to determine whether he performed his duty under all the circumstances. Where there is doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care

required varies with the circumstances, the question of negligence is necessarily for the jury. *Penn. R. R. Co. v. White*, 88 Pa. 327; *Penn. R. R. Co. v. Peters*, 116 Pa. 206, 9 Atl. 317; *Rusterholtz v. N. Y.*, etc., *R. R. Co.*, 191 Pa. 390, 43 Atl. 208; *Cohen v. Phil. & R. R. Co.*, 211 Pa. 227, 60 Atl. 729. The charge of the learned trial judge fairly and adequately presented the case to the consideration of the jury."

was acquainted with the character of the crossing, and the obstructions, if any, that prevented seeing or hearing approaching trains, if he (L.) knew, or by the exercise of ordinary care could have known, that the crossing was dangerous, if it was dangerous, on account of its location and the obstructions, if any; and if L. failed to exercise this degree of care, or if they believe from the evidence that he knew, or, by the exercise of ordinary care could have known, that the train was approaching in proximity to said crossing, and failed to take such care for his own safety as an ordinarily prudent man would have taken, and that on account of his negligence and carelessness in these respects, if any, the injury to him that resulted in his death occurred, and would not have occurred but for such negligence and carelessness, if any, they should find for the defendant.⁵⁸

§ 1883. Person May Assume That Ordinance as to Ringing Bell Will Be Obeyed. In the absence of some warning or evidence to the contrary, the plaintiff had the right to assume that defendant would obey the city ordinance, and cause the bell attached to said locomotive to be rung to give warning of the movement of its train. Whether or not the bell was so rung in compliance with said ordinance is a question of fact for you to determine from all the facts and circumstances shown by the evidence. If you find from the evidence that the bell was not rung, then I instruct you that, in determining the question whether the plaintiff was or was not guilty of contributory negligence, you may in connection with all other facts and circumstances shown by the evidence consider that plaintiff had a right to assume that if said train should be moved backward, some warning of such movement would be given him by the ringing of the bell as required by said ordinance.⁵⁹

§ 1884. When Failure to Ring Bell Is Excused. The court instructs the jury that if they believe from the evidence that E. had

58—*Louisville & N. R. R. Co. v. Lucas*, 30 Ky. L. 359, 98 S. W. 308.

59—*P. C. C. & St. L. Ry. Co. v. McNeil*, 34 Ind. App. 310, 69 N. E. 471 (474).

"Under the authority of *Louisville, etc., R. R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128, the instruction as given correctly stated the law. The particular objection urged to the instruction is that it told the jury that appellee, in the absence of some warning or evidence to the contrary, had the right to assume that appellant would obey the city ordinance, etc. In *Cleveland, etc., Ry. Co. v. Harrington*, 131 Ind. 426, 13 N. E. 37, it was said: 'In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance,' etc. 'And while the wrongful conduct of the

appellant in this regard would not excuse her from the exercise of reasonable care, her conduct is to be judged, in the light of such presumption.' That case is in harmony with the instruction here given. See also *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Penn. Co. v. Stegemeier*, 113 Ind. 305, 20 N. E. 843, 10 Am. St. 136. In *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, it was held that a traveler at a railroad crossing had a right to presume that the railroad company would obey the law. See also *Stoy v. Louisville E. & St. L. Cons. R. R. Co.*, 160 Ind. 144, 66 N. E. 615; *Malott (Receiver) v. Hawkins*, 159 Ind. 127, 63 N. E. 308. It was the province of the jury to determine the question of appellee's negligence in the light of all the facts pertinent thereto."

actual timely notice of the approach of the engine which struck him, that is, sufficient notice to enable him to get out of the way by the exercise of ordinary care, whether such notice was received by him from a bystander or from hearing or seeing the engine as she approached, then it makes no difference in this case whether the bell of the engine was ringing or not, or whether she was running at a greater rate of speed than six miles per hour.⁶⁰

§ 1885. Failure to Sound Whistle or to Ring Bell not Negligence Per Se. (a) The court instructs the jury that the neglect to sound the whistle or ring the bell of an engine is not of itself such negligence as will justify a recovery for damages, to person or property, injured upon the track. To entitle the plaintiff to recover for such injury, it must appear, from the evidence, that the injury was the result of such omission to ring the bell or sound the whistle.⁶¹

(b) The jury are instructed that it is not enough to create a liability for injuries caused by a railroad train, to prove the bell was not rung, or the whistle sounded. The jury must further believe, from the facts and circumstances proved, that the accident was caused by reason of such neglect.

(c) The jury are instructed that, although they may believe, from the evidence, that the (cow) in question was killed by the defendant's locomotive, and that there was a failure to ring the bell or blow the whistle, for a distance of (eighty) rods before reaching the crossing, still, if the jury further believe, from the evidence, that there was no connection between the failure to ring the bell, or blow the whistle, and the killing of the (cow), then the jury should find the defendant not guilty, unless they find, from the evidence, that the injury was occasioned by some negligence or misconduct, other than the failure to ring the bell or sound the whistle.

(d) The jury are instructed that, whether the failure to ring the bell, or sound the whistle, on approaching the highway, by the train in question, was, or was not, the cause of the injury complained of, is a question of fact, to be determined by the jury, from a consideration of all the evidence in the case.⁶²

§ 1886. Whistle Need Not Be Blown Continuously. The law does not require that the whistle shall be blown more than once, or blown all the time from where it is first sounded until such public crossing is passed, but only requires that it shall be blown a reasonable length of time to give persons warning who are about to go upon the public crossing, or may be already upon same, that the train is approaching.⁶³

§ 1887. Blowing Whistle at Insufficient Distance While Going at Dangerous Rate of Speed. If the jury find from the evidence that

⁶⁰—East St. L. Con. Ry. Co. v. Eggman, 71 Ill. App. 32 (37), aff'd 170 Ill. 538, 48 N. E. 981.

⁶¹—Ind. & St. L. Rd. Co. v. Blackman, 63 Ill. 117.

⁶²—I. C. Rd. Co. v. Benton, 69 Ill. 174.

⁶³—Houston & T. C. R. Co. v. Blan, — Tex. Civ. App. —, 62 S. W. 552 (553).

the defendant's servants in charge of the train that killed said A. B. gave signals by whistling once, and no more, at such distance, if it exceeded 100 rods from G. street, that said A. B. would naturally think that he could safely cross before the train arrived at G. street if he heard such a whistle, and that he did hear it, and further find that no bell was rung, and that said train was going at a greater rate of speed than men of ordinary care and prudence in like employment would have run it under like circumstances and conditions, and that said A. B., as a reasonable man, was thereby deceived and led to believe that he could cross the tracks of said defendant's railroad in safety, and that if, attempting under these circumstances, to cross said tracks, without fault or negligence on his part, he was, on account of carelessness upon the part of the servants of said defendant in operating said train at an unusual and dangerous rate of speed, struck and killed, then plaintiff would be entitled to recover, if such carelessness was the sole cause of his injuries.⁶⁴

§ 1888. When Suit Based on Failure to Give Signals, Recovery Must Be for Such Omission. Though the jury may believe the required signals were not given by the defendant, unless the accident resulted as a consequence of such omission, the plaintiff is not entitled to recover by reason of failure to give the signals.⁶⁵

§ 1889. No Duty Ordinarily to Give Signals at Private Crossings. The jury are further instructed that the statutes of this State do not regulate or prescribe the speed at which trains may be run, nor do they require any whistle to be sounded or bell rung on trains approaching private crossings, and within the enclosed right of way of the railroad company. While it is true that even at such places cir-

64—Schweinfurth v. C. C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89 (92).

"The objection urged to the charge is that it makes the defendant liable for the mistake or miscalculation of the person injured. But that, we think, is not its effect. It does no more than hold the defendant responsible for the proximate consequences resulting from the position in which the deceased was induced to place himself by its negligent omission to give the required signals of the approaching train where they might be reasonably expected by persons about to use the crossing, and upon the absence of which they might reasonably rely as an assurance that it was safe to cross over, and from the running of the train without such signals at an unusual and forbidden rate of speed, whereby persons who otherwise might cross in safety would be placed in a position of extraordinary peril. To give the instruction applicable to the

case, it was necessary for the jury to find, and they were so told, the existence of the facts thus calculated to mislead the deceased, and, further, that he exercised the care of a person of ordinary prudence in forming his conclusion that he could safely cross under the circumstances, and that the injury he received was caused wholly by the negligent acts and omissions of the defendant. If the facts stated were established to the satisfaction of the jury, the deceased was not guilty of contributory negligence which precluded a recovery by his administrator."

65—St. L. A. & T. H. R. Co. v. Odum, 156 Ill. 78 (82), aff'g 52 Ill. App. 519, 40 N. E. 559.

"Under this instruction, the fact that plaintiff may have been lulled into a feeling of security for the reason the signals were not given as a matter of no moment. Unless the accident resulted from the omission, a recovery could not be had."

cumstances may exist which would render it the duty of the engineer or person in charge of said train to ring the bell or sound the whistle or stop the train, yet such duty would only arise when such facts and circumstances are averred and proven as would make it a duty to do so, and to show that a failure to do so would be negligence; and in this case, unless you believe, from the evidence, that such facts and circumstances are proven, there was no duty to make any signal or stop the train.⁶⁶

§ 1890. But Duty to Give Warning at Crossing Made Public by Customary Use. The jury are instructed that it is admitted that plaintiff is the widow of E., deceased, and that suit was begun within six months after his death; and if the jury believe from the evidence that said E. was, on or about the — day of —, 19—, struck by a locomotive engine then being run on defendant's railroad by its servants and employes, and that he was thereby so injured that his death resulted therefrom, and that at the place where said E. was struck many people were at that time, and had been for several years prior thereto, accustomed to use said track as a footpath to and from points in the southern part of the city of B. and beyond, and that said track had been used in this way continuously for many years, and that defendant's servants and agents in charge of said train could reasonably have expected to find persons on said track at that place, on account of the frequent and continuous use thereof by footmen, and that no signal or warning was given by defendant's servants and agents in charge of its engine as it approached the deceased, and no efforts were made by them to prevent said injury, and that said E. was not conscious that said train was coming towards him, and if the jury shall further find that defendant's servants and agents could, by the exercise of reasonable care and diligence, have seen said E. upon said track a sufficient distance ahead of said train, so that by giving such signals or warnings, or taking such other action as a reasonably prudent man would have done under the circumstances, said accident could have been avoided, but that defendant's agents and servants in charge of said train through their carelessness and negligence either failed to observe said E. upon said track, or failed to give proper signals or warnings, or to take such other action as a reasonably prudent man would have done to avoid said injury, then the jury should find the issues for the plaintiff, notwithstanding they may believe from the evidence that said E. was on said railroad track without legal right, and was himself guilty of negligence in being there.⁶⁷

§ 1891. No Absolute Duty to Maintain Gates or Flagman at Crossing. (a) The court instructs the jury that there was no absolute duty imposed by law on the defendant to maintain either gates or

66—Chl. & A. R. R. Co. v. Sanders, 154 Ill. 531 (534), aff'g 55 Ill. App. 87, 39 N. E. 481.

67—Eppstein v. Mo. Pac. Ry. Co., 197 Mo. 720, 94 S. W. 971.

a flagman at the crossing in question, and if you believe, from the evidence, that there were no gates or flagmen there at the time of the alleged injury, that is not of itself evidence of negligence on the part of defendant. The plaintiff does not allege or claim any negligence on the part of defendant in regard to this. Evidence as to whether there were gates or a flagman at the crossing in question at the time of the alleged injury was admitted by the court, and should be considered by the jury, not as tending, of itself, to establish negligence, but solely for the purpose of showing the general condition of things at the locality of such crossing at the time of the alleged injury, so as to assist the jury to determine from all the circumstances and evidence in the case, and under the instructions of the court, whether the defendant was guilty of negligence as charged by the plaintiff in his declaration.⁶⁸

(b) The railroad law of this State lays upon the railroad commissioners of this State the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railway; and upon the testimony, and under the pleadings in this case, the absence of a flagman at S. Avenue, is no evidence of negligence upon the part of the receivers.⁶⁹

§ 1892. **When Flagman Reasonably Necessary for Safety at Crossing.** (a) If the jury believe from the evidence that such flagman was reasonably necessary for said purpose (the reasonable safety of those traveling over the crossing) at the time, to make such crossing reasonably safe, then, under the law, the presence of a flagman employed by the city up until just before the injury occurred, would not release the defendant from its duty to provide such flagman upon that crossing at the time of the injury, provided the appellant had notice that their city flagman usually quit his station before the time of day when the injury occurred.⁷⁰

(b) The second matter of negligence that is alleged is a failure to provide a switchman or flagman at this crossing, or to provide gates which should be closed and opened, so as to prevent passengers upon

68—Dick v. Marble, 155 Ill. 137 (139), 39 N. E. 602, rev'g 51 Ill. App. 351.

"We do not deem it necessary to discuss this instruction further than to say that it is fully in accord with the views we have expressed in the case of Chicago & I. R. R. Co. v. Lane, 130 Ill. 116, 22 N. E. 513, and that it states the law applicable to this case."

69—Battishill v. Humphrey, 64 Mich. 494, 31 N. W. 894 (903).

"This request of the defendant should have been given. No reference was made to this matter in the charge of the court; and it may well be considered, when a request is specifically made, and it is re-

fused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court of the reasons for such refusal to rebut such natural inference."

70—P. & P. Union Ry. Co. v. Herman, 39 Ill. App. 287 (294, 297).

"In view of the decision, while this instruction may not be logically correct, we can see no such error in it as would be likely to mislead a jury, and we can see no cause for reversal in the giving of that instruction. In addition the declaration specifies as a cause of action the failure to keep a flagman at the crossing."

the highway from being exposed to danger. The plaintiffs claim that under the facts and circumstances developed in this case, that this became a duty which the defendants owed to the traveling public. The terms "neglect," "negligence," "negligent," "negligently," import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Now, just simply apply that rule, gentlemen, to the facts in this case, and you can by that determine whether or not the defendants have been guilty of negligence in this matter. Did their conduct in operating this railroad track crossing, this highway, under all the circumstances and facts that have been detailed in evidence, import a want of such attention to the nature and probable consequences of their acts as a prudent man ordinarily bestows in his own concern? If it does, if there was such a want, then there is negligence, and it constitutes a ground of complaint on behalf of any person who is injured by reason of it. As to what a prudent man would do under the circumstances, gentlemen, it is for you to determine, and you are to determine it for yourselves.⁷¹

(c) If you find from a preponderance of the testimony that it was necessary to protect the public traveling on B. avenue for the defendant to keep said crossing watched and guarded, and if you find from the preponderance of the testimony that the defendant did not exercise reasonable care to keep the crossing watched and guarded, and you further find from a preponderance of the testimony that the injury and death of T. was caused by the negligence of the defendant in not exercising reasonable care to have said crossing properly watched and guarded, you will find for the plaintiff on both causes of action, unless the deceased was guilty of negligence that contributed to his injury and death.⁷²

71—English v. So. Pac. R. Co., 13 Utah 407, 45 Pac. 47 (49), 57 Am. St. 772, 35 L. R. A. 155.

"The statutes of Utah only impose upon railroad companies the duty of ringing the bells and sounding the whistles upon the approach of trains at public crossings, and the appellants contend that, if the defendants performed the statutory requirement before reaching the crossing, no additional duty was imposed under any circumstances to prevent injury. This question is surrounded with much difficulty and many conflicting decisions. In discussing it, we must remember that this crossing is over one of the main streets and avenues of travel in Ogden city, about three blocks from the business portion of the city, containing 15,000 people, and that the street is well settled; that farmers and the traveling public are almost constantly

passing over the crossing. Numerous railroad tracks of the three railroad companies cross this street, and engines and cars are very frequently, and almost constantly, passing and being switched one way or the other over this street."

72—Tiffin v. St. Louis, I. M. & S. Ry. Co., 78 Ark. 55, 93 S. W. 564 (565).

"We think that the above instruction fully placed before the jury the measure of the duty of the railway company, and that appellant was not prejudiced by the refusal to give the above instruction. The instruction given permitted the jury to say, from the testimony, that it was necessary, in order to protect travelers on the street from danger of passing trains, that the company should have provided gates or other barriers, or watchmen to flag trains

§ 1893. Open Gate as an Invitation to Cross. (a) If you believe from the evidence that on or about the — day of —, plaintiff was riding in his buggy, drawn by his horse, and endeavored to cross the railroad track of the defendant at the point where the track intersects F. street, and that plaintiff drove upon the track, and as he did so a car of the defendant was pushed over the railroad track by the engine, and collided with plaintiff's vehicle and horse, and in consequence thereof plaintiff was injured, as claimed by plaintiff in his petition; and if you further believe from the evidence that no warning was given of the car's approach by either ringing a bell or blowing a whistle, or that the car had no lookout upon the same, and had no light upon it, and that the defendant was negligent in causing the car to be so moved over the railroad track, if you find it was so moved, and that this negligence, if any, was the direct cause of the injuries, if any, to plaintiff, and that plaintiff was not guilty of any negligence which contributed to his injuries, if any, then your verdict must be for the plaintiff.

(b) Or if you believe from the evidence that on or about the — day of —, plaintiff was riding in his buggy, drawn by his horse, and endeavored to cross the railroad track of the defendant at the point where the track intersects F. street, and that plaintiff drove upon the track, and as he did so a car of the defendant was pushed over the track by the engine, and collided with plaintiff's vehicle and his horse, in consequence of which plaintiff was injured, as claimed by plaintiff in his petition; and if you further believe from the evidence that it was the duty of the defendant to maintain gates where its tracks intersect F. street, and that the defendant did maintain gates thereat; and if you further believe from the evidence that at the time plaintiff endeavored to cross the track, and if he did so endeavor to cross the track, the aforesaid gates were up, and that this indicated that no cars or engines were about to cross said F. street over the railroad track; and you further believe from the facts and circumstances before you that the defendant was guilty of negligence in allowing said gates to be up when a car was crossing the track over F. street, if you so find the facts, and that such negligence, if any, was the direct cause of the injuries, if any, to plaintiff, and that plaintiff was not guilty of any negligence which contributed to his injuries if any, then, in this event, I also charge you your verdict must be for the plaintiff.⁷³

§ 1894. Backing Cars Up After Gate Is Opened. If you believe from the evidence that on or about the — day of —, plaintiff was riding in a one-horse wagon or cart, with a horse attached, and

and warn travelers, and that the failure to provide either or all of those means of protection was negligence. Therefore, no error was committed in refusing to instruct the jury specifically that the failure to provide gates amounted to

negligence if gates were necessary to the protection of travelers. St. L., I. M. & S. Ry. Co. v. Baker, 67 Ark. 531, 55 S. W. 941."

73—San Ant. & A. P. Ry. Co. v. Votaw, — Tex. Civ. App. —, 81 S. W. 130 (131).

proceeded to cross over defendant's railroad tracks at the point where the tracks intersect B. street, and if you further believe from the evidence that the defendant maintained crossing gates on said B. street crossing, and that the gates on said B. street crossing were opened and raised by defendant, and if you further believe from the evidence that the plaintiff proceeded to cross over defendant's tracks at said B. street crossing, and that while doing so, if he did so, the defendant moved and backed a car against plaintiff's wagon, and injured him, as alleged in plaintiff's petition; and if you further believe from the evidence that said car came to a stop, and then was moved forward, and that plaintiff's vehicle was dragged with plaintiff in it, and that plaintiff was thereby injured as alleged in plaintiff's petition; and if you further believe from the evidence that it was negligence on the part of the defendant, under all the facts and circumstances in evidence before you, to move said car against plaintiff's wagon, if it did so, and then to move said car forward and drag plaintiff's said vehicle with plaintiff in it, if it did so, and that such negligence, if any, was the direct cause of plaintiff's injuries, if any, and that plaintiff was not guilty of contributory negligence, then your verdict must be for the plaintiff.⁷⁴

§ 1895. When "Kicking" Car Amounts to Willful Negligence While Person Is Crossing Track. The jury are instructed that, in order to find a verdict against defendant in this case and under the pleadings in the case, you must believe, from the evidence, that the injury to and the death of said E. was caused as stated in the declaration or in some one or more counts thereof, by the defendant, and that in so causing such injury at the time and place thereof, as appears from the evidence, the defendant was then and there guilty of a degree of negligence so gross as to amount to a willful, reckless and wanton disregard of the rights and safety of said E. It is not necessary that the action of the defendant shall be shown by the evidence to have been willful, in the sense that it was intentional on the part of the defendant or its servants, but before you can render a verdict against the defendant in this case you must believe, from a fair and impartial consideration of all the evidence in the case, that the injury to, and the death of said E. was the proximate result of such a want of care and regard for the rights and safety of others (in other words, of such gross negligence) as justifies the presumption of willfulness or wantonness on the part of the defendant.⁷⁵

§ 1896. Failure of Defendant's Servants to Avoid Threatened Injury, When Possible. (a) Even though the jury should find that S. was negligent in attempting to cross or walk upon defendant's railroad track, and that the plaintiffs were also guilty of negligence in the custody and care of their said son, and even though you believe

74—Galv. H. & S. A. Ry. Co. v. Fry, — Tex. Civ. App. —, 84 S. W. 664 (665).

75—C. B. & Q. R. Co. v. O'Neil, 172 Ill. 527, aff'g 64 Ill. App. 623, 50 N. E. 216.

from the evidence that the negligence of either the plaintiffs or their said son, S., directly contributed to cause the injuries complained of, still if you further believe from the evidence that S. had placed himself in a dangerous position by going on defendant's railroad track, and thereafter such dangerous position became known, or in the exercise of ordinary care and diligence could have become known to defendant's servants in charge of said train in question, in time to have stopped said train by the exercise of ordinary care, and avoided the injury complained of, and failed to do so, then your verdict should be for the plaintiffs.

(b) The court instructs the jury that if they believe from the evidence that the deceased saw the engine approaching, or knew of its approach, before he got upon the track, or could have seen such engine by looking, or could have heard it approaching by listening, then the failure of defendant's servants to ring the bell of the engine, if a fact, is immaterial, and plaintiff is not entitled to recover on that ground of negligence. The court further instructs the jury that plaintiffs ought not to recover in this case unless they find from the evidence that the servants and agents of defendant in charge of the engine saw, or by the exercise of ordinary care and diligence might have seen, deceased on defendant's track in time to have stopped the train, and thus averted the injury. The jury are also instructed that if, after deceased entered upon the railroad track, the employes in charge of the train which struck him did not have time, by the exercise of ordinary diligence, to stop the train, then no negligence can be imputed to defendant company because they did not do so, and the verdict should be for the defendant.

(c) The jury are further instructed that, while it may have been the duty of defendant's servants or agents to make all reasonable efforts to stop the train and avoid a collision, yet a duty also devolved upon the deceased, and if after he saw the train coming, or might be looking or listening have seen or heard it coming, he could have gotten out of its way, but did not, then the plaintiffs cannot recover, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by the exercise of ordinary care might have seen him, in time to have stopped the train, by the exercise of ordinary care, before it struck him.

(d) Although the jury may believe from the evidence that defendant's employes were guilty of negligence in failing to discover the presence of plaintiff's son, S., on the track, yet if they also believe from the evidence that said S. was negligent in failing to discover the approach of defendant's train in time to have kept out of its way, or to have gotten out of its way, if in it, then your verdict will be for the defendant, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by

the exercise of ordinary care might have seen him, in time to have stopped the train, by the exercise of ordinary care before it struck him. The court instructs the jury that if they believe from the evidence that the death of plaintiff's son, S., was the result of mere accident or casualty, and not of negligence on the part of the defendant, your verdict will be for the defendant.⁷⁶

§ 1897. **Ordinary Care Towards Watchman at Crossing.** The court instructs the jury that by ordinary care in this case the law means such a degree of care, under the circumstances and in the situation in which the plaintiff was placed, so far as may be shown, by the evidence, as an ordinarily prudent person would exercise under the same circumstances and in like situation to avoid danger.⁷⁷

§ 1898. **Injury at Crossing Through Horse Balking.** If you believe from the evidence that the accident was caused by the plaintiff's horse balking and backing, and that such balking and backing was not caused by fright from the whistle of the engine being blown, then you will consider no further, but return your verdict for the defendant.⁷⁸

§ 1899. **Reasonable and Ordinary Care Only Required in Switching.** The court instructs the jury that the defendant, while using the railroad track in moving cars thereon, was only bound to use reasonable care to avoid injuring persons and property of people being in and approaching its line of railroad. And if the jury believe, from the evidence in this case, that the defendant, by its servants, exercised reasonable and ordinary care in moving and managing the cars it was hauling, and to ascertain the condition of the switches before attempting to place their cars in position for the use of the X. company, then it performed its whole duty, and the jury will find a verdict for the defendant.⁷⁹

§ 1900. **Right to Raise and Lower Track—Duty of Public Authorities as to Approaches Thereto.** (a) If the jury find from the evidence in this case that, after defendant raised its track at the time and place in question, that its crossing over said track, as well as the approaches thereto, were then and there in good condition, but that the county authorities of M. county then and there failed to make a proper connection with said approaches and said crossing on

76—Above instructions approved in *Schmitt v. Mo. Pac. Ry. Co.*, 160 Mo. 43, 60 S. W. 1043.

77—*T. P. & W. Ry. Co. v. Hammett*, 115 Ill. App. 268 (276).

"We cannot believe appellant was injured or prejudiced by this instruction having been given when we consider all the evidence and the other instruction in the case. It has been repeatedly held that all the instructions in the case are to be considered as one series, and read and construed together. *Law-*

rence v. Hagerman, 56 Ill. 68; *Lourence v. Goodwin*, 170 Ill. 390, 48 N. E. 903; *Ill. C. Ry. Co. v. Bannister*, 195 Ill. 48, 62 N. E. 864."

78—*Houston & T. C. R. Co. v. Carruth*, — Tex. Civ. App. —, 50 S. W. 1036 (1038).

"There was some evidence tending to support this theory, and the charge should have been given."

79—*C. & A. R. R. Co. v. Anderson*, 67 Ill. App. 386 (389), *aff'd* 166 Ill. 572, 46 N. E. 1125.

the county road, then and there under the sole control of said county authorities; and if they find from said evidence that whatever defect, if any, existed in said highway at said time and place was occasioned by reason of said county authorities of M. county failing to make a proper or safe connection in said county road with the crossing and approaches thereto constructed by the defendant, whereby in driving down said approach the plaintiff was then and there thrown out of his wagon on the county road, or at the junction thereto with the approach to defendant's crossing, occasioned by said failure of said county authorities to make a proper and safe connection between said county road and said crossing as aforesaid, then they are instructed that plaintiff is not entitled to recover on account of said injury, and your verdict must be for the defendant.

(b) The jury are instructed that the defendant had a lawful right either to raise or lower its track at the place in question at any time whenever, in its judgment, the interests of the traveling public and the line of railroad then owned and operated by the defendant required such change in track; and if the jury find from the evidence in this case that the crossing constructed by the defendant after its track was raised as aforesaid, as well as the approaches thereto, were in proper and safe condition on the — day of —, 1899, and the plaintiff was not injured either upon said crossing or upon said approach by reason of any defect or imperfection in said crossing or said approach, then they are instructed that the plaintiff is not entitled to recover in this action, and your verdict must be for the defendant.⁸⁰

§ 1901. Injury to Person at Crossing by Employee Operating Hand Car for His Own Private Use—Series. (a) The plaintiff sues the defendant company for injuries inflicted upon the wife of plaintiff, damages to his buggy and horse, and expenses incurred in the treatment of his wife, alleging that these injuries were caused by a hand car of said company striking the buggy in which they were riding at the crossing of one of the streets of N. B., alleging that said hand car was negligently used, and thus negligently caused this injury.

(b) The defendant company, as a defense, alleges that at the time of said injury the hand car was not being used in the business of the company, but that said car was then being used only for the private use of the person operating it.

(c) The jury are charged that the uncontradicted testimony shows that at the time of the injury one B., an employee of the company, who had charge of the hand car, was using said car for his own private use, and was not using same for the company's business; and the company would not be liable unless the evidence shows said B. to be a disobedient and untrustworthy servant, and was in the habit of disobeying the company's rules in running and using said car, and that said company knew, or could have known by the use of ordinary care, that said B. was in the habit of disobeying the rules of the

company which forbid the use of the hand car at night unless by order of the company.

(d) You will determine from all the facts and circumstances in proof whether said B. was a disobedient and untrustworthy servant, and did frequently use said hand car when forbidden by the rules of the company, and that the company did know or could have known this fact by the use of reasonable diligence; and if you so believe, then you will find for the plaintiff, if said car was negligently run and used, and did thus cause the injuries. If, upon the other hand, you do not so believe, you should find for the defendant. If you find for the plaintiff, you will find such an amount as damages as will fairly and justly compensate the plaintiff for the injuries he has sustained. In doing this, you will consider the pain and suffering of his wife, the value of the loss of time from labor caused by the injury, the value of any impairment she has suffered to labor or earn wages, and whether temporary or permanent. You will estimate the value of the injury to the buggy and horse; also the expenses incurred incident to her injury, such as doctor's bill and medicine, not to exceed the several amounts sued for in plaintiff's petition.

(e) Negligence is the failure on the part of the defendant, while resting under a legal duty or obligation to the plaintiff, to do what an ordinarily prudent and careful person would have done under the facts and circumstances surrounding the transaction complained of, or the doing by the defendant, while resting under a legal duty or obligation to the plaintiff, of some act resulting in injury to the plaintiff, which an ordinarily prudent and careful person, under the same or similar circumstances, would not have done.

(f) The jury are instructed that by the term "ordinary care," as used in the charge of the court, is meant such care as an ordinarily prudent and careful person would have exercised under all the facts and circumstances surrounding the transaction under investigation.

(g) The jury are instructed that it devolved upon the plaintiff, J. B., in driving his buggy to a railroad crossing on one of the streets of the city of N. B., to exercise such care as an ordinarily prudent and careful person would have exercised under similar circumstances; and that if he failed to exercise such care, and it contributed directly and proximately to producing or causing the injuries complained of, you will return a verdict for the defendant. In this connection, you are also instructed that it likewise devolved upon L. B., plaintiff's wife, for alleged injuries to whom he seeks damages, also to exercise ordinary care in going upon the crossing; and if from the evidence you believe that the said L. B. failed to exercise such ordinary care, and that such failure on her part contributed directly and proximately to the infliction of the injuries complained of, you will return a verdict for the defendant.

(h) The jury are instructed that the fact that the defendant, after the happening of the accident complained of, did not discharge B. for using the hand car upon his own business at the time men-

tioned in plaintiff's petition, does not prove or tend to prove that he was using the same in furtherance of the business of the company.⁸¹

§ 1902. **Care Required of Travelers.** (a) The jury are instructed, as a matter of law, that both the plaintiff (or the deceased) and the railway company had an equal right to cross the street at the point where the accident happened and that the law imposes upon both parties the duty of using reasonable and prudent precautions to avoid accident and danger; and, while it was incumbent upon the railway company, in running its train on the occasion referred to, to give the required signal by ringing the bell or sounding the whistle (eighty) rods before reaching the crossing, it was also the duty of the plaintiff (or deceased) to look out for the approach of the train, and to observe all reasonable precautions before attempting to cross the track.

(b) Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous. And if the jury believe, from the evidence, that the plaintiff (or the deceased), as he approached the railroad track, did not look or listen to ascertain if a train was coming, and observe all reasonable precautions to avoid danger, but, on the contrary, drove directly onto the track, where the accident happened, without taking any steps to ascertain if a train was approaching, then he was guilty of such negligence as precludes a recovery in this case, unless the jury believe, from the evidence, that the servants of the railway company, upon such occasion, were guilty of gross negligence, as explained in these instructions.⁸²

(c) The plaintiff was bound to use ordinary care under the circumstances shown to have existed in this case. He was bound to approach the railroad carefully, and to look and listen for the approach of trains; and if the evidence shows that he did this with that degree of care that an ordinarily prudent person would have exercised under all the circumstances, and was unable to hear or see the train approaching until it was too late to avoid the collision, then he was not guilty of contributory negligence.

(d) There is no law requiring a man, in the lawful use of a public street approaching a railroad crossing, to stop his vehicle before crossing, but he is bound to use such care, under all the circumstances, as a man of ordinary care must have exercised under like circumstances; and if you find that H. exercised such care at the time of and preceding the injury, he was not guilty of contributory negligence.⁸³

81—These instructions approved in *Int'l & G. N. R. R. Co. v. Branch*, 29 Tex. Civ. App. 144, 68 S. W. 338.

82—*Lake S. & M. S. R. Co. v. Miller*, 25 Mich. 274; *C. & N. W. R. Co. v. Hatch*, 79 Ill. 137; *Davis v. N. Y.*

Cent., 47 N. Y. 400; *Allyn v. Railroad*, 105 Mass. 77; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 353; *Penn. R. Co. v. Beale*, 73 Penn. St. 504.

83—*Penn. Co. v. Horton*, 132 Ind. 189, 31 N. E. 45 (47).

"Counsel for the appellant con-

(e) This is an action by T., as administrator of the estate of M., deceased, to recover damages for the death of the latter, and the court instructs you that before plaintiff can recover he must show that the deceased M. at the time and immediately before the accident was in the exercise of due and reasonable care for his safety, for the law requires that all persons about to cross or step upon railroad tracks shall exercise such care and caution for their safety as prudent and careful men would properly exercise under the circumstances; and if you find, from the evidence, that M., the deceased, either walked upon or attempted to cross the tracks upon which he was killed without exercising such care and caution for his safety as a reasonably prudent man under all the circumstances would have exercised, and that his failure to exercise such care and caution materially contributed to the accident, then your verdict must be for the defendant.⁸⁴

(f) If the jury should find that the defendant was negligent, and should also find that the deceased, H., was himself guilty of negligence which directly and proximately caused or contributed to the accident, then the plaintiff cannot recover, and you will find for the defendant.

(g) It was the duty of H. in going along S. street to exercise such caution and care to avoid being injured while crossing the railroad tracks as a person of ordinary prudence would have exercised with reference to a similar matter under similar circumstances, and if he failed to do so, it was negligence on his part.⁸⁵

(h) The court instructs the jury that if they believe from the evidence that at the time of, and immediately before, the collision between the car and plaintiff's wagon, the plaintiff, by the exercise of ordinary care in looking out for the approach of a car on the east track of the defendant's line, could have avoided said collision, and that he omitted to use such care up to the time of such collision, and that his said omission directly contributed to produce the said collision, then your verdict should be for the defendant.

(i) The court instructs the jury that if they find from the

cede the law to be as laid down in these instructions as an abstract proposition, but insist that when applied to the facts of this case, they were too general and indefinite and such as tended to mislead the jury. We are satisfied that these instructions were not only correct as abstract propositions of law, but that, when taken in connection with the other instructions, they correctly and fairly submitted the questions of law involved in the case to the jury. The objections urged to these charges are that they do not state any facts, nor advise the jury what the appellee should have done under the cir-

cumstances to have shown him to be in the exercise of due care. It was not necessary, nor would it have been proper, for the court to have entered into a discussion of the facts. The court stated the law to the jury applicable to the case, and left it to them to determine from the evidence whether there had been negligence on the part of the plaintiff contributing to the injury."

84—Chi., M. & St. P. Ry. Co. v. O'Sullivan, 143 Ill. 48 (51), 32 N. E. 398.

85—Tex. & P. Ry. Co. v. Hagood, 21 Tex. Civ. App. 442, 52 S. W. 574 (575).

evidence that by exercising ordinary care plaintiff, up to the moment of the said collision of his wagon and the car, could have avoided said collision, and that the collision occurred because plaintiff failed to exercise such ordinary care to avoid it, then your verdict should be for the defendant, even though you may further find from the evidence that the defendant's employes in charge of the car in question were also guilty of negligence in any of the particulars charged or alleged by the plaintiff in this case.⁸⁶

§ 1903. High Rate of Speed Will Not Excuse Want of Ordinary Care. You are instructed that, although you may find from the evidence that the defendant's train of cars was running at a high or excessive rate of speed, that would not excuse or overcome the negligence of the deceased, if he was negligent, in attempting to cross the railroad track in front of a rapidly approaching train without first looking and listening.⁸⁷

§ 1904. Failure to Have Gate-keeper Required By Ordinance Will Not Excuse Traveler From Using Ordinary Care. The court instructs the jury that, although you may believe from the evidence that an ordinance of the city of D. required the defendant to have a gate at the C. street crossing, with a man in charge of the same, and to lower said gate whenever a train attempted to cross said street, and although you may believe from the evidence that the defendant company failed to provide said gate-keeper at the crossing in question, or to have said gate lowered on the occasion of the accident, and although you may believe that the defendant company failed to have at the front of the train as it approached said crossing a light or to signal its approach by bell or otherwise, yet the said failures on the part of the company did not relieve the plaintiff's intestate, R., from exercising care and caution in attempting to avoid injury from the approaching train; that it was the duty of said R. before attempting to cross said track, or while standing on or near said track, to look in both directions, and to listen for approaching trains; and that if said R. stepped upon said track without looking and listening, or stood in such close proximity to said track, without looking and listening, as to be struck by said train, then said R. was guilty of such contributory negligence as precludes any recovery, and the jury must therefore find for the defendant.⁸⁸

§ 1905. Failure to Give Signals Does Not Excuse Traveler From Using Ordinary Care. The court instructs the jury that when the railroad company fails to give the statutory signals, this will not excuse the traveler from using ordinary care at a highway crossing.

(b) There is no rule of law which relieves or absolves a person from looking out for the train when he goes to cross the track, though no whistle may blow or bell ring. The traveler must use

⁸⁶—*Schafstette v. St. Louis & L. Ry. Co.*, 60 Ohio St. 215, 54 N. E. M. R. R. Co., 175 Mo. 142, 74 S. W. 89 (91).
⁸²⁶ (830).

⁸⁸—*Rangeley's Adm'r v. So. Ry.*

⁸⁷—*Schweinfurth v. C. C. C. & St. Co.*, 95 Va. 715, 30 S. E. 386.

ordinary care, and that involves the use of all his senses, and it is for the jury to determine, whether, under the circumstances of each particular case, the traveler used reasonable care.⁸⁹

(c) The court instructs the jury that if you believe from the evidence that the plaintiff could have discovered the approaching train by the exercise of ordinary care, in time to have enabled her to avoid the accident by the exercise of ordinary care on her part, and that she did not exercise such care, you will find the defendant not guilty.⁹⁰

(d) If you find that at the time of and just preceding the injury A. approached the railway crossing, and could, by looking in the proper direction, have seen the train coming towards him in time to have avoided the injury, although the engineer gave no warning of his approach by ringing the engine bell or otherwise, and though the train was running fifteen or twenty miles an hour, still your verdict must be for the defendant; for, if you find, under such circumstances, A. omitted to look for the train, he was guilty of such negligence as deprives him of the right to recover.⁹¹

§ 1906. **Flagman's Signal to Cross Will Not Excuse Want of Ordinary Care.** The jury are instructed, as a matter of law, that under the evidence in this case, the plaintiff is not entitled to recover even if the jury believe, from the evidence, that the flagman signalled to him to come across the track, and if the jury also believe, from the evidence, that no bell was rung or whistle sounded, provided the jury believe, from the evidence, that the plaintiff did not exercise ordinary and reasonable care under all the circumstances as shown by the evidence to discover the approach of the train and prevent being injured.⁹²

§ 1907. **Voluntarily Crossing Over to a Place of Danger.** The jury is charged that if you believe from the testimony that plaintiff, C., crossed over to the southeast side of defendant's track and train in H. at the time he was injured in full view of defendant's running trains on the switches and side tracks at H., and if you believe that plaintiff voluntarily went across said track into a place of danger, knowing that the place he went was not a place where defendant usually received and discharged passengers in H., and knowing that

89—*Edwards v. So. Ry. Co.*, 63 S. C. 271, 41 S. E. 458 (459).

90—*C. & E. I. R. R. Co v. Zápp*, 110 Ill. App. 553 (556), *aff'd* 209 Ill. 339, 70 N. E. 623.

91—*Penn. Co. v. Horton*, 132 Ind. 189, 31 N. E. 45 (47).

"This instruction was pertinent to the theory of the defense. That the plaintiff might, by looking, have seen the approaching train, was not objectionable on account of the omission of the elements of listening, which was fully treated of in other instructions. Some crit-

icism is made of other instructions, but, as no objections were made to them upon the trial, we cannot consider them now. Taken as a whole, the instructions were quite favorable to the defendant."

92—*C. R. I. & P. Ry. Co. v. Clough*, 134 Ill. 586 (595), 25 N. E. 664, 29 N. E. 184.

"This instruction stated the law in substantial conformity with the views heretofore expressed by this court. See *C. St. L. & P. Ry. Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855, and authorities there cited."

the usual place for receiving passengers for defendant was safe; and if plaintiff, after crossing said main track, failed to see or hear the movement of said cars in time to avoid injury; and if you further believe that such conduct on the part of plaintiff was negligent on his part, and that it was not such care and prudence as would have been exercised by a person of ordinary prudence and care under the circumstances; and if you believe also that such negligence of plaintiff contributed to his injury, then plaintiff is not entitled to recover in any sum, and you will find a verdict for the defendant, even though you should find that defendant was also negligent.⁹³

§ 1908. Track Itself is a Proclamation of Danger. While it is the duty of the defendant receivers to give notice of the approach of its trains to a crossing, by the ringing of its bell, the blowing of the whistle or otherwise, and that its failure to give such notice is negligence, there are also reciprocal duties imposed on the plaintiff's intestate; that a traveler cannot go upon the track even at a public crossing, without exercising ordinary care and caution, that the track itself is a proclamation of danger, and that it is the duty of anyone going upon it to use his eyes and ears. He should look in either direction from which the train could come and listen to ascertain if it is approaching, and if his faculties warn him of the near approach of a train it is his duty to keep off the track; and if a traveler fails to so look and listen, as duty requires of him, and attempts to cross the track in front of a moving train, and is caught before he can get across, and killed, his own act and his own negligence so contributed to the injury that a recovery therefor cannot be sustained, and the jury must find for the defendant.⁹⁴

§ 1909. Person Must Use His Faculties in Proportion to the Known Danger. (a) The court instructs the jury that he must use his faculties in proportion to the danger impending, and should look and listen before attempting to cross, provided you find that an ordinary prudent man under the same circumstances would do that.⁹⁵

(b) You are charged that it was the duty of the deceased, as he approached the said crossing just before the time of the accident which resulted in his death, both to listen for and look in the direction from which the train approached, to ascertain if any train was approaching, and it was his duty to continue to so look and listen until he had crossed said railroad. The failure of the company, if it did fail, to ring the bell, sound its whistle, or give any alarm of its

93—St. Louis S. W. Ry. Co. of Tex. v. Casseday, 92 Tex. 525, 50 S. W. 125.

"We are of the opinion that this special charge applied the law to the very facts of the case, and that it was error to refuse it, for which the judgment must be reversed, and the cause remanded. Mo. K.

& T. R. Co. v. McGlamory, 89 Tex. 639, 35 S. W. 1058; G. C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902."

94—Kimball v. Frind's Adm'x, 95 Va. 125, 27 S. E. 901 (902).

95—Edwards v. So. Ry. Co., 63 S. C. 271, 41 S. E. 458 (459).

approach, did not relieve the deceased from the obligations to perform the said duty of listening and looking, and if the said deceased, as he approached said crossing, by the use of his senses of sight and hearing in looking and listening for the approach of the said train, could have discovered that it was approaching, and have avoided said collision, then the plaintiffs cannot recover in this case.

(c) If without so looking and listening for an approaching train, a person attempts to cross a railroad track, and is injured by a passing train, his own careless conduct is deemed, in law, to have assisted in bringing about the injury, and he cannot complain of the other party concerned in the transaction, even though such other party may also have been negligent.⁹⁶

(d) The court instructs the jury that if you believe and find from the evidence in this case that the plaintiff and the person driving the vehicle in which plaintiff was riding had knowledge of the fact that a train of cars was, at the time, in the switchyards at P., Missouri, and with such knowledge approached the railroad crossing at W. street, in said city of P., then it became the duty of plaintiff, before undertaking to cross the railroad tracks at said W. street crossing, either by her sense of hearing or by her sense of sight to determine whether or not any train of cars was about to cross said street at said crossing before undertaking to cross the same, and, if necessary, to stop at such distance before reaching said crossing as would enable her to determine this fact; and if you find and believe from the evidence that she failed to do so, then your finding must be for the defendant.

(e) The admitted facts in this case disclose that from the north rail of the main track to the north rail of the L. & S. track the distance was 13 feet 4 inches. If, therefore, the jury believe from the evidence that without any lights a person in the exercise of ordinary care could have seen a moving box car at the rear of defendant's train, at such a distance therefrom as to be able to stop and avoid a collision, then it was the duty of plaintiff, before passing over defendant's main track, to stop at a reasonable distance therefrom for the purpose of learning of the approach of said train and preventing a collision. If she failed to do so, and by reason thereof caused or contributed to the injuries complained of, she is not entitled to recover in this action.⁹⁷

§ 1910. Duty of Person Crossing Tracks to Stop, Look and Listen.

(a) The court instructs the jury, as a matter of law, that it may be the duty of a person approaching the crossing of a railroad, with a wagon and team, along a highway, to stop, to listen and to

96—*Olson v. Oregon S. L. R. Co.*, 24 Utah 460, 68 Pac. 148 (152).

97—*Montgomery v. Mo. Pac. Ry. Co.*, 181 Mo. 508, 79 S. W. 930 (932, 936).

"The above instructions fully de-

fined plaintiff's duty as to stopping, looking, and listening before entering upon the crossing, and were as favorable as defendant had a right to ask."

look both ways along the railroad before going upon it. If, from a rise in the ground or other obstructions, or if, by reason of a defect of his sense of sight or hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping, and, if necessary, going in advance of his team to examine, it is his duty to do so. If, in such case, he goes upon the track without taking such precaution, he does so at his own peril, and cannot recover, if injury results.⁹⁸

(b) If the jury believe that the train was running beyond the rate of eight miles an hour, that no bell was ringing or other signal given of the approach of the train to the crossing, still this or any other negligence of the defendant did not excuse plaintiff from the use of the proper care for his safety. It was his duty to have looked and listened all the time until he reached the crossing; and, if his failure to do so was the proximate cause of his injury, the answer to the second issue should be, "Yes."⁹⁹

(c) A person about to cross the track of a railroad, upon a public highway, is bound to exercise all reasonable care and caution to avoid injury upon the crossing. In his approach to the crossing, it may be incumbent upon him to exercise care and caution by stopping, looking and listening for any train that may be approaching, so as to avoid a collision; otherwise he cannot recover for an injury so received, unless it appears that the injury was inflicted willfully or wantonly.¹⁰⁰

(d) And, on the other hand, it was the duty of S., in attempting to cross or walk upon defendant's track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person of his age and intelligence, under like circumstances, would have exercised, and a failure to exercise such a degree of care and prudence would render him guilty of negligence.¹

(e) The jury are instructed that if they believe, from the evidence, that the said A. B. was guilty of negligence, which materially contributed to the accident, by driving upon the track of the railroad without first looking and listening to see if a train was approaching, then the defendant cannot be found guilty in this case, unless the jury believe, from the evidence, that the defendant's servants were guilty of gross negligence, which caused the accident. And the jury are instructed, that in this connection gross negligence means a willful act or omission, or one which shows a reckless disregard of life or property.

(f) The court further instructs the jury, that while a traveler on the highway is not required to leave his wagon, or to use any other unusual means to discover an approaching train, he cannot

98—C. B. & Q. R. Co. v. Lee, 87 Ill. 454; Dolan v. Delaware, 71 N. Y. 285.

99—Norton v. N. C. R. Co., 122 N. C. 910, 29 S. E. 886 (889).

100—Hearne v. Southern, etc., Rd.

Co., 50 Cal. 482; Toledo, etc., Rd. Co. v. Shuckman, 50 Ind. 42; Haines v. Ill. C. R. Co., 41 Iowa 227.

1—Schmitt v. Mo. Pac. Ry. Co., 160 Mo. 43, 63 S. W. 1043.

voluntarily close his eyes to danger, or needlessly expose himself to it, and then claim compensation for an injury thus received. And if the jury believe, from the evidence, that the said A. B., if he had looked, could have seen the approaching train, for a distance of, etc., before the train reached the crossing, and that either he did not look, or else paid no attention to the train, but went upon the track while the train was approaching, and so near to the crossing as to cause the accident, then he was guilty of gross negligence, and cannot recover in this suit.²

(g) If you find and believe from a preponderance of the evidence in this cause that B. failed to look and listen for cars before going upon the track where he was killed; and if you believe such failure to look and listen for approaching cars was negligence on the part of the said B., as the same is hereinbefore defined; and if you believe that the said B., by so looking or listening, could have discovered the approaching cars, you will find for the defendant.

(h) If you believe from a preponderance of the evidence that the said B. attempted to cross the defendant's track in front of the moving cars, and that he was thereby run over and killed by the cars of defendant; and if you believe that the said B., in so attempting to cross said track, was guilty of negligence as the same is hereinbefore defined, you will find for the defendant.

(i) Gentlemen of the jury, in response to your inquiry made verbally in open court, you are charged that, if you find and believe, from a preponderance of the evidence, that the agents and employes of the defendant were guilty of negligence in running over and killing the said B., and you further believe, from a preponderance of the evidence, that the said B. was himself guilty of negligence in going upon and being upon the track of the railroad at the time, and if you believe that such negligence on the part of the said B. contributed proximately to his death, then, if such you find the facts to be, the plaintiff cannot recover, and should, if you so find, return a verdict for the defendant railroad company.³

§ 1911. Failure of Person at Crossing to Stop, Look and Listen.

(a) If the jury believe the train was running beyond the rate of eight miles an hour, that no bell was ringing or other signal given of the approach of the train to the crossing, still this or any other negligence of the defendant did not excuse the plaintiff from his use of the proper care for his own safety; he should have looked and listened all the time, until he reached the crossing, and, if his failure to do either was the cause of his injury, the answer to the second issue should be, "Yes."

(b) When the plaintiff saw the freight cars on the siding cut off

2—Rockford, etc., Rd. Co. v. Byam, 80 Ill. 528; Benton v. Cent. Rd. Co., 42 Ia. 192; Cleveland, etc., Rd. Co. v. Elliott, 28 Ohio St. 340;

Fletcher v. Atlantic, etc., Rd. Co., 64 Mo. 484.

3—Lumsden v. C. R. I. & P. Ry. Co., 31 Tex. Civ. App. 604, 73 S. W. 428.

his view of the main line of the defendant's road, it was his duty to stop and listen carefully immediately before entering upon the crossing of the defendant's road; and if he had failed to do so, and that was the proximate cause of the injury, the answer to the second issue should be, "Yes."

(c) If the jury believe that the defendant was ringing its bell as it approached the crossing, and continued to ring it up to the crossing, or to a point where it would have given the plaintiff warning of the approach of the train, if he had been exercising proper care, the answer to the first issue should be, "No."⁴

(d) If the jury believe from the evidence that ordinary care on the part of B. for his own safety required him, before driving to or upon the track parallel with the track upon which he had been driving, at the time and place in question, and under all the circumstances in evidence, to look and ascertain whether or not a car was approaching along the north-bound track, and not to drive upon said track without so looking, and if the jury believe, from the evidence, that B. if he had looked, could, by the exercise of ordinary care, have ascertained whether or not a car was approaching along the said north-bound track, and if the jury further believe, from the evidence, that B. did not so look and ascertain whether or not the car was so approaching, and that he was injured in consequence, and because of, his failure, if he did so fail to look and ascertain, then the court instructs the jury to find the defendant not guilty.⁵

(e) It is the duty of a person approaching a railroad crossing to look and listen for approaching trains. This duty requires him to look in every direction from which he knew a train might approach, and continue on his guard until the danger is passed; and when, by the due exercise of care in this respect, the danger could have been discovered and avoided, no recovery can be had. Therefore, if you find from the evidence in this case that the plaintiff's intestate, T., started and went on to the crossing without looking in the direction from which the train came, after he started to go across the track, when, by looking he could have seen the train approaching and avoided the injury, then he was guilty of contributory negligence which bars a recovery, and your verdict must be for the defendant.⁶

§ 1912. Failure to Select the Best Place to Stop, Look and Listen.

(a) There is evidence that plaintiff stopped at the first track of the D. and N. road to look and listen. If so, and he did not exercise such care and diligence in the selection of the proper place to stop and listen, under all the circumstances, as were reasonable, and a failure to do so was the proximate cause of his injury, then you answer the second issue, "Yes."

4—Norton v. N. C. R. Co., 122 N. C. 910, 29 S. E. 886 (888).

5—"Should have been submitted. *Mallen v. Waldowski*, 203 Ill. 87, 67 N. E. 409; *C. B. & Q. R. Co. v. Camper*, 199 Ill. 569, 65 N. E. 448;

C. & E. I. R. R. Co. v. Storment, 190 Ill. 42, 60 N. E. 104." Chicago C. R. Co. v. O'Donnell, 208 Ill. 267 (275), 70 N. E. 294 (477).

6—*Tiffin v. St. L. I. M. & S. Ry. Co.*, 78 Ark. 55, 93 S. W. 564 (566).

(b) If, however, you find that this was not the best place to have stopped, but that if a better place had been selected, and by reason of defendant's failure to ring the bell or blow the whistle and the obstruction of the box cars plaintiff could not have seen or heard from such better position, and such negligence of the defendants, if you find that there was such, was the proximate cause of the injury to the plaintiff, you should answer the second issue, "No."

§ 1913. Evidence of Constant Habit to Stop, Look and Listen. Evidence has been submitted here that it has been the constant habit of C. for many years to stop or check his horse on approaching the W. crossing, and look and listen for approaching trains. The reason for admitting such evidence in this class of cases is that a man is apt to do by force of habit that which it is his fixed and constant practice to do under the same circumstances. You are to consider C.'s habit of looking and listening at this crossing only as having some tendency to show that he checked his horse, looked and listened on the night of the accident as usual. Upon all the evidence whether he did or not act that night according to his habit is for you to say.⁸

§ 1914. When Duty to Look and Listen is Excused. It is the duty of one approaching a known railway crossing to look along the line of the railroad track, and see if any train is approaching, and if he fails to take this precaution, and goes on the track, this, under ordinary circumstances, would be negligence. If, however, in this case, you shall find from the evidence that the deceased was thrown off his guard and induced to refrain from taking this precaution, by seeing the defendant's engine pass the crossing immediately before he stepped upon the railroad track, I will submit to you the question whether or not, under all the circumstances then surrounding the deceased, he was guilty of negligence.⁹

"It has been repeatedly held by this court that it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence. *L. R. & Ft. S. Ry. Co. v. Blewitt*, 65 Ark. 235, 45 S. W. 548; *St. L. & S. F. R. R. Co. v. Crabtree*, 69 Ark. 135, 62 S. W. 64; *St. L. I. M. & S. Ry. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911."

7—*Norton v. N. C. R. Co.*, 122 N. C. 910, 29 S. E. 886 (890).

8—*Smith v. Boston & M. R. R.*, 70 N. H. 53, 47 Atl. 290 (291), 85 Am. St. 596.

9—*Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801 (804).

"A person thus about to cross a railroad, to be free from negligence,

must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances. It is upon this reason that the requirement to look and listen is based. So far as the precaution would be useless it is not required. Whether reasonable caution was exercised by the intestate in approaching depended upon the nature and extent of his knowledge of facts, and his opportunity for knowledge. He was required to act like an ordinarily prudent man. A prudent man's attention may be diverted so that he will fail to look and listen, and the evidence may be such as to make it proper to leave to the jury the question whether it was negligence for him to so fail. There may be circumstances which excuse the taking of the usually necessary precaution of looking and listening. See *Penn. Co. v. Rudel*, 100 Ill. 603;

§ 1915. **Crossing Track Swiftly on Bicycle without Looking and Listening.** If you believe from the evidence that the said engine approached said crossing without blowing a whistle for said crossing or ringing its bell, and if the gong at said crossing failed to ring, and that such conduct was negligence on the part of the railroad company, and further believe that the said F. came out of the cut, towards the crossing, at a fast rate of speed, on a bicycle, that he did not look nor listen, and that the said bicycle and the said locomotive came into a collision at said crossing, then the said F. was guilty of such contributory negligence as to prevent recovery, and a verdict must be found for the defendant receivers, unless after the defendant saw or could, by the use of ordinary care, have seen his peril, they could afterwards, by the use of ordinary care have prevented the accident.¹⁰

§ 1916. **Crossing in Covered Milk Wagon.** The court instructs the jury that it is the duty of a person approaching a railway crossing to look along the line of the railroad to see if a train is coming, or to listen, or to use any other reasonable means of informing himself of an approaching train, before going on such crossing, and if the jury believe, from the evidence in this case, that the deceased, approached the crossing in question in this case in a covered milk wagon, which had the sides thereof closed, and that he did not look or listen for the approaching train, and that if he had looked or listened for the approach of said train he might have seen or heard said train before driving or going on said crossing, and that in so doing he failed to exercise ordinary care to avoid the injury which he received, then the plaintiff cannot recover, even though the jury may further believe, from the evidence, that the defendant's servants or employes failed to ring the bell or sound the whistle as required by law, and were running said train at a greater rate of speed than ten miles an hour.¹¹

§ 1917. **Looking Out of Glass at Back of Buggy Only—Contributory Negligence Defined.** (a) If you find that Mr. P. did all that the ordinarily careful and prudent man would do under like circumstances, and with his knowledge of this crossing, and of the trains passing over it, in approaching this crossing, to ascertain if any train was coming on this track, then and in that case he is not guilty of contributory negligence, and so far as that question is concerned, plaintiffs would be entitled to recover.

Laverenz v. Chicago, etc., R. Co., 6 Amer. & Eng. R. Cas. 274; *Philadelphia, etc., R. Co. v. Troutman*, Id. 117; *Smedis v. Brooklyn, etc., R. Co.*, 88 N. Y. 13.

In *Ind., etc., R. Co. v. McLin*, 82 Ind. 435, 452, it was said that while it was true that the failure of a railroad company to give warning does not relieve a person about to cross the track from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required

or not. See *Penn. R. Co. v. Ogier*, 35 Pa. St. 60 (71).

It would be a hard rule to impute to the injured person as his negligence a want of vigilance which could be said to have been produced by the defendant's negligence. Negligence cannot be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man."

10—*Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901 (902).

11—*Terre H. & I. R. Co. v. Voelker*, 129 Ill. 540 (550), 22 N. E. 20.

(b) Contributory negligence in the law may be defined as an act by the injured person which an ordinarily prudent man would not have done under the same circumstances, or the omission to do that which an ordinarily careful and prudent man would have done under the circumstances and which act or acts directly aid in causing or contributing to the injury received. If the mind of an ordinarily prudent man would be impressed with the belief of danger, under the circumstances existing and surrounding him at the time of the injury, he has no right to incur the danger. But, on the other hand, if the mind of an ordinarily prudent man would not be impressed with the belief of danger by the circumstances surrounding and existing at the time of the injury, he is not guilty of contributory negligence.

(c) Therefore you will understand that it is a very important question in this case for you to determine whether or not the deceased, P., was exercising the care and caution which he should have exercised as he approached this track, for unless it be shown that he gave proper attention—that is exercising due and proper care in the question of whether there was an approaching train—then he cannot recover; and if the train was easily to be seen, had he stopped and looked for it, or had looked attentively enough without stopping, and the approaching train would have been seen by him if he had used due care and caution and given proper attention, then he was guilty of such a degree of negligence as would prevent a recovery in this case.

(d) There is no particular act necessary to be found on which to base contributory negligence. It may exist in a variety of ways. It may be inferred from the failure of the plaintiff or decedent to stop his horse or to look in the direction of the approaching train, or a failure to hear the approaching train because of the noise of the buggy, or any other noise, if you find there was any, or by being occupied in conversation with his companion, and various other things which may occur may be considered as contributory negligence. Anything in the way of inattention to the approaching train, which in the mind of the jury contributed to the injury of the deceased, and the injury would not have occurred, had it not been for such inattention, is contributory negligence. The attention which is required of Mr. P. is the same attention and observation that is used and exercised by an ordinarily careful and prudent man under the same circumstances.

(e) You are also instructed that the plaintiffs are not entitled to recover in this case simply because there was an accident which resulted in the death of Mr. P. for whom the plaintiffs claim to act as administrators. The fact that Mr. P. was killed at this crossing is of itself no evidence whatever of any negligence on the part of defendant, or of any liability on its part to respond in damages. While it is true that simply because an accident had occurred, negligence is not to be presumed, still in determining the question of negligence, the fact that an accident has occurred may and should be taken into

consideration in connection with all the other facts and circumstances in the case for the purpose of determining whether in fact there was negligence; and if you find from the evidence that when Mr. P. and his companion Mr. W. had reached a point in the highway which was somewhere in the neighborhood of fifty feet or six or seven rods from the track, as estimated by various witnesses, he stopped his horse and looked and listened for the train, then started up again, and as he started, Mr. W. looked out of the glass at the back of the buggy, where he could only see a few rods of the track and the parties then passed onto the track without any further looking in the direction of the approaching train, or any further attempt to find whether there was an approaching train, then such acts constituted contributory negligence, and plaintiffs could not recover.¹²

§ 1918. When Contributory Negligence Cannot Be Imputed from Fact That Gates Were Down. The jury are instructed that if you believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10:30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of S. street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone.¹³

§ 1919. Attempting to Drive Upon Track Although View Obstructed—Looking and Listening. (a) If the jury believe, from the evidence, that as the plaintiff drove upon the railroad of the defendant his view of the approaching train was obstructed, that he had knowledge of such obstruction while attempting to drive upon the railroad, and that he drove upon the railroad without taking all reasonable precautions to ascertain whether or not a train was approaching, and if the jury believe, from the evidence, that in the manner in which he approached said crossing he failed to exercise ordinary care and prudence for his own safety, then the law is that the plaintiff cannot recover, and the jury must find the defendant not guilty, independently of all other questions in the case.¹⁴

(b) Before attempting to cross the track, the plaintiff was bound to look and listen, and if by looking and listening he might have seen and heard the train in time to avoid being struck he cannot recover.

12—These instructions approved in *Proper v. L. S. & M. S. Ry. Co.*, 136 Mich. 352, 99 N. W. 283 (284).

13—*Baltimore & P. R. R. v. Landrigan*, 191 U. S. 461 (472), 24 S. Ct. 137.

14—*Wabash R. Co. v. Jenkins*, 84 Ill. App. 511 (513).

"This is the only instruction asked upon that particular view of the case, and it is presented in none other. . . . The instruction is considered proper."

(c) That if the east-bound train obstructed his view, but it was moving out of his way so that in a short space of time he would have had a clear view of the west-bound train approaching, and he, without waiting, and as soon as the gate was open, drove across, and in consequence was injured, he was guilty of contributory negligence and cannot recover.¹⁵

(d) You are instructed that if you find from the evidence that the deceased or his son stopped, looked, and listened before driving upon the track, and further believe that by reason of the obstructions on the side track—the arc light maintained by the town and the headlight of the freight engine, if you believe these lights were burning—could not see the headlight of the passenger train, or the reflection thereof, in time to have avoided the injury, and that no signals were given as defined in these instructions, and that the deceased and his son took such precautions as would have enabled them to have seen or heard the train if such signals had been given, you may find for the plaintiff as to the issue of contributory negligence.

(e) If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence unless it appears from the evidence that the deceased himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed, but must be proven by a preponderance of the evidence.¹⁶

15—Kane v. N. Y. N. H. & H. R. R. Co., 132 N. Y. 160, 30 N. E. 256 (257).

"It is well settled that a traveler approaching a crossing guarded by gates is not required to exercise the same vigilance to look and listen as when he approaches one not so guarded. Rodrian v. N. Y. N. H. & H. R. R. Co., 125 N. Y. 526, 26 N. E. 741; Oldenburg v. N. Y. C. & H. R. R. Co., 124 N. Y. 414, 26 N. E. 1021; Palmer v. N. Y. C. & H. R. Co., 112 N. Y. 234, 19 N. E. 678. Under the evidence in this case, it was a fair question of fact for the jury to determine whether the plaintiff, by his own negligence, contributed to the accident which caused the injury, and we do not think the defendant is in a position to take advantage of instructions which were perhaps too favorable to it."

16—St. Louis, I. M. & S. Ry. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908 (909).

"The point urged against these instructions is that they displayed to the jury an expression of opinion upon the part of the court upon

the weight of the evidence. It is further urged against the first that it has singled out certain parts of the evidence in favor of the plaintiff, and disregarded every item of contributory negligence, and, without referring to the same, in a counter statement, has said the weight of this specific evidence is sufficient to set aside all the evidence establishing contributory negligence. If there is evidence to sustain a particular theory of a case, the court should properly instruct the jury as to such theory. Smith v. State, 50 Ark. 545, 8 S. W. 941. Instructions should declare the law as applicable to any view of the facts which upon the evidence may be taken by either of the parties to the cause on trial. Luckinbill v. State, 52 Ark. 45, 11 S. W. 963. Every instruction should be hypothetical, i. e., predicated upon the supposition that, if certain evidence be true, then the legal consequence resulting therefrom is one way or the other. State Bank v. McGuire, 14 Ark. 530; Collins v. Mack, 31 Ark. 684.

It is error to refuse to give a

§ 1920. Negligence to Go Forward When There is a Permanent Obstruction and a Transient Noise. (a) The duty of a person to look and listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to sight that will make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a possible danger. Prudence requires delay until the transient noise has abated, and hearing again becomes efficient for protection. You are instructed that if the deceased was familiar with the G. street railroad crossing, and drove towards it at a rate of speed such as he was unable to check and stop his vehicle in time to escape a collision with a passing train, after arriving at a point where he must have seen it if he had looked, and where he could have avoided it, he was guilty of contributory negligence, and the plaintiff cannot recover.¹⁷

(b) You are instructed that the care which is required of persons driving near or approaching a railroad crossing is such care as an ordinarily prudent person would use under the circumstances; and if therefore you believe from the evidence that the plaintiff knew that his view of defendant's track was obstructed by houses, trees, and the lay of the ground, and that he further knew or by the use of ordinary care might have known, that the team which he was driving would or might become frightened at the appearance or ordinary noise made by a railroad train; and if you further believe from the evidence that he knew or by the use of ordinary care might have known, that the frightening of his team or near approaching with said team to a railroad crossing, would result in the injury or fright to his wife in her condition; and if you further believe from the evidence that the plaintiff did not use that degree of care which an ordinarily prudent person would have used under like circumstances; and if you further believe from the evidence that the plaintiff's failure to do so caused or contributed to the accident—then you will find for the defendant.¹⁸

§ 1921. Presumption That Party Crossing Track Stopped, Looked and Listened. In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances

specific instruction correctly and clearly applying the law to the facts in the case, even though the law, in a general way, is covered by the charge given. *Ry. v. Crabtree*, 69 Ark. 134, 62 S. W. 64.

Applying these settled principles to the instruction in question, it cannot be said they are open to the objections urged. Each side prayed and was granted many specific instructions, covering phases of the

case which they desired drawn sharply to the attention of the jury. The court fails to find error in them, and, taken together, they consistently present the whole case, generally and specifically."

17—*Schweinfurth v. C. C. C. & St. L. Ry. Co.*, 60 Ohio St. 215, 54 N. E. 89 (92).

18—*Texas M. R. Co. v. Booth*, 35 Tex. Civ. App. 322, 80 S. W. 121 (124).

proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop, and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.¹⁹

§ 1922. Failure of Driver of Vehicle to Turn in Seat on Sounding of Whistle or Ringing of Bell. (a) If the jury believe, from the evidence, that the defendant's employes sounded the whistle, or rung the bell of the engine for (eighty) rods before reaching the crossing, and used all such ordinary care and diligence as is generally used by careful and skillful engineers, brakemen, and employes of railroad companies under like circumstances, and if the jury further believe, from the evidence, that the said A. B. was sitting on his wagon, with his back turned in the direction of the approaching train, so as to prevent his seeing it, and that he could have seen the train in time to avoid the injury if he had turned and looked in the direction of the approaching train, then the jury must find the defendant not guilty.

(b) The court instructs the jury, as a matter of law, that it was the duty of the deceased, in approaching the railroad crossing, to have exercised that degree of care and prudence for his personal safety, which an ordinarily prudent man would do, and if the jury believe, from the evidence, that the deceased, by the exercise of that degree of care and prudence, could have discovered the approaching train in time to stop his team and avoid the collision, then the plaintiff cannot recover, unless the jury find, from the evidence, that the injury was caused by the willful conduct of the person in charge of the engine, or by conduct so utterly reckless as to show an utter disregard for the life of the deceased.²⁰

§ 1923. Discovery of Approaching Train in Time to Avoid Going on Crossing. If one sees or hears an approaching train in ample time, by the exercise of ordinary care, to keep from going on the railway track just in front of such train, it is his duty to stop before entering upon such track just in front of the engine; and if he, knowing of its approach, and of the dangers attendant upon his act, does go on the track, and by reason of this is struck and injured, and the jury believe that in going on such track he failed to exercise ordinary care, and this failure contributed as a proximate cause to his injury, then he cannot recover damages of the railroad on account thereof.²¹

§ 1924. Failure to Heed Watchman's Signal to Stop. If the jury believe from the evidence that Watchman L—, with a lighted lantern in his hand, was standing in W. street, within eight or ten feet

19—Baltimore & P. R. R. v. Landrigan, 191 U. S. 461 (471), 24 S. Ct. 137.

20—C. B. & Q. R. Co. v. Lee, 68 Ill. 576.

21—Gosa v. So. Ry. Co., 67 S. C. 347, 45 S. E. 810 (813).

of defendant's main track when plaintiff passed over the latter, and said watchman either signaled to plaintiff or to train crew with his lantern, then the plaintiff is not entitled to recover, and your verdict must be for the defendant, provided you further find that plaintiff saw such signal, or by the exercise of ordinary care and prudence could have seen such signal, in time to have stopped the horse and buggy in time to have avoided the accident or collision.²²

§ 1925. **Right of Railroad Company's Servants to Assume That Driver of Vehicle Will Remain at a Safe Distance.** (a) The defendant's servants in charge of the engine which struck the deceased had a right to assume that he was rational, and would exercise reasonable care and caution to keep himself out of danger until they saw something in his conduct which was inconsistent with such assumption. And if the jury believe, from the evidence, that when the persons in charge of the engine first came in sight of the deceased, he was so far removed from the track as to be free from danger of collision, then they had a right to assume that he would remain at such safe distance, unless there was something in the circumstances calculated to rebut such presumption, or until he manifested a purpose to place himself in a dangerous position.²³

(b) If a train of cars hauled by a locomotive engine upon a railroad, and a citizen traveling in a wagon upon a public highway, are both approaching a crossing of such highway with such railroad, under circumstances indicating that a collision between them is likely to occur, if they both proceed on their way without stopping, the engineer in charge of such train, if he has sounded the required signals with the engine whistle, and is ringing the bell of the engine, has a right to presume that the citizen will stop before he drives upon the crossing, and has a right to proceed on his way with his engine and train until he discovers that the citizen does not stop, when it is too late to stop his train in time to avoid the collision, and for that reason a collision occurs and injury results therefrom, the railroad company would not be liable therefor. But if the engineer makes the discovery before it is too late that the citizen does not stop, and if, after making such discovery, the engineer could have stopped his train, and did not, then, in that view of the case, the railroad company would be liable for the injury inflicted upon the citizen by such collision.²⁴

(c) Railway companies have a legal right to run their trains and engines over their roads and over public crossings, and they are liable to other persons for such damages only as result from their negli-

22—*Montgomery v. Mo. Pac. Ry. Co.*, 181 Mo. 508, 79 S. W. 930 (933).

23—*C., R. I. & P. R. Co. v. Austin*, 69 Ill. 426.

24—*B. & O. S. W. Ry. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352 (354).

"The evident purpose or theory of the instruction asked for by the

appellant was to inform the jury as to what the general legal rule was, in the opinion of the trial court, when a train of cars and a person in a wagon were both approaching a public crossing, under circumstances indicating that a collision would result."

gence or disregard of the rights or safety of such other persons. If you believe from the evidence that at the time plaintiff drove his team over defendant's railroad the engine was sixty or more feet away from said public crossing, and was moving at a moderate rate of speed, so that plaintiff had ample time to take his wagon and team over the said railway before the said engine would reach the crossing, and if you believe defendant's servants operating the said train at the time acted as men of ordinary prudence would have acted under the circumstances, then in that event plaintiff cannot recover damages in this suit, and you will find for the defendant.²⁵

§ 1926. Driving Over Tracks With Lines Hanging Loose. You are further instructed that if you believe from the evidence that plaintiff drove his team over defendant's railway at the time and place alleged in the petition; and further believe that at the time, and after crossing said railway, plaintiff permitted his lines to hang loose in such manner that he had no control of his team; and if you further believe from the evidence that the act of plaintiff in so driving his team over the said railroad at that time and place, and under the circumstances surrounding plaintiff, caused or contributed to plaintiff's injuries; and if you further believe from the evidence that a man of ordinary prudence would not, under the circumstances then surrounding plaintiff, have driven his team over said railroad with the lines hanging loose,—then in that event plaintiff is not entitled to recover in this suit, and you will find for the defendant.²⁶

§ 1927. Injury Through Team Being Unmanageable. (a) To recover damages from the defendant for the killing of W. by the defendant's train, all the following matters must appear from the evidence: First, that the defendant was negligent in some one or more of the particulars complained of in plaintiff's petition; second, that such negligence on defendant's part caused the death of W.; third, that W. was not guilty of negligence on his part that contributed to the injury; fourth, that the estate of W. suffered injury by reason of his death. The burden rests with plaintiff to show all of said matters by the greater weight or preponderance of evidence. If all of said matters are thus shown, the plaintiff will be entitled to recover; but, if any one or more of said matters are not thus shown by the evidence, then your verdict must be for the defendant.

(b) Unless it appears from the evidence that the defendant was negligent in the running and management of its train in one or more of the ways complained of, as before explained, then the plaintiff cannot recover; but, if such negligence is shown by the evidence, then it must also appear from the evidence that such negligence on the part of defendant caused the death of W. That is, it must appear from the evidence that but for such negligence the accident and consequent death of W. would not have occurred. If it appears from the evidence

²⁵—St. L. S. W. Ry. Co. v. Hall,
98 Tex. 480, 85 S. W. 786 (789).

²⁶—St. L. S. W. Ry. Co. v. Hall,
supra.

that the defendant company was negligent in some one or more of the particulars complained of, as in failure to ring the bell or blow the whistle on approaching the crossing, still, if it appears from the evidence that, by reason of the team driven by W. being unmanageable, the giving of said signals, or placing of a flagman at the said crossing, would not have prevented the injury, then it cannot be said that the failure of the defendant to give said signals, or to station said flagman at the crossing, caused the injury.²⁷

§ 1928. **Negligence per se in Traveler.** (a) The court instructs the jury, as a matter of law, that it is not the exercise of ordinary care and prudence for a person to drive with a team directly onto a railroad crossing, without making an effort, by stopping or listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe to drive onto the track with his team.

(b) The jury are instructed, that ordinary care and caution is that degree of care and caution which persons of common prudence are accustomed to exercise for their own safety, and in this case the driver was bound to use that degree of care and caution to avoid injury; and if the jury believe, from the evidence, that by the exercise of that degree of care and caution on his part, the injury complained of might have been avoided, then the plaintiff cannot recover in this suit.

(c) If the jury believe, from the evidence, that the driver of the wagon, before he drove onto the crossing, knew that he was approaching and about to cross the railroad track at the time in question, and that by looking and listening he might have discovered the train in time to have avoided the injury, and he did not make any effort by looking, listening or otherwise, to ascertain whether a train was approaching, but drove directly onto the track as he approached it, then this was such negligence on his part as will prevent a recovery by the plaintiff in this suit.²⁸

§ 1929. **Conduct in Presence of Sudden Danger.** (a) The jury are instructed that in the face of sudden, unexpected and deadly danger, a person is not expected or required to be cool and collected, and to act with perfect prudence and deliberate judgment; in such case he is only required to use such degree of prudence and judgment as ordinarily careful and prudent men would be likely to exercise under the same or similar circumstance. And if the jury believe, from the evidence, that the deceased used ordinary care and prudence to avoid accident in approaching the crossing, and that when he became aware of his danger, he used such care as men of ordinary prudence under like circumstances would be likely to use to avoid or escape injury, then his negligence did not contribute to the injury.²⁹

27—Pratt v. C. R. I. & P. Ry. Co., 107 Ia. 287, 77 N. W. 1064 (1066).

"We think the instructions were sufficiently full and explicit."

28—Cleveland, C., C. & I. Ry. Co.

v. Elliott, 28 Ohio St. 340, Penn Co. v. Rathgab, 32 Ohio St. 66.

29—Ind. & St. L. R. Co. v. Stout, 53 Ind. 143; C. & N. E. Ry. Co. v. Miller, 46 Mich. 532, 9 N. W. 841.

(b) If the jury believe, from the evidence, that at the time of the accident in question, the plaintiff was seated in his wagon near the track of defendant's road (or as the case may be) and that the servants or agents of defendant were guilty of negligence in, etc., and that the plaintiff was thereby put in great danger of life or limb, or had reasonable ground to believe, and did believe, that he was thereby put in such danger, and that it was necessary to leap from his wagon in order to avoid the threatened danger, and that in consequence of such belief he did jump from his wagon, and thereby caused the injury complained of, when, if he had remained in the wagon he would have sustained no injury, this alone would not deprive him of the right to recover in this suit, provided you find from the evidence, under the instruction of the court, that the defendant is otherwise guilty and the plaintiff otherwise entitled to recover.³⁰

§ 1930. **Jury May Consider Surrounding Circumstances.** The defendant in its answer denies the allegations of the complaint and alleges that the plaintiff was also guilty of negligence that contributed to the injury, and it is for the gentlemen of the jury, in the light of all the evidence, after carefully considering it, to determine, first, whether the defendant was guilty of the negligence described in the complaint; second, if you should find that defendant was guilty of the negligence described in the complaint, it is then your duty to consider and determine whether the plaintiff himself was guilty of negligence that contributed to the injury. In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed, as alleged in the complaint, and under which its agents or servants failed to act, if you find they did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the location of both the railroad tracks and the wagon road, if you believe there was a wagon road from the evidence, and their location with respect to each other, and the fact that the plaintiff was hauling ore, if you believe that he was (as to that, I presume, there is no dispute). You have a right to take into consideration the cars of the defendant and their situation and location upon the ore track. You have a right to take into consideration the crossing, as to whether the defendant placed the crossing there for the plaintiff and others to travel over and upon the wagonway, if you believe there was a wagonway on which persons usually travelled, and that the plaintiff at the time of the injury was travelling upon the wagonway. You have a right to take into consideration that the train of cars, one of which struck plaintiff's wagon (as to that, I presume, there is no dispute)—you have a right to take into consideration the fact that it came down grade without an engine attached to it, and then passed up a slight grade at the time it struck the plaintiff's wagon, if you believe

30—Dyer v. Erie R. Co., 71 N. Y. 496; Schultz v. Chicago, etc., R. Co., 228; Roll v. N. Cent. R. Co., 16 Hun 44 Wis. 638.

from the evidence that it did so pass down and up. It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, you must determine whether the defendant was guilty of the negligence charged or whether the plaintiff was guilty of negligence contributing to the injury.³¹

§ 1931. **Imputed Negligence—Parent and Child.** (a) The court instructs the jury that it was the duty of the plaintiffs, in the care and custody of their son, to have exercised such degree of care and prudence, in keeping him off defendant's railroad track and out of danger, which was reasonable and prudent under like circumstances, as shown by the evidence, and a failure to exercise such a degree of care and prudence would render plaintiffs guilty of negligence.

(b) If, therefore, the jury believe from the evidence that S., on the — day of —, —, was the unmarried son of plaintiffs, and that on said day he was walking eastwardly on defendant's railroad track between N. and L. avenues, in the city of St. L., and that while so walking he was run over and killed by defendant's east-bound engine and train of cars in charge of defendant's servants, then your verdict should be for the plaintiffs, provided you further believe from the evidence that the injury complained of occurred while plaintiffs were exercising that degree of care as to the care and custody of their son, as that term is explained in instruction No. 4 (a) and while the said S. was himself exercising that degree of care and prudence for his own safety that an ordinarily careful and prudent person, of his age and intelligence, under like circumstances, would have exercised, and provided that you further believe from the evidence that the injury was caused by the negligence of the defendant's servants, as the term "negligence" is explained in either the first or second of the foregoing instructions.³²

(c) The court instructs the jury that, by the laws of this state, every railroad company is required to have a bell of at least thirty pounds weight and a steam whistle placed and kept on each locomotive engine, and to cause the bell to be rung or the whistle to be sounded by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses any public highway, and shall keep the same ringing or whistling until such highway is reached. And in this case, if the jury believe, from the evidence, that the defendant's servants in charge of the engine in question omitted to ring a bell or to sound a whistle as required by law until the highway crossing at which said child was killed was reached (if the jury believe, from the evidence, said child was killed at a highway crossing as alleged), such omission constitutes a *prima facie* case of negligence on the part of the defendant. And if the jury further believe, from the evidence, that such negligence was the proximate cause of the injury complained of, and that the parents of said child were at the time exercising such care and foresight over his person

31—Rio Grande W. R. v. Leak,
163 U. S. 280 (282), 16 S. Ct. 1020.

32—Schmitt v. Mo. Pac. Ry. Co.,
160 Mo. 43, 60 S. W. 1043.

as ordinarily careful and judicious persons would have exercised under like circumstances, and that said child, being on said highway, was run over and killed, as charged in the declaration, in consequence of the failure to so ring the bell or sound the whistle, then the jury should find for the plaintiff.³³

§ 1932. **When Negligence of Driver of Plaintiff's Vehicle in Crossing Track Will Prevent Recovery.** (a) According to the admitted facts in this case, the plaintiff (or deceased), at the time of the accident, was being driven across the railroad track by one E., in a lumber wagon, and you are instructed by the court, if you believe, from the evidence, that there was any negligence on the part of the driver of the wagon, which contributed to the injury in question, then that negligence has the same effect on the plaintiff's right to recover as if the negligence had been that of the plaintiff (or deceased) himself.³⁴

(b) If the jury believe, from the evidence, that the driver of the wagon was employed by the plaintiff to drive, etc., and that there was negligence on the part both of the defendant and of the driver, which contributed directly to the accident, then the jury have no right to strike a balance between them, so as to find a verdict for the plaintiff, but in such case the jury should find a verdict for the defendant.

(c) If you believe, from the evidence, that the defendant was guilty of negligence or a want of ordinary care and skill in the construction of its track at the road crossing in question, and that the plaintiff was injured thereby in attempting to cross the track, and that he was not himself guilty of any negligence that contributed directly to such injury, and that such injury caused his death, then your verdict should be for the plaintiff.³⁵

(d) The jury are instructed, that the defendant had a right to build its road across the highway described in the complaint, but, in doing so, it was required to restore the highway to its former state of usefulness, so far as it was reasonably practicable, and so as not unnecessarily to impair the usefulness of the highway or render it unnecessarily dangerous in crossing. But whether, in this case, the de-

33—C. & A. R. Co. v. Logue, 158 Ill. 621 (628), aff'g 58 Ill. App. 142, 42 N. E. 53.

"The child in this case was about twenty-one months old. The contention is that a child of tender years, as in this case, could not exercise discretion or intelligence in caring for itself, and the giving of the signals could not have affected the question of the injuries, as doing so would not have caused the child to exercise care for its own safety. It was requisite that parents should exercise reasonable care and caution in caring for the child, and the giving of the signals required by the statute might have caused a greater degree of watchfulness on their part at the par-

ticular time of the injury and tended to call their attention to the approach of the train. It is not alone a question whether the child could have appreciated or known of the danger, but whether by giving the signals the injury might have been avoided by increased vigilance on the part of the parents, who would thereby have been able to prevent the accident by rescuing the child. Under the particular facts of the case, we are of opinion it was not error to give this instruction."

34—L. S. & M. S. Rd. Co. v. Miller, 25 Mich. 274.

35—Ind. & St. L. Rd. Co. v. Stout, 53 Ind. 143.

defendant was guilty of a want of ordinary care and skill, etc., are questions of fact to be determined by the jury from all the evidence in the case.

(e) If you believe from the evidence, that the driver of the team was guilty of any degree of negligence, which contributed directly to the injury, then the jury should find for the defendant, even though you believe, from the evidence, that the negligence of the defendant, in some measure, caused the injury complained of.

(f) Although the jury may believe, from the evidence, that at the time of the injury complained of, the plaintiff was riding in a wagon driven by one A. B., and that the said A. B., as such driver, was guilty of negligence which contributed directly to the injury complained of, still, if the jury further believe, from the evidence, that the plaintiff was merely riding for pleasure with the said A. B., and upon his invitation, and that the plaintiff had no right nor authority to control the movements of the said horses and wagon or their driver, and did not exercise any such control, then the contributory negligence of the driver would not prevent a recovery by the plaintiff in this suit, provided the jury further believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby, and also, that the plaintiff was not himself guilty of any negligence which contributed to the injury.³⁶

§ 1933. Proof of Death at Crossing Must Correspond with Plaintiff's Allegation That It Occurred There. (a) The court instructs the jury that it is your duty to determine from the evidence where the deceased was when he was struck. The plaintiff alleges that the deceased was struck at S. street while he was passing along S. street over and across the railroad tracks, and this is denied by the defendant company. Unless from the evidence you believe that deceased was struck by the engine of the defendant while passing along S. street over and across the railroad tracks, you must find the defendant not guilty,—or, in other words, if from the evidence you believe that the deceased was struck and killed by an engine of the defendant, and further believe from the evidence that deceased, when he was struck by such engine, was not passing along S. street but was on the railroad track several hundred feet from S. street, then you must find that the evidence does not support the allegation of plaintiff that deceased was struck while passing along S. street, and that unless you find that that allegation has been proved, you must find the defendant not guilty.³⁷

36—*Dyer v. Erie Rd. Co.*, 71 N. Y. 228.

37—*B. & O. R. R. Co. v. Stanley*, 158 Ill. 396 (400), *aff'g* 54 Ill. App. 215, 41 N. E. 1012.

"The instruction given by the court embodied the theory upon which the plaintiff claimed a right of recovery, and announced very

clearly the law applicable to such theory, and directed the jury in a plain strong statement of the law that the plaintiff could not recover at all unless it was shown that it was at the public crossing where plaintiff's intestate was struck by defendant's train."

(b) You are instructed that it is the duty of the defendant company to exercise ordinary care in operating its cars to prevent injury to persons at places used as crossings by the public over its tracks; and if you believe from the evidence that on or about the — day of —, —, the plaintiff, E., was crossing on foot the track of defendant at or near a point where P. avenue intersects S. street, in the city of —, Texas; and if you further believe from the evidence that the said P. street, at the place where it crosses said track, was used by the public as a crossing; and if you further believe from the evidence that, while the plaintiff was crossing the said track at said point, defendant's employes pushed one of its flat cars forward upon its track, in an easterly direction, upon and over a part of the right foot of the plaintiff, E., as set forth in plaintiff's petition; and if you find from the evidence that the plaintiff received the injuries as described in said petition; and if you further find from all the facts and circumstances in evidence that the collision, if any, between the plaintiff and the said car was caused by negligence of the defendant, and that such negligence, if any, was the proximate cause of the said injuries, if any, of the plaintiff,—then you are instructed to find for the plaintiff, unless you find that the plaintiff himself was guilty of negligence which contributed to cause his injuries, if any. On the other hand, if you do not believe that the defendant was guilty of negligence proximately causing plaintiff's injuries, if any, or if you believe from the evidence that the plaintiff was injured on defendant's track in its private yard, at a place other than the crossing at P. street, above referred to, or if you believe the plaintiff was guilty of negligence himself that contributed to or caused his injuries, then, in either of these events, you should find for the defendants.³⁸

VIOLETION OF ORDINANCES.

§ 1934. Negligence May Be Inferred From Injury at Crossing. It is a question of fact for you to say, under the evidence in this case, whether or not the defendant has violated the provisions of the ordinance giving it a right of way through certain streets of the city of C., or in fact of any of the ordinances that have been introduced in evidence. I charge you, however, that if you find from the evidence that any of the provisions of the city ordinances have been violated, and that the injury complained of resulted from such violation, then such violation is a circumstance from which negligence may be inferred.³⁹

§ 1935. Fact That Deceased Was Killed by Cars of Defendant Insufficient, Standing Alone, to Justify Verdict for Plaintiff. The court instructs the jury that it is not enough to justify the jury in finding

³⁸—G. H. & S. A. Ry. Co. v. Kief, — Tex. Civ. App. —, 58 S. W. 625 (626).

³⁹—Brasington v. So. B. R. Co., 62 S. C. 325, 40 S. E. 665 (668), 89 Am. St. 905.

a verdict for the plaintiff that it shall appear from the evidence that deceased was killed by cars of the defendant, or that, looking at the facts and surroundings in evidence after the accident, it can now be seen that something not done by the defendant's servants at the time might have avoided the injury. But if the jury believe from all the evidence in the case that defendant's servants at the time of the accident used due and ordinary care in the operation of defendant's train under the circumstances, then the verdict must be for the defendant.⁴⁰

§ 1936. When No Eye Witness to Killing of Person by Railroad Train Presumption of Due Care by Deceased Usually Exists. You are instructed that, where there are no eye-witnesses to the accidental killing of a person by a railroad train, the presumption is, in the absence of other evidence and circumstances to the contrary, that the deceased was exercising due care, but this presumption is not conclusive, and may be rebutted by evidence to the contrary; and if you then find, taking into consideration the location of the highway with reference to said crossing, and the distance from said crossing on said highway, from which said approaching train could have been seen, and taking into consideration all other circumstances surrounding said injury, as disclosed by the evidence in this case, you should find that plaintiff's intestate could not have been at or immediately prior to said accident in the exercise of reasonable care on his part, or you find that by the exercise and use of his senses of seeing and hearing he could have discovered the approaching train in time to have avoided injury thereby, with the exercise of reasonable care on his part, then said presumption as to due care is not to be given any weight by you, and, unless there is other evidence from which you can find that plaintiff's intestate did not contribute to said injury by his own negligence, then your verdict should be for the defendant.⁴¹

§ 1937. Railroad Company's Duty in Crossing Tracks of Another Railroad. A railroad corporation must exercise ordinary care when approaching a crossing of another railroad, and, when means are not provided by which a collision at a railroad crossing is rendered impossible, the rule to stop, look and listen is not less imperative on a train approaching such crossing than upon a traveler about to approach a railroad crossing, who must stop, look and listen for approaching trains before entering upon such crossing.⁴²

40—C. & A. R. R. Co. v. Anderson, 67 Ill. App. 386 (388), *aff'd* 166 Ill. 572, 46 N. E. 1125.

41—Rietveld v. Wabash R. Co., 129 Ia. 249, 105 N. W. 515 (516).

"This, or something conveying the same thought, should have been given. See Ames v. Transit Co., 120 Ia. 640, 95 N. W. 161; Beem v. I. & T. El. R. R. Co., 104 Ia. 563, 73 N. W. 1045."

42—B. & O. S. W. R. Co. v. Klee-

spies, — Ind. App. —, 76 N. E. 1015 (1019).

"The objection urged to this instruction is that it told the jury in substance, that a railroad company, in backing its train over the crossing of another railroad company, was required to observe the same care that a traveler about to approach a railroad crossing must before crossing over the road. As applied to the facts in this case,

§ 1938. **Liability of Railroad and Street Car Companies for Repair of Tracks at Crossing.** (a) If the jury believe from the evidence that both the railroad company and street car line so negligently maintained their tracks and crossing, as charged in the declaration, that the engine upon which G. was riding was caused to rock or sway, and thereby to project the foot-board of said engine against some obstruction, and if the jury further believe from the evidence that the said negligence of said defendants, if they were negligent, was the sole proximate cause of the injury to G., and that said G. at the time of the accident exercised ordinary care for his own safety, then the jury should find the defendant street car line and the railroad company guilty and the City Railway Company not guilty. The word "proximate" used in this instruction means closely connected with the injury in the order of events and so connected with the injury but that for the negligence of street car line and the railroad company, if they were negligent, the injury would not have happened.

(b) The court instructs the jury that the law did not impose solely upon the defendant Chi. C. Ry. Co. the duty of maintaining the crossing of the Chi. C. Ry. Co. and the Chi. J. R. Co., but the law required the Chi. J. R. Co., as well as the Chi. C. Ry. Co., to exercise ordinary care to see that said crossing was reasonably safe; and if the jury further believe from the evidence that the City Ry. Co. did exercise ordinary care in repairing and maintaining the said crossing in a reasonably safe condition, and that the Chi. J. R. Co. did not exercise ordinary care to repair or maintain in a reasonably safe condition its tracks, then the jury must find the defendant Chi. C. Ry. Co. not guilty, and if the jury further believe from the evidence that the proximate cause of the injury to G. was said failure on the part of the Chi. J. R. Co. to repair or maintain its track, if there was such a failure on its part, and that G. exercised ordinary care for his own safety, then the jury must find the defendant Chi. J. R. Co. guilty.⁴³

we do not think the instruction is wrong. If it is subject to criticism, it is because it is not as drastic as it might be. In it the court told the jury that a railroad company 'must exercise ordinary care when approaching the crossing of another railroad,' etc. We think the court would have been justified in saying to the jury that it was the duty of such railroad company to exercise the highest degree of care under the circumstances. The facts here show that this railroad crossing was dangerous and unsafe. The evidence does not show that an interlocking switch was maintained, whereby accidents of this character might have been averted. Where human life is at stake, we

see no reason why those who put it in jeopardy, whether it be a railroad corporation or not, should not be charged with the exercise of the highest degree of care, so as to avert danger to life. In this case where the signals given to both companies by their servant gave to the Pennsylvania Company the right to pass over the crossing, it was the duty of the appellant in the face of such signal, to refrain from undertaking to back its train over the crossing while the Pennsylvania train was passing, and the degree of care it was required to exercise was not too strongly stated in the instruction."

43—Brecher v. Chicago J. R. Co., 119 Ill. App. 555.

DUTY TOWARD SHIPPERS AND CONSIGNEES.

§ 1939. **Duty Toward Shipper Loading Cars.** (a) If you believe, from the preponderance of the evidence, that plaintiff had car furnished him by defendant to be loaded with hogs for shipment over defendant's road, and at time of alleged injury in first count, plaintiff was loading or fastening said car, it became the duty of defendant to exercise due care to prevent doing personal injury to plaintiff while engaged in loading car; and if you believe, from a preponderance of evidence, at time of injury, plaintiff was rightfully in car, in exercise of due care and caution for his safety, such as a reasonably prudent man would exercise under like circumstances, and that defendant, by its employes, negligently or willfully ran an engine against said car upon which plaintiff was, thereby knocking him off, and injured him, then your verdict should be for plaintiff in such sum as, from all the evidence, you believe he is entitled to receive.⁴⁴

(b) When a railroad company puts unloaded cars upon the side track for the purpose of being loaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to load the car, the company in such case has no right, without reasonable notice or warning, to run or back a train upon the side track while the cars are being loaded. And while in such case those engaged in the work of loading are not permitted to close their eyes or ears to what comes within the range of their senses, yet they may give their undivided attention to their work, and they are justified in assuming that the company will not molest them or render their position hazardous without such notice or warning.⁴⁵

§ 1940. **Liability for Injury to Consignee While Unloading Car.**

(a) If an agent of defendant at P., with authority to direct or provide for the unloading of the car, knew in time to notify the trainmen before the engine went upon the side track that plaintiff was taking the corn from the car when the engine was run upon the side track, and in such position that he might probably be injured by the running of the engine against the car, it became the duty of the persons operating the engine to use ordinary care to so operate it as not to thereby cause injury to plaintiff, though they did not know he was there.⁴⁶

(b) You are instructed that where a carrier of freight on its arrival at the place of destination, places the car containing such freight upon one of its side tracks, and notifies, invites or requires the consignee to remove such freight from its car, that the owner, who in pursuance of such notice, invitation or request proceeds to remove such freight from such car, while so engaged has the right to rely

44—I. C. R. R. Co. v. Anderson, 184 Ill. 294 (296), aff'g 81 Ill. App. 137, 56 N. E. 331.

45—Copley v. U. Pac. Ry. Co., 26 Utah 361, 73 Pac. 517 (520).

46—St. L. S. W. Ry. Co. v. Kenne-

upon the carrier to exercise reasonable care not to injure him while so employed; and if you believe from the evidence in this case that the plaintiff was notified, invited or requested by the defendant to remove certain freight from a car placed by it upon one of its side tracks for the purpose of enabling the plaintiff to remove his goods therefrom, that while plaintiff was in said car for the purpose of so removing his freight, and in the exercise of due care for his own safety, the defendant's servants in charge of one of its freight trains either knowing of plaintiff's presence in said car, or the circumstances being such that they ought in the exercise of ordinary care on their part to have known of his presence therein, thereafter negligently ran into said car with such force and violence, as to overturn a safe therein contained upon the plaintiff, thereby injuring him, then you should find the defendant guilty.⁴⁷

§ 1941. Injury While Going to Car, Although Told It Could Not Be Unloaded That Day. (a) If you believe from the evidence that the plaintiff went late in the evening, after business hours, to the yards of the defendant, and after he had been told by the person whose duty it was to seal or open the cars, that he could not get into the car that day, then he would be a trespasser, and the railroad company owed him no duty until his presence there was discovered by the persons in charge of the train; and if you believe from the evidence that they had not seen him, and did not know of his presence near the car, until after the injury, your verdict must be for the defendant.

(b) One who voluntarily goes into the yards of a railroad company after it is getting dark, crossing one or two tracks to get there, and after he knows the car has been sealed up to prevent any more unloading that day, is a trespasser, and would be guilty of contributory negligence, and cannot recover for injuries received while there.

(c) It is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any persons or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout the company owning and operating any such railroad shall be liable and responsible to the persons injured for all damages resulting from neglect to keep such lookout and the burden shall devolve upon such railroad to establish the fact that his duty has been performed. But you are further instructed that the failure to keep a constant lookout would not render the railroad liable if the plaintiff himself was a trespasser in going upon said track or

more, — Tex. Civ. App. —, 81 S. W. 802 (803).

47—C. & E. I. R. R. Co. v. Burridge, 107 Ill. App. 23 (27), rev'd 211 Ill. 9, 71 N. E. 838, for the refusal of two other instructions asked by appellant, the Supreme

Court saying: "We have carefully considered the propriety of the court's action in passing upon instructions, and are of the opinion that no error was committed except in refusing appellant's refused instructions No. 6 and No. 7."

was guilty of any act of negligence contributing to the injury of which he complains.

(d) If you find that the employes of defendant who had charge of looking after the unloading of cars on its tracks knew that plaintiff was engaged in unloading a car and that he was upon defendant's yards for that purpose after business hours and you further believe from the evidence that the plaintiff did not know that he was violating any rule or custom of the company, then you will find that defendant owed him the duty not to injure him by any negligent act of its employes in moving cars on said yard.

(e) You are instructed that if from the evidence that the plaintiff had spoken to the watchman of the defendant, that he was going to return for the last of his freight in a car, and that said watchman knew that plaintiff was hauling freight from said car and that said watchman had the right and it was his duty to close said car and that plaintiff did return and found said car at the same place and in the same condition as when he left the same and you further find that the plaintiff believed as an ordinary prudent man that he had a right to unload his freight at the time, then he would not be a trespasser and if he was injured by negligence of any employe in charge of said train you will find for the plaintiff.

(f) The burden is on the plaintiff to show, by a preponderance of the evidence, that the defendant was guilty of negligence, and that he was injured by such negligence, to entitle him to recover in this action; and if you find from the evidence, that the defendant was negligent, and that the plaintiff was injured thereby, then, in order to defeat his recovery on the ground that he was guilty of contributory negligence, the burden is on the defendant to show such contributory negligence by a preponderance of the evidence.⁴⁸

§ 1942. **Assault upon Person Getting Freight by Company's Agent or Servant.** (a) If you believe from the preponderance of the evidence that, at the time of the difficulty between plaintiff and the said M. and R., it was a part of the duties of said M. and R., as such employes of defendant, to care for, and protect from injury, interference or rough handling, the freight situated in defendant's said depot, and if you further believe from a preponderance of the evidence that the said M. and R. did commit an assault upon the plaintiff as alleged in his petition, and if you further believe from a preponderance of the evidence that the said M. and R., in committing such assault, if you find that they did so, committed the same for the purpose and with the intention of protecting the freight situated in said depot, or any of it, from injury, interference or rough handling by plaintiff, then you will return a verdict for the plaintiff. Unless you so find from a preponderance of the evidence, you will return a verdict for the defendant.

⁴⁸—This series of six instructions *S. W. R. Co. v. McQueeney*, 78 Ark. 22, 92 S. W. 1120.
were approved in *Little Rock & H.*

(b) If you believe, from a preponderance of the evidence, that, at the time of the difficulty between the plaintiff and the said M. and R., it was a part of the duty of said M. and R., as employes of defendant at its said depot, to care for, and protect against injury, interference or rough handling, the freight situated in said depot, then you are instructed, as a matter of law, that the defendant would be responsible for the wrongful acts if any, of the said M. and R., or either of them, committed for the purpose of caring for or protecting such freight against injury, interference or rough handling, although such wrongful acts, if any, had not been expressly authorized by defendant, and although such wrongful acts, if any, had been expressly forbidden by defendant. The defendant would not be responsible for the wrongful acts, if any, of the said M. or said R., committed for a purpose other than discharge of some duty for which the one so committing such wrongful act, if any, was employed.⁴⁹

RULES AND REGULATIONS.

§ 1943. Right to Make Reasonable Rules for Management of Trains. A railroad company has the lawful right to make all reasonably necessary rules for the conduct of its employes, and also of its passengers. And whether such rules are adequate to secure the safety of others, and the safe management of its trains, is a question of fact for the jury.⁵⁰

§ 1944. Expelling a Person from the Cars. (a) The jury are instructed, that if the conductor, or other person in charge of a train of cars, attempts to expel a person, who, by the rules of the company, has no right to ride thereon, he must use no more force than is necessary to accomplish that purpose; and if he does use more force than is necessary and the person so put off is thereby injured, the company will be liable.

(b) If a person gets on a railroad car, in order to ride without payment of fare and without the consent of the persons in charge of the train, he may be ejected from the cars, prudently, and in such a manner as not unnecessarily to endanger his personal safety; but if reasonable care and prudence are not exercised, and the person is thereby injured, the company will be liable, and it cannot excuse itself upon the ground that the wrong was mutual.⁵¹

CONTRIBUTORY NEGLIGENCE.

§ 1945. Plaintiff Must Exercise Ordinary Care. (a) The court instructs the jury, that in an action against a railroad company to recover for injuries occasioned by the alleged negligence of the com-

49—H. & T. C. R. Co. v. Bell, — Tex. Civ. App. —, 73 S. W. 56 (59).

50—C. B. & Q. R. Co. v. McLal-

len, 84 Ill. 109; Stone v. C. etc., Rd. Co., 47 Ia. 82.

51—Breen v. Tex. & P. Rd. Co., 50 Tex. 43.

pany, in running its train, although the servants of the company may have been guilty of negligence, contributing to the injury complained of, still, if the plaintiff could, by the exercise of ordinary care and prudence, have avoided the injury, he cannot recover.⁵²

(b) One who is injured by the mere negligence of another cannot recover, either at law or in equity, any compensation for the injury, if he, by his own ordinary negligence contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; therefore, if you find from the evidence in this case that the plaintiff's own negligence or fault either caused or contributed to the injury he cannot recover.

(c) If you believe from the evidence that the servants in charge of the train which caused the injury did what men of ordinary prudence and caution would have done, under the circumstances, then defendant was not guilty of negligence, and is not liable; but even if you should believe that defendant is guilty of negligence, still, if plaintiff by his own negligence or fault, contributed to the injury, or if his negligence or fault co-operated with the acts of the defendant and caused the injury, your verdict must be for the defendant.⁵³

§ 1946. Plaintiff Not Bound to Highest Degree of Care and Prudence. (a) The court instructs you, that while a person walking on a public highway is bound to use all reasonable care and caution to avoid injury, yet he is not held to the highest possible degree of precaution and prudence; and to authorize a recovery for injuries negligently inflicted, it is only necessary that it appear, from the evidence, that he was using reasonable care and caution.

(b) The court instructs you, that when a person is injured by the negligence of another, he must, after the injury is received, act as an ordinarily reasonable and prudent man would under the circumstances, and use reasonable diligence to know whether medical aid is required, and to use all reasonable efforts to have himself cured; and if he does not do so, he cannot recover of the defendant for any suffering, injury or damage which results from his failure to exercise such care and diligence.⁵⁴

§ 1947. Plaintiff Must Exercise Reasonable Care and Prudence. The jury are instructed, that the plaintiff was bound to exercise ordinary care and prudence in attempting to cross the street, and though the jury may believe, from the evidence, that the crossing in question was dangerous, still, if they further believe, from the evidence, that the accident in question is attributable to the want of ordinary care on the part of the plaintiff, then she cannot recover in this suit, unless the jury further believe, from the evidence, that the

52—*Chi. & A. Rd. Co. v. Jacobs*, 63 Ill. 178. *Co. v. McQueeney*, 78 Ark. 22, 92 S. W. 1120.

53—*Little Rock & H. S. W. R. Eddy*, 72 Ill. 133. *54—Toledo, W. & W. Rd. Co. v.*

defendant was guilty of such gross negligence as implies willful or wanton injury.⁵⁵

§ 1948. **Contributory Negligence of Children.** (a) As to the degree of care and circumspection required of A. B., whose age is alleged to have been eleven years when the accident happened, I instruct you that a child of tender years is not held in the same degree of accountability as an adult man, but the question of his intelligence and mental capacity must be left for your determination from all the facts and circumstances in evidence before you.⁵⁶

(b) If the jury shall find from the evidence that the act of the child itself in going under the gates and onto the crossing as the defendant's engine and train were about to pass over said crossing was the sole cause of the accident, then they are instructed that the plaintiff cannot recover, and their verdict must be for the defendant.⁵⁷

§ 1949. **Eye-Witness as to Care and Caution of Party Injured Not Essential.** The court instructs the jury that evidence of the general habit of A. & B. in crossing railroad crossing may be taken into consideration by the jury, together with all the facts and circumstances in evidence, in determining the degree of care used by the deceased while attempting to cross the defendant's railroad at the time they were killed, and that it is not necessary that the plaintiff should show by an eye-witness as to said A. & B.'s care and caution exercised by them at the crossing at the time they were killed, in order for the plaintiff in this case to recover, provided you believe, from the evidence, and all the facts and circumstances in evidence, that they were exercising ordinary care and caution for their own safety at the time they attempted to cross the said railroad track.⁵⁸

§ 1950. **Contributory Negligence of Person Injured at Crossing.** (a) The plaintiff cannot recover in this case unless it is proved, by a preponderance of the evidence, not only that the defendants were guilty of the negligence charged against them in the plaintiff's declaration,

55—Indianapolis, etc., R. Co. v. McClure, 26 Ind. 370; Litchfield, etc., Co. v. Taylor, 81 Ill. 590; Brown v. Hannibal, etc., Rd. Co., 50 Mo. 461; Cooper v. Cent. R. Co., 44 Ia. 134.

56—Tex. & P. Ry. Co. v. Ball, — Tex. Civ. App. —, 85 S. W. 456 (458).

57—C. & N. W. R. Co. v. Jamieson, 112 Ill. App. 69 (76).

58—McNulta v. Lockridge, 137 Ill. 270 (275), 27 N. E. 452, 31 Am. St. 362.

"It is urged that this instruction was erroneous, that it limited the inquiry of the jury as to the exercise of ordinary care by the deceased to the moment of time when they were killed, and to the immediate time they were in the act of crossing the railroad track. The

general habit of A of looking and listening and of care and caution when approaching or attempting to cross railroad tracks was in evidence. The instruction called the attention of the jury to this 'general habit' of A. & B. and in connection therewith used the expressions 'at the time they were killed' and 'at the time they attempted to cross the railroad track.' The jury could not reasonably have understood the instruction otherwise than as referring to the occasion on which the intestates attempted to cross the track and were killed. As was said by this court in L. S. & M. S. Ry. Co. v. Johnsen, 135 Ill. 641, 36 N. E. 520: 'the words "at the time" as used in the instruction refer to the whole transaction.'"

or some count thereof, but that C. was using reasonable care for his safety at the time of the accident; and if the jury shall find, from the evidence, that C. did not use reasonable or ordinary care for his own safety immediately before and at the time of the accident complained of, then the plaintiff cannot recover, and their verdict should be for the defendants.⁵⁹

(b) You are instructed that the law did not require of the deceased the exercise of an extraordinary degree of care. All that was required of him was the exercise of ordinary care, and what is ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances.⁶⁰

§ 1951. Person Crossing Track Knowing That Cars Were Shifted at That Point. If the plaintiff had long been a resident of D., and had frequently crossed the railroad at the point, and knew the trains, both passenger and freight, were frequently passing on this and other parallel roads, and that cars were frequently being shifted on this and other roads, and that the train which struck him was due about that time, and attempted to cross at this point then, and to exercise his senses of sight and hearing all the time and all the way across; and, when he saw his view of the main line obstructed by the cars on the side track, he should have been the more diligent; and if he was negligent in these particulars, and by reason thereof he was injured, and that negligence was the proximate cause of the injury, you should find the issues for the defendant.⁶¹

§ 1952. Standing on Track—Duty to Look and Listen. The court instructs the jury that, notwithstanding the negligence of the defendant company, the plaintiff's intestate E. had no right to stand on said track, or so near thereto as to be in danger from passing trains without keeping a lookout in both directions for their approach; and that if in consequence of his position, and of his failure to look and listen, he was struck and killed, there can be no recovery in this case.⁶²

§ 1953. Contributory Negligence—Failure of Plaintiff to Discover Approaching Train. The court instructs the jury that if you be-

59—C. & E. I. R. Co. v. Coggins, 212 Ill. 369, 72 N. E. 376.

60—C. & A. R. R. Co. v. Pearson, 184 Ill. 386 (393), aff'g 82 Ill. App. 605, 56 N. E. 633.

"It is objected to this that it left the way open for the jury to understand that, if the plaintiff usually exercised the care of an ordinarily prudent person, that would be sufficient, although he might not have done so in the particular instance when the accident occurred. We do not think it would admit of such an interpretation, but that it required him to exercise on that occasion the care which a person of

ordinary prudence would have exercised under the same or similar circumstances. It is said that the question involved was the kind of care a person of ordinary prudence exercises when acting prudently, and that the care an ordinarily prudent person usually exercises may be a very different kind of care from that which a person exercises when acting prudently. We do not think it was subject to the objection."

61—Norton v. N. C. R. Co., 122 N. C. 910, 29 S. E. 886 (890).

62—Rangeley's Adm'r v. So. Ry. Co., 95 Va. 715, 30 S. E. 386 (387).

lieve, from the evidence, that the plaintiff could have discovered the approaching train, by the exercise of ordinary care, in time to have enabled her to avoid the accident by the exercise of ordinary care on her part, and that she did not exercise such care, you will find the defendant not guilty.⁶³

§ 1954. **Knowledge of the Deceased of the Presence of One Engine at Crossing and the Approach of Another Engine.** While knowledge by the deceased of the presence of the F. engine on the north track or partly upon the S. C. street crossing and the approach of No. — upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred.⁶⁴

§ 1955. **Contributory Negligence—Driving Across Track in a Careless or Indifferent Manner.** (a) If you find from the evidence that plaintiff at said time and place passed over said railway in a careless, indifferent or negligent manner; or if you find from the evidence that at said time plaintiff did not have his team under control, and made no effort to keep or hold his team under control, but at the time of crossing said railway permitted the lines to hang loose, or swing loose and hang down almost to the ground and that the lines were in such position when plaintiff's team ran away; and if you find that the plaintiff was thereby guilty of negligence, as that term is hereinbefore defined, and that such negligence, if any, caused or contributed to his injury—you will find for the defendant. Railway companies have a legal right to run their trains and engines over their roads and over public crossings, and they are liable to other persons for such damages only as result from their negligence or disregard of the rights of safety of such other persons. If you believe from the evidence that at the time plaintiff drove his team over defendant's railroad the engine was sixty or more feet away from said public crossing, and was moving at a moderate rate of speed, so that plaintiff had ample time to take his wagon and team over the said railway before the said engine would reach the crossing, and if you believe defendant's servants operating the said train at the time acted as men of ordinary prudence would have acted under the circumstances, then in that event plaintiff cannot recover damages in this suit, and you will find for the defendant.⁶⁵

63—C. & E. I. R. Co. v. Zapp, 209 Ill. 339 (343), 70 N. E. 623.

64—Baltimore & P. R. R. v. Landrigan, 191 U. S. 461 (472), 24 S. Ct. 137.

65—St. L. S. W. Ry. Co. of Texas v. Hall, 98 Tex. 480, 85 S. W. 789 (790).

"As we have stated, there was no instruction given affirmatively calling to the attention of the jury any view of the facts which would acquit the defendant of liability, except that upon the subject of contributory negligence. That a party is entitled, when he requests

(b) You are further instructed that if you believe from the evidence that plaintiff drove his team over defendant's railway at the time and place alleged in the petition; and further believe that at the time, and after crossing said railway, plaintiff permitted his lines to hang loose in such a manner that he had no control of his team; and if you further believe from the evidence that the act of plaintiff in so driving his team over the said railroad at that time and place, and under the circumstances surrounding plaintiff, caused or contributed to plaintiff's injuries; and if you further believe from the evidence that a man of ordinary prudence would not, under the circumstances then surrounding plaintiff, have driven his team over said railroad with the lines hanging loose—then in that event plaintiff is not entitled to recover in this suit, and you will find for the defendant.⁶⁶

§ 1956. **Contributory Negligence—Riding upon Locomotive.** The jury are instructed that, if they believe, from the evidence, that a man of ordinary care and prudence would not ride upon a locomotive engine in the position and manner that said — was shown to have been riding at the time of the accident, and you further believe from the evidence that his injury was caused by his not exercising ordinary care and prudence, then the plaintiff cannot recover.⁶⁷

§ 1957. **Riding on Coal Car without Consent of Defendant's Employees.** If the jury should find from the evidence that the plaintiff, on the night of the alleged injury, voluntarily, and in order to get a ride on the defendant's train without paying for it, got on the end of a coal car composing a part of the defendant's freight train, without the knowledge or consent of the engineer or fireman or other employe of the defendant, and was on said coal car while the train was running over defendant's track, and if thereby the plaintiff voluntarily placed himself in a dangerous position on the train, and on account thereof fell off the train and was thereby injured, then the jury should answer the first issue, "No."⁶⁸

it by correct instructions, to have the facts establishing his cause of action or ground of defense, with the law applicable to them, affirmatively stated by the court to the jury, is the settled rule of practice established by many decisions of this court. *Texas T. Ry. Co. v. Ayres*, 83 Tex. 269, 18 S. W. 684; *Mo. K. & T. Ry. Co. v. McGlam-mory*, 89 Tex. 639, 35 S. W. 1058. It is no answer to a complaint that this was not done that the jury might negatively have inferred the proposition expressed in the request from the instructions stating the case of the opposite party. The right is, upon proper request, to have the law plainly and affirmatively stated in its application to facts supported by evidence under which the party would be entitled to a verdict. The instruction in question was applicable to a view

of the evidence which the jury might have taken, and the rule on the subject required that it be given, if it truly stated the law. We are unable to see wherein it is incorrect. It refers, it is true, to particular facts, but submits to the jury whether or not those facts existed, and constituted negligence on the part of the defendant. It has no reference to the question of negligence on the part of the plaintiff, and lays down no rule on that subject, but merely seeks an appropriate instruction in the question of defendant's negligence."

66—*St. L. S. W. Ry. Co. of Tex. v. Hall*, supra.

67—*L. S. & M. S. Ry. Co. v. Brown*, 123 Ill. 162 (183), 14 N. E. 197, 5 Am. St. 510.

68—*Lewis v. Norfolk & W. Ry. Co.*, 132 N. C. 382, 43 S. E. 919 (921).

§ 1958. **Contributory Negligence of Plaintiff No Defense If Defendant Could Have Avoided Injury after Discovering Plaintiff's Peril.** (a) If you believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby, and that the plaintiff was himself guilty of some slight degree of negligence, this would not alone prevent a recovery, provided the jury further believe, from the evidence, that the act of defendant which caused the injury was done by the defendant after discovering the plaintiff's negligence and that the defendant could have avoided the injury by the exercise of reasonable care.⁶⁹

(b) The jury are instructed that if they believe and find from the evidence that defendant approached and passed the depot at a greater rate of speed than six miles an hour, then such rate of speed was excessive, and negligence on the part of the defendant. And if you further believe and find from the evidence that such excessive speed caused, or materially contributed to, the death of the child; or if you believe and find from the evidence that defendant's engineer saw the perilous position of the child upon the track, or about to place itself in a perilous position upon the track, or that he could have seen and known it by the exercise of ordinary care; or if you believe and find from the evidence that such omissions of duty and acts of negligence, if proven, contributing together, caused or materially and directly contributed to the death of the child,—then your verdict should be for the plaintiff.

(c) Although you may believe from the evidence that the engineer had the danger signal for D. and others on or near the track, and exhausted a part of his air to slow his train to avoid injury to them, and that it was a matter of prudence for him to do so, yet, so soon as the engineer discovered that said parties were off the track and in a position of safety, then it was his duty to be on the lookout for the safety of persons on the depot platform; and if you believe from the evidence that said engineer negligently failed to do so, and thereby failed to see the child, and in consequence thereof the child was struck and killed in consequence of his negligence,—then your finding should be for the plaintiff.

(d) You are further instructed that it is conceded in this case that the engineer did not see the child before she was struck and killed. Now, if you believe from the evidence that he could have seen her, by the exercise of ordinary care, in time to stop his engine before he struck her, or in time to slow his train for the child to cross over the track before being struck, but negligently failed to do so, then your finding should be for the plaintiff.

(e) You are further instructed that in coming into a station, such as that at M., the law required the employes of the train to be watchful, and on the lookout, to avoid accidents and injury to those

69—*Morris v. The C. B. & Q. R. Hannibal & St. J. Rd. Co.*, 50 Mo. Co., 45 Ia. 29; *Isbell v. N. Y. & N. H. Rd. Co.*, 27 Conn. 393; *Brown v.* 464.

on or about the platform. And if you believe from the evidence that in coming into the station at M. the defendant's engineer or other servants of the defendant saw the child in a perilous position, or saw it about to place itself in a perilous position by running upon the track, or could have seen the same, by the exercise of ordinary care, in time to have avoided the injury and saved the life of the child, but negligently failed to do so, then the defendant is liable, and the finding must be for the plaintiff.

(f) If you believe from the evidence that the child took fright and ran across the depot platform in a northwesterly direction towards the railroad track, while the engine and cars were approaching, in a manner to indicate to a person of ordinary prudence and caution that she intended to and would run upon the track, and that defendant's engineer or other employes saw her, or could have seen and known of her design and peril, by the exercise of ordinary care, in time to have avoided the injury and saved her life, but negligently failed to do so, then the defendant is liable, and the verdict must be for the plaintiffs, although you may further believe from the evidence that the engineer did not have time to stop the train and avoid striking her after she got upon the track.⁷⁰

§ 1959. Attendant Circumstances Determine Whether Unconscious Person Is Guilty of Contributory Negligence. (a) The court instructs the jury that if he, the plaintiff, was hit in the side by a piece of iron, and the force of the blow caused him to step back upon track 5, or if he through a natural impulse, caused by the blow in front, threw himself backwards upon the track in a moment of mental perturbation or excitement, why then his stepping upon the track couldn't be said to be a voluntary act on his part, but would be an incident to his attention to his business; and if he then fell faint upon the track, not having the time or ability to get off of it, such conduct on his part would not be contributory negligence.

(b) If he voluntarily stepped upon the track for any reason whatsoever, except that he was caused to be there by the blow that he received, then his stepping upon that track would be contributory negligence which would prevent his recovery.

(c) If he was struck a blow by the link, but through inadvertence, through forgetfulness, or through anything of that sort, he stepped back upon track number five, and then was hurt, and there fainted upon the track, and then was run over, then he was guilty of contributory negligence in being on that track, and would not be entitled to recover. A man may be unconscious upon a track and be guilty of contributory negligence in being there. It is not lying on the track in an unconscious condition that determines whether a person is guilty of contributory negligence in being there, but the circumstances attendant upon going upon the track, before he became

unconscious, determine whether or not he is guilty of contributory negligence.⁷¹

§ 1960. **Failure of Law to Regulate Speed Does Not Authorize Wanton, Reckless and Dangerous Rate of Speed—What Will Not Amount to Wanton Misconduct.** (a) The general statutes of our State do not regulate the rate of speed that a railroad company shall run its cars, yet the failure of the law to regulate the rate of speed, does not authorize a railroad company to run its trains at a wanton, reckless and dangerous rate of speed over a public crossing in an incorporated town or village, a point where the people cross and recross the public crossing in numbers, and frequently.⁷²

(b) Neither the placing of cars on the sidetrack as shown by the evidence nor the failure to ring the bell of the engine, or blowing the whistle, nor the speed of the train, before the peril of Mrs. M. became manifest, under the evidence, is evidence of wanton, reckless or intentional misconduct on the part of defendant's servants.

(c) If the jury believe from the evidence that the manifestation of the peril of Mrs. M. and her being struck by the engine was so close, in point of time, that the train could not have been stopped in time to have avoided the injury to her, then the defendant's agents in charge of the train cannot be deemed guilty of wanton, reckless or intentional misconduct.⁷³

§ 1961. **Rule That Burden of Proof as to Contributory Negligence Is on Defendant.** The court instructs the jury that the plaintiff need not affirmatively prove that his decedent stopped, looked and listened. The presumption is that he did so, and the burden of proof that he did not stop, look and listen is on the defendant railway company, and must be proved by a preponderance of the testimony on its part.⁷⁴

71—*Louisville & N. R. Co. v. Thornton*, 117 Ala. 274, 23 So. 778 (781).

"These charges contain no error, certainly of which defendant can complain. *Helton v. Ala. M. R. R. Co.*, 97 Ala. 275, 284, 12 So. 276."

72—*Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231.

"This charge given for plaintiff asserts a correct proposition of law. We refer to this charge specially, because this conclusion disposes of charge six requested by the defendant, and others which asserted that there can be no wanton negligence, in the absence of an ordinance or statute regulating the speed of trains."

73—*Memphis & C. R. Co. v. Martin*, *supra*.

"These charges requested by the defendant were approved in the case of *Ga. Pac. R. R. Co. v. Lee*, 92 Ala. 264-272, and abstractly con-

sidered, assert correct propositions of law. The injury there was at a public road crossing, but not in a town or populous district, and there was no question of wanton injury arising from the character of the public crossing. The charges requested were calculated to mislead a jury in the present case and the court committed no reversible error in refusing them."

74—*Pittsburg C. C. & St. L. R. Co. v. Reed*, 36 Ind. App. 67, 75 N. E. 51.

"In the absence of evidence to the contrary, the presumption is that a person injured or killed by collision with a train at a railroad crossing, through the negligence of the railroad company, exercised ordinary care; and where, to do so, he would stop, look and listen, the presumption, where there is no evidence on the subject, in an action to recover for his injury or his

FENCING TRACK (LIVE STOCK).

Note.—The obligation of railroad companies to fence the track of their roads, to give warning at highway crossings, and their liability for damages occasioned by fire escaping from their locomotives, are mainly imposed or regulated by the statutes of the several States; and these statutes differ somewhat in their details. The following instructions can readily be adopted to the statutes of the different States, by making the changes necessary for that purpose.

§ 1962. **Failure to Comply with the Law, Negligence Per Se.** (a) The jury are instructed, as a matter of law, that if a railroad company, or its servants, fail to perform a duty prescribed by statute or ordinance, such failure is negligence of itself; provided, it is the proximate cause of an injury to the person or property of another.⁷⁵

(b) The first paragraph of the complaint is based upon a statute of the State which requires railroad companies operating roads in the State to securely fence in the tracks of their roads. A railroad company operating a railroad in this State is required to securely fence in its track, and where this is not done, the railroad company so operating the road is liable for all damages done to stock by its locomotives and cars while being operated upon its road, without regard to the question whether such injury was the result of willful misconduct or negligence or the result of unavoidable accident.⁷⁶

§ 1963. **Company Must Exercise Reasonable Care.** (a) The court instructs the jury, as a matter of law, that when, by the use of ordinary care and diligence, on the part of the servants of a railroad company, animals straying upon its tracks can be saved from injury,

death, is that he stopped, looked, and listened. The care to be exercised by a traveler on a highway approaching a railroad crossing is not diminished by reason of the enactment of 1899, relating to pleading and evidence in such cases (section 359a, Burns' Ann. St. 1901); but the presumption in the absence of evidence on the subject is that he did exercise such requisite care, his contributory negligence being by that statute made matter of defense. The burden of establishing such evidence is upon defendant and so continues throughout the case. It must be presumed in such case that the person killed or injured was free from contributory negligence in all respects until the defense of contributory negligence has been sufficiently proved. See *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 229, 71 N. E. 170; *Chi. I. & L. R. R. Co. v. Turner*, 33 Ind. App. 264, 69 N. E. 484; *Harris v. Pittsburg, etc.,*

R. Co., 32 Ind. App. 600, 70 N. E. 407; *Chi. & E. R. R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Texas & P. R. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *So. Ind. Ry. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722. If the contributory negligence constituting a defense appears from the evidence, it is not material whether it appears from the evidence of the defendant or that of the plaintiff. *Cleveland C. C. & St. L. R. R. Co. v. Coffman*, 30 Ind. App. 462, 469, 64 N. E. 233, 66 N. E. 179; *Evansville v. Christy*, 29 Ind. App. 44, 63 N. E. 867; *Howard v. Indianapolis St. L. R. Co.*, 29 Ind. App. 514, 518, 64 N. E. 890."

75—*Penn. Co. v. Hensil*, 70 Ind. 569.

76—*Louisville N. A. & C. Ry. Co. v. Grantham*, 104 Ind. 353, 4 N. E. 49 (51).

then it is the duty of such servants to exercise that degree of care, and a failure to do so, if proved, renders the company liable for any damages thereby sustained.⁷⁷

(b) The court further instructs you, that when a railroad company fails to fence its track, as required by statute, it must see that its servants so conduct its trains that injuries shall not result to stock that may get upon its track, if it can be done by care and caution. If the company fails to fence its track, it takes upon itself the hazard, and when injury results therefrom it must respond in damage.⁷⁸

§ 1964. Company Only Held to Reasonable Care—Casual Breach in Fence. (a) The court instructs the jury, that while railroad companies are not required to keep such a guard on their roads as to see a breach in the fence and repair it the instant it occurs, still the law does require them to keep such a force as will discover breaches and openings in their fences, and to close them within a reasonable time; and if they neglect to do so within a reasonable time, it is a neglect of duty that will render them liable for an injury to stock escaping onto the road through such openings; provided, the owner or the person having the stock in charge is guilty of no negligence which contributed to the injury.⁷⁹

(b) If you believe, from the evidence, that the defendant had erected a fence suitable and sufficient to prevent horses and cattle, sheep and other stock from getting upon the railroad at the point where the animals in question got upon the track, and had maintained the fence in good repair up to (the evening before the accident), and that the injury was occasioned by the fence being broken down at the time of the accident, then negligence on the part of the defendant ought not to be inferred, unless you further find, from the evidence, that the servants of the company knew of the fence being down, or else that it had been down for such a length of time that, in the exercise of reasonable care and watchfulness, they ought to have known of its being down, and failed to repair it within a reasonable time thereafter.⁸⁰

(c) The court further instructs you, as a matter of law, that when a railroad is inclosed by a suitable and sufficient fence, and a casual breach occurs therein, without the knowledge or fault of the company, and through such breach stock get upon the track and are injured, the company is not liable, unless it has had a reasonable time to discover such breach, or has been notified and fails to repair within a reasonable time, and before the injury occurred.⁸¹

77—T., P. & W. R. Co. v. Ingraham, 58 Ill. 120; Parker v. Rd. Co., 34 Ia. 399, Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227.

78—Toledo, P. & W. R. Co. v. Lavery, 71 Ill. 522; Toledo, W. & W. R. Co. v. McGinnis, 71 Ill. 346.

79—C. & N. W. R. Co. v. Harris, 54 Ill. 528.

80—C. & A. R. Co. v. Umphenour, 69 Ill. 198.

81—Robinson v. Grand Trunk R. Co., 32 Mich. 322; Davis v. Chicago, R. I. & P. Rd. Co., 40 Ia. 292; Indianapolis, P. & C. Rd. Co. v. Truitt, 24 Ind. 162; Ind. & St. L. R. Co. v. Hall, 88 Ill. 368.

(d) If you believe, from the evidence, that on (the day before the injury) the defendant had a good and sufficient fence to prevent horses, cattle, sheep, hogs and other stock from getting onto the track, at the point in question, and that after that it was blown down, or broken down by trespassers or otherwise, without the fault of the defendant, and that while the fence was so down, the plaintiff's stock got through the broken fence and was injured, before the defendant had a reasonable time in which to repair it, then the defendant would not be liable for injuries resulting from the fence being out of repair.

(e) If you believe, from the evidence, that defendant had a good and sufficient fence on the side of its road, through plaintiff's farm or pasture, until shortly before the accident, and that it was broken down by trespassers, or by unruly stock, or blown down by wind, and that plaintiff's horses got through the fence before defendant had reasonable time to repair it, then you should find for the defendant.

(f) The court further instructs you, that when a railroad company builds and maintains a good and sufficient fence through a farm, and it is blown down, burnt down, or thrown down by trespassers, and without the fault of the railroad company, then the company has a reasonable time in which to repair the fence, and it is not responsible for any damages which may ensue solely from the insufficiency of the fence until such reasonable time has elapsed.⁸²

§ 1965. **Stock Unlawfully Running at Large.** (a) The court instructs the jury, that at the time in question it was unlawful to permit cattle or horses to run at large, at and within, etc., and if the jury believe, from the evidence, that the plaintiff voluntarily permitted the horse in question to run at large at and within, etc., and under such circumstances that it might reasonably have been foreseen or anticipated that the horse might get upon the defendant's track, then the plaintiff cannot recover of the defendant for the killing of the horse by one of its trains, upon the ground alone that the company had failed to fence its track at the place where the animal was killed.⁸³

(b) The fact that the owner of stock permits it to run at large, in violation of the act prohibiting domestic animals from running at large, does not relieve railroad companies from their duty to fence their roads, nor from their liability for stock injured in consequence of their failure to do so; and the question whether the owner of the stock has been guilty of contributory negligence in permitting them to run at large, is one of fact to be determined by the jury from all the circumstances of the case. And to render the owner of the stock guilty of contributory negligence, in permitting his stock to run at

82—I. C. R. R. Co. v. Swearingen, 47 Ill. 206; Gill v. Rd. Co., 27 Ohio St. 240.

83—P. P., & J. R. Co. v. Champ,

75 Ill. 577; Indiana R. Co. v. Shimer, 17 Ind. 295; Jef., etc., Rd. Co. v. Adams, 43 Ind. 402; Pearson v. Milwaukee, etc., 45 Ia. 496.

large, it must appear, from the evidence, that he did so under such circumstances that the natural and probable consequences of so doing was that the stock would go upon the railroad track and be injured.⁸⁴

(c) A railroad company owes no duty to the owner of stock which strays upon its track, except to keep a constant and careful lookout upon the track, and to use reasonable and ordinary care at the time to avoid striking it. So, if you believe from the evidence in this case that the engineer in charge of the train was keeping such a lookout, and did use such care to avoid striking the animals in controversy as an ordinarily prudent man would have used under the circumstances, but, on account of the close proximity of the animals to the moving train when the engineer discovered them on the track, he was unable to stop the train in time to avoid striking them, then the company was not guilty of such negligence as will entitle the plaintiff to recover, and your verdict will be for the defendant.⁸⁵

(d) The court instructs you, that the fact, if proved, that the plaintiff permitted his stock to run at large, in violation of the law prohibiting domestic animals from running at large, does not relieve the defendant from its duty to maintain a suitable and sufficient fence along the line of its road, if you find, from the evidence, under the instructions of the court, that the defendant was otherwise bound to do so; nor from liability for stock injured in consequence of its failure to do so, if you find, from the evidence, under the instructions of the court, that the defendant is otherwise liable therefor.⁸⁶

(e) The question whether the plaintiff was guilty of contributory negligence in permitting his cattle to run at large, is one of fact to be determined by the jury from all the circumstances of the case. And to render him guilty of contributory negligence, in permitting his stock to run at large, the jury must believe, from the evidence, that he did so under such circumstances that the natural and probable consequence of so doing was, that the stock would go upon the railroad track and be injured.

(f) In the absence of an order of the county commissioners (or a vote of the inhabitants, etc.,) permitting stock to run at large, the plaintiff was in duty bound to keep his stock on his own premises, or to use all ordinary and reasonable means and appliances for that purpose, and if he knowingly and voluntarily suffered his stock to run at large, in the immediate vicinity of that part of defendant's road where it was not bound by law to fence, as explained in these instructions, and if you further believe, from the evidence, that the (cattle), while so suffered to run at large, got upon the track of defendant's road at a point where it was not bound by law to fence as explained, etc., and were then killed, the plaintiff cannot recover unless such killing was willful or wantonly reckless.⁸⁷

84—Ewing v. C. & A. R. Co., 72 Ill. 25.

85—St. L. I. M. & S. R. Co. v. Norton, 71 Ark. 314, 73 S. W. 1095.

86—Flint & P. M. R. Co. v. Lull,

28 Mich. 510; L. N. A. & C. R. Co. v. Whitesell, 68 Ind. 297; White v. Utica, etc., Rd. Co., 15 Hun 333; Cairo Rd. Co. v. Murray, 82 Ill. 76.

87—Ind. & C. & L. R. Co. v.

§ 1966. Obligation to Fence Not Limited to Adjoining Owner.

(a) The obligation to construct and maintain fences upon both sides of their roads, imposed by the laws of this State upon railroad companies, is not limited to owners and occupiers of adjoining lands, but extends to the public generally.

(b) Where cattle running at large without the fault of the owner, enter the inclosed field of another person through which a railroad passes, and thence go upon the track of the road by reason of a want of sufficient fence, and are injured, the railroad company will be liable, provided they have not built a good and sufficient fence (according to the statute) or had allowed the fence to become out of repair after notice thereof, and a reasonable time for its repair.⁸⁸

§ 1967. Cattle Guards. (a) In order to keep its road securely fenced, the statute of this State requires a railroad company to construct and keep in repair cattle guards on each side of its track at all highway crossings.⁸⁹

(b) It is however provided in this same statute that a cattle guard that has been approved by the railroad commissioner of the State shall be deemed a reasonable and sufficient cattle guard; and if this cattle guard had been kept as it was originally placed, and if there was no question about the space between the cattle guard and the fence, then there would not be any case here, and the plaintiff could not recover.

(c) If the cattle passed the cattle guard, if they crossed it because it was out of repair, or if they passed beside the cattle guard and between it and the fence, and were killed by the cars of the defendant, then the plaintiff is entitled to recover the value of the cattle—the full market value of the cattle at that time.

(d) The defendant has offered evidence to show that some of the cattle at least passed over that portion of the guard which it is not alleged was defective, and for at least so many of such cattle as passed over the guard where it was not defective no recovery whatever can be had; and unless you find that some of the cattle passed over said guard by reason of its defective condition no recovery can be had.⁹⁰

§ 1968. Plaintiff's Contributory Negligence. The jury are instructed, that when a railway company fences its track, as required by statute, and the fence afterwards becomes defective, an action against the company for injuries to horses or cattle straying upon the track, through such defective fence, cannot be maintained, if it appears that the owner of the animals was guilty of negligence, which naturally and directly contributed to such injury.⁹¹

Harter, 38 Ind. 557; *Eames v. S. & L. R. Co.*, 98 Mass. 560.

88—*Rd. Co. v. Stephenson*, 24 Ohio St. 48.

89—*Pittsburg, C. & St. L. R. Co. v. Eby*, 55 Ind. 567.

90—*Johnson v. Detroit & M. R. Co.*, 135 Mich. 353, 97 N. W. 760 (761).

91—*Jones v. Sheboygan & F. du L. R. Co.*, 42 Wis. 306.

§ 1969. **Stock Escaping and Running at Large.** If the jury believe, from the evidence, that the horse in question broke out of the pasture and went upon the railroad track, without any fault or negligence on the part of the plaintiff, and was there killed, and that such killing was the result of negligence, and of a want of ordinary care and reasonable caution on the part of defendant's servants, then the plaintiff was not guilty of such contributory negligence as will prevent a recovery in this case.⁹²

FENCING TRACK (CHILDREN).

§ 1970. **Duty of Railroad to Fence Track Is Also for Benefit of Children.** If you are satisfied from the evidence that by reason of or on account of its failure to so erect and maintain such fence at the point where you may conclude it is reasonable to infer that the child went upon the track, and if you are convinced from the evidence that the plaintiff got upon the track at the time he was hurt on account of the fence not being there,—in other words, that he would not have done so if such fence had existed to impede his progress; and, furthermore, if you believe that he got upon the track without fault on the part of those who should be held accountable for his care and custody, in consequence of the neglect of the railroad company, as above stated, to erect and maintain the requisite fence, you would be warranted in finding that there was such negligence on the part of the defendant in this particular as would afford the plaintiff a remedy for the injuries received by him.⁹³

92—T. P. & W. Rd. Co. v. Johnson, 74 Ill. 83.

93—Keyser v. C. & G. T. Ry. Co., 66 Mich. 390, 33 N. W. 867 (871).

"I think this is a correct statement of the law as heretofore held by this court. See this case in 56 Mich. 559, 23 N. W. 311; Marcott v. Marquette, H. & O. R. Co., 47 Mich. 9, 10 N. W. 53 and 49 Mich. 99, 13 N. W. 374.

"The statute requires the defendant to fence its road with a fence 'sufficient to prevent cattle or other animals from getting on such railroad.' This clause quoted is only descriptive of the sufficiency of the structure to furnish the required protection. The duty of the company in this respect is a positive one. The public, as well as the company, are entitled to the benefit and protection it affords against the perils and dangers incident to the use made of the road, and it would be strange reasoning, indeed, that would give to the citizen living along the line of these

roads this barrier against danger of injury to 'his cattle and other animals,' and deny it to his infant children who are not yet old enough to enable them to comprehend such perils and dangers. The legislature never intended any such limitation upon the protection to be furnished by the fencing required by the statute, and no decision of any court giving the statute such construction can receive my approval. I know it is said it is the duty of the parent or guardian of such children to restrain them from going into such dangers, but the experience of any man acquainted with the large families of the poor in this country is that at best this duty can be only imperfectly performed by the parents, and that it is not infrequently the case that these little ones are seen wandering from the immediate care of the mother, whose domestic affairs absolutely preclude her at times from being with her children; and the present

ACTIONS FOR KILLING LIVE STOCK.

§ 1971. **Actions for Killing Live Stock—Care Due in Operation of Trains.** (a) The court instructs the jury that if the railroad employes used ordinary and proper precaution to ascertain as to whether its path was obstructed, and, if it was obstructed, it used proper and ordinary care such as a prudent and cautious engineer would use under the same circumstances, then the railroad company could not be said to be negligent in the operation of its railroad.

(b) It was his duty in the first instance to avoid a collision if he could by the use of ordinary care, such care as a prudent ordinary engineer would have used under the circumstances.⁹⁴

§ 1972. **Highest Duty of Engineer of Passenger Train Is to His Passengers—Series.** (a) The negligence for which it would be liable is the failure of its engineers or employes operating its engines and trains to exercise reasonable care to discover animals on the track, and to avoid striking them after they have discovered them. Reasonable care is the care which a prudent person would use in like agencies and under like circumstances. If you believe from the evidence that the defendant's employes operating its engines were guilty of lack of reasonable care in endeavoring to discover animals upon its track and to avoid striking them, and by reason of said lack of care injury was inflicted upon the animals (in this case a horse), and that such injury would not have occurred but for the failure on the part of the defendant's engineer or employes operating its engines to exercise reasonable care to discover the horse upon the track and avoid striking him, then you should find for the plaintiff.

(b) If you find that the defendant's engine and train did actually kill the stock, but that there was not a failure upon the part of its employes operating its engines to exercise reasonable care, that is, the care which a reasonable, prudent man with like agencies and under like circumstances would exercise to discover animals upon the track and avoid striking them or inflicting injuries upon them, the defendant would not be liable, and as to such horse, where you find there was not a failure to exercise such care, your verdict should be for defendant.

(c) The court instructs you that it does not necessarily follow that when an engineer discovers an animal upon the track that he is negligent if he does not stop his train. Regard must be had for his own safety and for the safety of his fellow employes and passengers, and if a reasonable, prudent man, under circumstances in which an

would seem to be one of those cases; and, if accidental injury overtakes them, it is a misfortune, but not negligence on her part. Negligence assumes ability to do otherwise, and better. She is at least entitled to the aid the law

gives her. The testimony received showing the defendant had omitted to fence its road was properly admitted."

⁹⁴—Long v. S. Ry. Co., 50 S. C. 49, 27 S. E. 531 (532).

engineer may be shown to have been by the evidence when the animal was discovered, would not have checked the train in the exercise of reasonable prudence and caution, then he would not be guilty of negligence, and the company would not be liable in that case. If, however, in the exercise of such care after discovery of the animal, having due regard to his own safety and the safety of his fellow employes and passengers, he could have stopped the train or slackened its speed or avoided striking the animal, and the evidence failed to show that he exercised reasonable care in that particular, then the defendant would be liable for such injury.

(d) The degree of care to be exercised is to be determined by the exigencies of the situation, having regard not only to the killing or avoiding injury to the animal, but also to the safety of the engineer and his fellow employes. If in the exercise of ordinary care he could have stopped or slackened his speed or avoided the injury as I have told you, and he failed to do so, it would be negligence for which the company would be liable. If he could not do these things, having regard to the safety of himself and fellow employes and passengers, he would not be negligent. Of this matter you are the judges under the evidence.

(e) The burden is upon the plaintiff to show negligence on the part of the company's employes operating its engines, and, if he has failed to show a failure upon the part of the company's employes to exercise ordinary care as thus defined to you, then your verdict will be for the defendant.

(f) If it is shown that such failure to exercise that degree of care resulted in the injury to the stock in question, then your verdict will be for the plaintiff.

(g) If you find for the plaintiff, you must find a reasonable market value for the animal so killed because of the negligence of its employes under the instructions that I have given you. Gentlemen, you are the sole judges of the credibility of the witnesses, and weight to be given to their testimony. You will take into consideration all the testimony in the case, and if you find by a preponderance of the evidence that the plaintiff has made out his case according to the instructions I have read you, then your verdict should be for the plaintiff in such sum as the evidence shows the horse was worth; and if you fail to so find by a preponderance of the testimony, then your verdict should be for the defendant.

(h) If, however, in the exercise of such care after the discovery of the animal, having due regard to his own safety, that of his fellow employes, and, in this case I would say to the passengers on the train he could have stopped the train or slackened its speed or avoided striking the animal, and the evidence showed that he failed to exercise reasonable care in that particular, resulting in the injury to the animal, then the defendant would be liable for such injury.

(i) Of course, gentlemen of the jury, the servants of the train, in charge of the train, the highest duty of the servants and engineers,

would be to the passengers upon the train, if the proof shows that it was a passenger train, and the engineer and servants of the defendant would not be required, it would not be their duty, to injure their passengers in an attempt to save a horse.⁹⁵

§ 1973. **Duty to Avoid Injury After Discovering Dangerous Position of Live Stock.** (a) Although you may believe, from the evidence, that the stock in question got upon the railroad track of the defendant, without any negligence upon the part of the company, still, if you further believe, from the evidence, that the person in charge of the engine by the exercise of reasonable and ordinary care, and without danger to his engine and train, could have avoided the injury, and did not do so, then the company would be liable for such injury; provided, that you further believe, from the evidence, that the owner of the stock, or the persons having it in charge were guilty of no negligence which contributed to such injury.⁹⁶

(b) The court instructs the jury, that if they believe, from the evidence, that the persons in charge of the engine and train of cars in question, by ordinary care, skill and prudence, could have seen the animals, or that they did see them in season, so that by the use of ordinary care and skill and without danger to the train, they might have stopped the train before striking the animals, and thus avoided the injury, and did not do so, this would be such negligence as would render the defendant liable for the injury and damage sustained by the plaintiff; provided, the jury believe, from the evidence, that the animals were injured, and that plaintiff thereby sustained damage, in manner and form as charged in the declaration; and also that plaintiff's own fault or negligence did not contribute to the injury.⁹⁷

§ 1974. **Injury to Stock at Crossing.** (a) The jury are instructed, as a matter of law, that it would be gross negligence, in persons in charge of an engine, not to see and observe stock if they are on or near a railroad crossing, at least (forty) rods before reaching that point, if there was nothing in the way to prevent them seeing, if they had looked.

(b) And in this case, if the jury believe, from the evidence, that the plaintiff's horse was injured by the defendant's engine, while the horse was on a highway crossing, and that the persons in charge of the engine could have seen the horse on the track, or in dangerous proximity to it, in season to have stopped the cars and prevented the injury, and did not see him, or seeing him, in season to have avoided the injury, did not do so, this would be gross negligence, for which the company would be liable unless the jury believe, from the evidence, that the plaintiff was himself guilty of negligence, which contributed directly and materially to the injury.⁹⁸

95—These instructions approved. *Mo. K. & T. Ry. Co. v. Webb*, — Ind. Ter. —, 97 S. W. 1010.

96—*Chl. & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Eames v. S. & L. R. Co.*, 98 Mass. 560; *Locke v. St. Paul*, etc., 15 Minn. 350; *Needham v.*

Railroad, 37 Cal. 409; *Shephard v. Railroad*, 35 N. Y. 641.

97—*T. P. & W. R. Co. v. Bray*, 57 Ill. 514.

98—*C. B. & Q. R. Co. v. Cauffman*, 38 Ill. 424; *Parker v. Railroad Co.*, 34 Ia. 399.

§ 1975. Elements of Liability for Killing of Heifer. The court instructs the jury that in deciding whether a heifer belonging to the plaintiff was injured by defendant's train, you will take into consideration the testimony tending to show where the heifer was before and at the time of the alleged injury; when and where she was found; the nature of the injury; the presence or absence of other causes to account for such injury; what trains, if any, had passed after the heifer was seen before the injury and the time she was found to be injured; and all facts as you find them to be proven, fairly tending to show whether the heifer, if injured, was injured by defendant's train of cars.⁹⁹

§ 1976. Failure to Keep a Proper Lookout for Horses on Track Negligence. (a) The court charges the jury that if they believe from the evidence that the horse sued for was killed on account of negligence on the part of the engineer, then they must find for the plaintiff.

(b) The court charges the jury that if they believe from the evidence that the engineer in charge of the train that killed the horse sued for could by keeping a proper lookout, have seen the horse before he got on the track, in time to check or stop the train and thereby save the life of the horse, and that he failed to keep such proper lookout, then the defendant is liable for the value of the horse.¹⁰⁰

§ 1977. Railroad Company Not Liable for Injury to Horse on Track Where Reasonable Care Used. (a) If the jury believe from the evidence that the train which it is alleged struck the mare in question was running at a lawful rate, and had the customary appliances and force of trainmen, and the mare, when seen by the engineer, or might, with due care, have been seen, was so close that the train could not be stopped, with ordinary care and diligence, in time to avoid striking it then the plaintiff cannot recover.

(b) If you find from the evidence that plaintiff's mare, or the mare in question, was grazing near the railroad track, and, becoming frightened at an approaching train, ran a short distance, and then jumped upon the track, and was struck and killed, and that ordinary care was used by the engineer after the animal was in danger of being struck, then your verdict must be for the railroad company.¹

§ 1978. Animals Coming on Track So Suddenly That Accident Cannot Be Prevented. If the jury believe from the evidence that the animals came suddenly from the left-hand side of the track, and so close to the train that the engineer could not stop in time to prevent the accident, then they must find for the defendant.²

99—Taylor v. Chi., St. P. & K. C. Ry. Co., 76 Ia. 753, 40 N. W. 84 (85).

100—Central of Ga. Ry. Co. v. Edmondson, 135 Ala. 336, 33 So. 480 (482).

"Written charges 1 and 2 (a. b.) given at the request of the plaintiff on a case similar in its facts to the present case were pronounced good,

and the giving of them free from error. Chattanooga So. Ry. Co. v. Wilson, 124 Ala. 444, 27 So. 486."

1—Sims v. So. Ry. Co., 59 S. C. 246, 37 S. E. 836.

2—Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 892 (894).

ligent and careless; and if you further find that, in consequence thereof, plaintiff's horse was injured thereby, without contributory negligence on the part of plaintiff, or said B., your verdict should be for the plaintiff.

(e) If you find from the evidence that in May, 1889, plaintiff's horse was injured, as alleged, on said crossing by getting his foot fast in the space for flangeway between the rail and plank of the crossing, and if you further find that said crossing had been in that condition for a long time previously without being repaired, these are facts that you should consider in determining whether said crossing, at the time of the alleged injury, was in a safe condition, for the travel of horses across it, and whether the defendant was not careless and negligent in permitting it to remain in that condition.

(f) And if you further find that, some three or four months before said alleged injury to plaintiff's horse, a horse driven by X. got his foot in the space left for flangeway on said crossing, and that one of Y.'s horses, driven by Z., got its foot fast in said space left for flangeway while passing over said crossing near a year prior to said alleged injury to plaintiff's horse, these are facts you are authorized to consider as to whether defendant had notice of the condition of said crossing prior to said alleged injury of plaintiff's horse.⁴

§ 1981. Injury to Animal on Track—Burden of Proof as to Negligence. The question for the jury to decide in this case is not alone whether or not the plaintiff's cow was killed by the defendant's company, but before you can find for the plaintiff you must be reasonably satisfied from the evidence that the killing was caused by the negligence of the defendant or its employes, and the burden of proving such negligence rests in this case upon the plaintiff, and the negligence is not presumed against the defendant from the mere proof of striking the cow.⁵

§ 1982. Running Extra Train, or Train Not on Schedule Time, Not Negligence as to Live Stock. The court instructs the jury that the defendant had the right to run trains over its road at any hour of the day or night, and the fact that the train in question was an extra train, or not running on schedule time, could not constitute negligence.⁶

§ 1983. Burden of Proof as to Place of Injury of Live Stock Is on Plaintiff. Your verdict must not be founded on mere guesses, speculations or far-fetched inferences. You must confine yourselves to facts

4—Toledo, St. L. & K. C. R. Co. v. Milligan, 2 Ind. App. 578, 28 N. E. 1019 (1020).

"The instructions objected to, and those not objected to, when considered together, embraced all the issues in the case, and contained a statement of the law of the case that certainly should furnish appellant no good cause for complaint."

5—Kansas C. M. & B. R. Co. v. Henson, 132 Ala. 528, 31 So. 590 (592).

"This charge should have been given. The latter is an exact copy of the one in Ala. Gr. So. R. Co. v. Boyd, 124 Ala. 525, 27 So. 408, which this court said should have been given."

6—Graybill v. C. M. & St. P. R. Co., 112 Ia. 738, 84 N. W. 946 (948).

directly proven, and the inferences that fairly arise therefrom. It is not for the defendant to prove that the colt was struck in the highway, but it is for the plaintiff to prove it was not struck in the highway, but was struck on the right of way. That is, if the evidence fails to show where the colt was struck, then your verdict should be for the defendant, as well as if it shows that it was struck on the highway; but if the facts directly proven, and the fair and natural inferences arising therefrom, fairly prove that the colt was struck on defendant's right of way, then your verdict may be for the plaintiff.⁷

§ 1984. Neglect to Ring the Bell, etc., Prima Facie Evidence of Negligence. The jury are instructed that in a suit against a railroad company for killing stock at a road crossing, an omission, on the part of the company, to ring a bell or sound a whistle continuously for a distance of at least (eighty) rods before reaching the crossing, if proved, constitutes a *prima facie* case of negligence against the company.⁸

§ 1985. Burden of Proof as to Ringing Bell. The court instructs the jury, that it is not for the defendant to prove that the bell was rung and kept ringing for eighty rods before the engine reached the highway crossing. It is incumbent upon the plaintiff to prove, by a preponderance of the evidence, that said bell was not rung and kept ringing for eighty rods before the engine reached said crossing.⁹

§ 1986. Must Exercise Reasonable Care and Watchfulness to Avoid Injuring Stock. (a) If the jury believe, from the evidence, that the (cow) in question was killed by a passing train of cars on the defendant's road, and that before she was killed she was in plain view of the engine driver and fireman in charge of the engine, and that she was seen, or could have been seen, by them by the use of ordinary care and attention, in time to have slackened the speed of the train and avoided the accident, and that no efforts were made by them in that direction, this was such negligence as renders the company liable; provided, the jury find, from the evidence, that plaintiff's own negligence did not contribute to the injury.

(b) The court instructs the jury, as a matter of law, that a railroad company is liable for stock killed upon its track, where such killing results from the want of ordinary care and caution in the running of its trains, and the plaintiff's own negligence does not materially contribute to the injury. To render the company liable in such cases, it is not necessary that the killing should be wantonly or willfully done by its servants or employees.¹⁰

§ 1987. Speed Through Cities and Villages—Limited by Ordinance.

(a) The jury are instructed, that when a railroad company runs its trains through a city, incorporated town or village, at a greater rate of speed than is permitted by the ordinance of the city, town or vil-

7—Crodgy v. C. R. I. & P. R. Co., 91 Ia. 598, 60 N. W. 214 (216).

8—I. C. R. Co. v. Gillis, 68 Ill. 317.

9—P. D. & E. R. Co. v. Foltz, 13 Ill. App. 535.

10—Rockford, R. I. & St. L. R. Co. v. Rafferty, 73 Ill. 58.

lage, and stock is killed by such train while so running, the killing will be presumed to have been done through the negligence of the company.¹¹

(b) The court instructs the jury that it is negligence on the part of a railroad company to run its trains through a city, incorporated town or village, at a rate of speed prohibited by law; and if a railroad company does so run its trains, and thereby injures or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury to such property, the company will be liable.¹²

(c) The court instructs the jury, that it is gross negligence on the part of a railroad company to run its trains through a city, incorporated town or village, at a rate of speed prohibited by law; and if a railroad company does so run its trains, and thereby causes the death of a person, who is himself in the exercise of reasonable care and caution to avoid injury, the company will be liable.¹³

(d) It is the duty of a railroad company, whose road runs through a city or village, to run its trains while in the city or village at such a rate of speed as to have them under control, so as to be able to avoid injury to persons or property, though there is no ordinance of such city or village on the subject; and if it fail to do so, it will be guilty of negligence.¹⁴

(e) The court instructs the jury that although the law presumes that where a train is running at a rate of speed in excess of that fixed by the ordinance of a village, and property is struck and injured by the train, that the injury was the result of negligence on the part of the railroad company, yet such presumption of negligence may be rebutted by the evidence; and in this case, if you believe from the evidence that the injury in question was not caused by reason of the north-bound train running at a rate of speed in violation of the ordinance of the village of M., but that it was caused by the defendant's horses becoming frightened at the train, and that the horses were not frightened by reason of the speed of the train, but because they were afraid of a locomotive, then you are instructed that the plaintiff cannot recover upon the ground alone that the train was running at a greater rate of speed than that fixed by the ordinance of the village of M.¹⁵

11—T. P. & W. R. Co. v. Deacon, 63 Ill. 91; Monahan v. Keokuk, etc., R. Co., 44 Ia. 523; Brusberg v. Milwaukee, etc., R. Co., 50 Wis. 231, 6 N. W. 821.

12—C. & E. I. R. Co. v. Crose, 113 Ill. App. 547 (555), aff'd 214 Ill. 602, 73 N. E. 865.

13—C. & A. R. Co. v. Becker, 84 Ill. 483; C. & E. I. R. Co. v. Cross, 113 Ill. App. 547 (555), aff'd 214 Ill. 602, 73 N. E. 865.

14—Chi. & A. R. Co. v. Engle, 84 Ill. 397.

15—C. & E. I. R. Co. v. Crose, 113

Ill. App. 558, aff'd 214 Ill. 602, 73 N. E. 865.

"This instruction fully and correctly stated the law on this subject, and supplied the omission from appellee's instruction. It is insisted that appellee's instruction is a positive statement that a railroad company is liable for all damage done by its trains while running through an incorporated city or village at a prohibited rate of speed if the injured party was exercising reasonable care and caution, and is irreconcilable with, and

INJURIES BY FIRE.

§ 1988. **Prima Facie Negligence.** (a) The court instructs the jury, that if they believe, from the evidence, that the plaintiff's property was injured by fire, caused by fire or sparks escaping from defendant's locomotive, while passing along the railroad, in manner and form as charged in the plaintiff's declaration, then, under the laws of this state, these facts make a *prima facie* case of negligence against the defendant; and the burden of proof is then upon the defendant to rebut this *prima facie* case, by showing affirmatively that at the time in question the engine was properly constructed and equipped with the best approved appliances for preventing the escape of fire; that these appliances were all in good repair and condition, as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in such repair and condition, and that the engine was carefully and skillfully handled, as regards the escape of fire there-

could not be cured by appellant's instruction above quoted. In *C. B. & Q. R. Co. v. Haggerty*, 67 Ill. 113, the Supreme Court say immediately following the quotation we have above given: 'Had defendant's counsel been apprehensive that the jury might be misled by the instruction as to the character of the presumption, he might have asked, on his part, an explanatory instruction to the effect that the presumption was not a conclusive but only a *prima facie* one. And such, in effect, may be considered the fourth instruction which was given on behalf of the defendant.' That instruction was to the effect that if plaintiff's cow was on the track she was wrongfully there, and if the jury believed, from the evidence, that she was injured without the fault of the defendant and while its employees in charge of the train were exercising proper care and diligence to avoid injury, then it would not be liable. If the instruction complained of in that case could be cured by the one given, it appears to us that there is equally as strong or stronger ground for holding that appellee's fourth instruction in this case was cured by the one we have quoted given for appellant. But if the jury were told in plain and explicit terms that while the law presumes an injury inflicted by a train running at a prohibited rate of speed was the result of negligence of the company, still such presumption is

subject to be rebutted by proof, and that if the jury believe that appellee's injury was not caused by the train running at a rate of speed prohibited by the ordinance but was caused by the horses becoming frightened at the train because they were afraid of the locomotive and not because of its speed, then no recovery could be had on the ground that the train was running at a prohibited rate of speed."

"In *I. C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521, an instruction was given for plaintiff telling the jury that running a train at a prohibited rate of speed within the city limits 'would be negligence in and of itself.' The giving of this instruction was assigned for error in the Supreme Court, and that court said: 'The writer of the instruction no doubt supposed that it was authorized by the foregoing section of the statute. It is, however, manifest, that the instruction goes somewhat further than the statute. Under the statute, negligence is presumed from a violation of its provisions, while under the instruction the running of trains at a rate of speed in violation of the ordinance is of itself negligence. We think the instruction was erroneous, but the error was so slight we do not think the jury could have been misled, and if they were not misled the error was harmless.' In that case no other instruction appears to have been given upon this question."

from; provided, the plaintiff was guilty of no fault or negligence contributing to the injury.¹⁶

(b) If the jury are reasonably satisfied from the evidence that plaintiff's cotton was burned or damaged as the result of the negligence on the part of defendant, either in the construction and equipment of its engine, or in the operation and management of the engine at the time, then the jury should find a verdict for the plaintiff.¹⁷

(c) If the jury believe, from the evidence, that plaintiff's property was injured by fire escaping from defendant's engine, while passing along the railroad, as charged in plaintiff's declaration, then this makes a *prima facie* case of negligence against the defendant; and it is not enough to rebut this *prima facie* case to show that the engine was originally constructed with the best and most approved appliances and improvements to prevent the escape of fire. The law imposes upon the company and its employes the duty of keeping a vigilant, careful watch to see that the engine is kept in proper repair, so as not to be unnecessarily dangerous to property in the vicinity of the road; and unless the defendant has shown, by a preponderance of evidence, that the engine in question was in such good repair and condition at the time of the injury complained of, or that all reasonable precautions had been taken to have it in such repair and condition, then the defendant has not rebutted such *prima facie* case made against it; provided the jury believe, from the evidence, that the plaintiff's own fault or negligence did not contribute to the injury.¹⁸

(d) If you find from the evidence that the fire mentioned in plaintiff's petition escaped from defendant's engine at the time and place charged by plaintiff, and that the fire spread to plaintiff's pasture, and injured his property, then such facts constitute a *prima facie* case of negligence on the part of defendant and in the absence of rebutting evidence sufficient to overcome such *prima facie* case of negligence, will render the defendant liable for the injury, if any, caused thereby.

(e) But if you believe from the evidence that sparks of fire escaped from the engine of the defendant mentioned in plaintiff's petition, whereby fire was communicated to defendant's pasture; and burned his grass and posts thereon, and destroyed the turf thereon, whereby the land was injured, yet if you believe from the evidence that defendant's engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agent and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then you are instructed to find for the defendant on this issue.¹⁹

16—P. C. & St. L. R. Co. v. Campbell, 86 Ill. 443; Kellogg v. C. & N. W. R. Co., 26 Wis. 223; Keesee v. C. & N. W. R. Co., 30 Ia. 73.

17—So. Ry. Co. v. Wilson, 138 Ala. 379, 35 So. 561 (564).

18—C. & A. R. Co. v. Quaintance, 53 Ill. 389.

19—San An. & A. P. Ry. Co. v. Ilse, — Tex. Civ. App. —, 59 S. W. 564 (565).

"That this charge is a correct

§ 1989. **But Not Conclusive Evidence of Negligence.** The jury are instructed that the mere fact that fire from the defendant's locomotive caused the plaintiff's damages is only *prima facie* evidence and not conclusive.²⁰

§ 1990. **No Recovery Against Railroad When Origin of Fire Left to Guess or Conjecture.** If the evidence, fairly considered, leaves this matter in doubt, so that you are left to guess or conjecture as to whether the fire from defendant's right of way or some other fire caused the damage complained of, there can be no recovery for the plaintiffs by reason thereof, and your verdict upon that issue must be for the defendant.²¹

§ 1991. **Rule That Burden of Proof Is on Plaintiff to Show Negligence on Defendant in Starting Fire.** The jury are instructed that the burden of proof is on the plaintiff to show conclusively that the fire that burned his barn or granary was negligently and carelessly set out by the defendant; and unless he should so show you must find for the defendant. In considering this you will bear in mind that, though the plaintiff shows that the defendant's engine did set out the fire, this of itself is not negligence, for if the defendant shows that the engine alleged to have set the fire was provided with all the appliances commonly used in preventing fire from escaping it will not be liable, for such a precaution will not allow the plaintiff to recover. The jury will bear in mind that, if the plaintiff does show that the fire was caused by the defendant, it is competent for the defendant to show that the engine or engines alleged to have caused the fire were provided with the best known appliances for preventing fire from escaping from the smokestack or ashpan; and if the defendant does prove that it has used all due care and caution to prevent fire by

statement of the law applicable to the facts in this case has been expressly decided by our supreme court in a number of cases. *Int. & G. N. R. Co. v. Timmerman*, 61 Tex. 660; *Ryan v. Railway Co.*, 65 Tex. 20, 57 Am. Rep. 289; *F. W. & D. C. R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Gal. H. & S. A. R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440."

20—*C. & E. I. R. Co. v. Goyette*, 133 Ill. 21 (29), 24 N. E. 549.

"To overcome the *prima facie* inference of negligence which arises by force of the statute from the mere fact that damages had been caused by fire communicated from a locomotive engine, it must appear not only that the engine was provided not only with the best and most approved appliances, but also that they were at the time in suitable order and repair, and that there was no negligence in their use and management. (C.

& A. R. R. Co. v. Clampit, 63 Ill. 95; *C. & A. R. R. Co. v. Quaintance*, 58 Ill. 389; *T. W. & W. Ry. Co. v. Larmon*, 67 Ill. 68; *P. C. & St. L. Ry. Co. v. Campbell*, 86 Ill. 443.)"

21—*Clifford v. Minneapolis, St. P. & S. S. M. R. Co.*, 105 Wis. 618, 81 N. W. 143 (145).

"This was the whole gist and substance of the instruction requested, namely, that the jury must find from the evidence that the damage was caused by a fire for which the defendant was responsible, and, if their conclusion to that effect could be only the result of conjecture or guess, they could not allow the damages. It was not necessary for the court to indulge in repetition of this instruction by applying it to the several places where damage was claimed to have occurred, or to any of them."

equipping the engine with such appliances, and that its engine or engines were handled by competent and careful men, and in a safe manner, you must find for the defendant, even though you may believe the fire was caused by the defendant's engine. That is, if the defendant has used care to prevent fire, it has done all that is required of it, and will then not be liable.²²

§ 1992. **Rule in Texas as to Instruction of Juries in Actions for Injuries by Fire.** (a) But if you further believe from the evidence that the engine from which such sparks escaped was equipped with the most approved spark arrester in use, and that such engine was operated at the time in a skillful manner, so as to avoid the escape of fire, as nearly as could be by the use of reasonable care, then you are instructed that the *prima facie* case arising from the mere fact of setting out the fire by sparks from said engine is rebutted, and if you so find you will find for defendant. If, from a consideration of all the evidence, the defendant has failed to show that the engine was at the time of the fire equipped with the most approved spark arresters in use, and was in good repair and skillfully handled in reference to preventing the escape of fire, then the *prima facie* case made out by proof of sparks escaping and causing the fire (if so proved) has not been rebutted.²³

(b) The jury are instructed that if, from the evidence, they believe

22—Union Pac. Ry. Co. v. Keller, 36 Neb. 189, 54 N. W. 420 (422).

"When, however, the evidence shows that a fire originated from an engine running over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Burlington & Mo. R. Co. v. Westover, 4 Neb. 268. In the case cited it is said: 'There is a direct conflict of authorities in this country on this question; in many of the cases, particularly the early ones, it being held that it devolved on the plaintiff to prove negligence on the part of the defendant. The better rule appears to be, where it is shown that a fire has originated from sparks thrown out by an engine, to require the company to show that their engine was properly constructed, equipped, and operated. The reason for the rule, as stated in a late case in Wisconsin, being, 'that the agents and employees of the road know, or are, at least, bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that

purpose, and, if so, what was their character; while, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information. Spaulding v. Railroad Co., 30 Wis. 122, 11 Am. Rep. 550, 8 Am. & Eng. Enc. Law 9, 10, and cases cited.'"

23—Texas & P. Ry. Co. v. Rice, 24 Tex. Civ. App. 374, 59 S. W. 833 (834).

"Appellant assigns error to this charge upon the ground that it is upon the weight of the evidence. We can answer the objection made no better than to quote the counter proposition of the learned counsel for the appellee: 'As a general rule of practice, it is not permissible for the court to instruct the jury that proof of certain facts will establish the fact of negligence upon which the action may be maintained, but in this class of actions a different rule has been established by the supreme court of this state, and the charge above given, in substance, is not subject to the objection that it is upon the weight of the evidence.' Gulf C. & S. F. R. Co. v. Johnson, 92 Tex. 591, 50 S. W. 563."

that sparks of fire escaped from the defendant's engine, and set fire to the bed and clothing of the plaintiff O. J., and that said fire was communicated to said plaintiff, and injured her, then such facts constitute a *prima facie* case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such *prima facie* case of negligence, will render the defendant liable for the injury occasioned thereby. If, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff's injuries, but if, from the evidence, they believe that the engine from which the sparks escaped was equipped with the most approved spark arresters in use, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of escape of sparks and fire resulting therefrom is rebutted, and if they so believe they will find for the defendant; but if, from the evidence, they believe that the defendant failed to equip its engine from which the sparks escaped that caused the fire with the most approved spark arrester in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of sparks escaping and causing the fire has not been rebutted.²⁴

§ 1993. **Statutory Rule in South Carolina.** If you come to the conclusion that this land was burnt, as charged in the complaint, then your next inquiry will be whether or not it was injured by the fire communicated by a locomotive engine of the defendant company, or a fire originating within the limits of the right of way of the road. If it did, the plaintiff is entitled to receive whatever damages you think he is entitled under the evidence.²⁵

24—Gulf C. & S. F. Ry. Co. v. Johnson, — Tex. Civ. App. —, 51 S. W. 531 (532).

25—Wilson v. So. Ry. Co., 65 S. C. 421, 43 S. E. 964 (966).

"The circuit judge read to the jury the exact language of the statute. This section is as follows: 'Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for

which it may be held responsible, and may procure insurance thereon in its own behalf.' This section of our statutory law has already been construed by this court. See Thompson v. R. R. Co., 24 S. C. 370; McCandless v. R. R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; Rogers v. R. R. Co., 31 S. C. 378, 9 S. E. 1059; Hunter v. R. R. Co., 41 S. C. 91, 19 S. E. 197. Now, the circuit judge had read the entire section to the jury, but he was very careful to tell them that they could find damages for the fire set out by the sparks from the engine, as the complaint only covered injuries from that source. The testimony was confined to this issue. No harm could result to the railroad company from any other source. This is what governed the jury."

§ 1994. Elements Constituting Negligence in Injuries by Fire.

(a) It is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, and other acts indicating an unusual course in operating the engine—are things the jury may consider in determining whether or not the defendant was guilty of negligence.

(b) You have a right to take into consideration every fact and circumstance which tends to demonstrate, subject to the explanation of the defendant, the kind of care and caution usually exercised by defendant's employes in charge of the engine which alleged to have set the fire, and also the sufficiency of the equipments for preventing the escape of fire used by the defendant on this train in operating the same, and to judge as to the probable state of repair in which the engines which hauled this train were.²⁶

(c) To warrant the jury in finding for the plaintiff, you must first determine from the evidence whether fire which occasioned the damage complained of originated from the engine of defendant, as averred in plaintiff's petition; and, in addition thereto, you must find that the fire originated from the negligence of defendant's servants by means of their carelessness, or by means of defective engines or machinery, and the plaintiff did not directly by his own negligence contribute towards the destruction of the house and oats sued for herein.

(d) If the evidence fails to satisfy you that the fire which caused the injury originated from the defendant's engine, you will inquire no further, and at once render a verdict for the defendant; and you will bear in mind that it is incumbent upon the plaintiff, by a preponderance of the evidence, to satisfy you that the fire which did the injury originated from the defendant's engine.

(e) If you are satisfied that the fire did originate from the defendant's engine, as claimed, then the burden is upon the defendant to remove a presumption, though small, indeed, of negligence; to show you that the engine of the defendant from which the fire escaped was in good order, properly constructed and provided with the usual appliances and spark arrester to prevent the escape of fire; and if you so find, then it is your duty to find for the defendant, as the defendant would not be liable if it used the most approved appliances, engine and machinery, and it was carefully handled and managed by the servants of the defendant, unless the jury believe the defendant or its employes were guilty of actual negligence.

(f) Though the jury believe from the evidence that the engine of defendant was supplied with a "spark arrester" and other contrivances to prevent the escape of fire from the engine, of the most approved style and pattern, yet, if the jury believe from the evidence that the employes or servants of defendant operating its locomotives at the time of the fire mentioned in the petition failed or neglected

to exercise due care and caution in so operating and running said locomotives, and that for want of such due care and caution the said fire was communicated by said locomotives or engines to the house of plaintiff, described in the petition, then they will find for the plaintiff.

(g) You are the sole judges of the credit that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be, provided the jury believe from all the evidence that such witness is mistaken or has knowingly testified falsely. Take this case, and from all the facts and circumstances of the case return such a verdict as you believe to be just.²⁷

§ 1995. **Heavy Grade Requiring Engines to Be Worked Hard and to Emit Sparks.** I instruct you that it is the duty of the railroad company to see to it that its engines and trains are skillfully and carefully managed. And in this connection I instruct you that if you should find from the evidence that there was a heavy grade at the point where the alleged fire occurred, and that a train passing said point just prior to the discovery of the fire was so heavily loaded as to require the engines to be worked hard, and to cause them to emit an unusual quantity of sparks, these are circumstances which you have a right to consider in determining whether or not the engines attached to said train were skillfully and carefully managed.²⁸

§ 1996. **Running Engine Past Cotton Compress or Yard—Series.**

(a) Even if the jury should believe from the evidence that the spark which started the fire originated from a locomotive of the defendant, the statute only makes it *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to the fire, liable to be rebutted by proof of such reasonable care and skill; and if the jury should further believe from the evidence that the fire was set out from a locomotive of the defendant, nevertheless, if they should further believe from the evidence that the locomotive was properly constructed and in good order with a reasonably safe and proper spark arrester, and that the locomotive was handled with due care, and that the spark arrester was in good condi-

27—Union Pac. Ry. Co. v. Keller, 36 Neb. 189, 54 N. W. 420 (421).

"These five instructions, taken together, submit the questions involved fairly, as shown by the testimony, to the jury. It devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over the defendant's railway; and the evi-

dence may be wholly circumstantial,—as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and, second, facts tending to show that it probably originated from that cause, and no other. Field v. Railroad Co., 32 N. Y. 339; Karsen v. Railroad Co., 29 Minn. 12, 11 N. W. 122; Longabaugh v. Railway Co., 9 Nev. 271; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 8 Am. & Eng. Enc. of Law 7, 8, and cases cited."

28—Anderson v. Oregon R. Co., 45 Ore. 211, 77 Pac. 119 (121).

tion, but on account of a high wind prevailing at the time, or other causes over which defendant had no control, a spark was accidentally blown or carried onto the cotton, and that it was accidentally set on fire, without any negligence or fault on the part of defendant or those in charge of the locomotive and train, then the jury will find for the defendant.

(b) If the jury believe from the evidence that, after the M. & O. railroad was built, the compress or yard at which the cotton was burned was established along side its right of way and close to the railroad track, then those in charge of the compress and yard and those who stored cotton there, are presumed to know that trains are expected to be run with regularity, and if there are any special risks arising from no want of care in the proper equipment and management of the engines and trains those risks are not chargeable to the railroad, but are incident of the situation, and the extra risk from accident must devolve on the owners and insurers of the cotton. There was no obligation on those in charge of the locomotive to shut off steam, and while they must act in reference to circumstances, so as not to create an unusual or unnecessary danger, still they are entitled to transact the business in the usual and necessary manner; and if the jury further believe from the evidence that those in charge of the locomotive from which the fire is claimed to have originated, were operating it at the time in the usual and necessary manner, and there was no want of care in the proper equipment and management of the locomotive, they will find for the defendant.

(c) If the jury believe from the evidence that the locomotive by which the fire is claimed to have been set was properly constructed and supplied with the approved appliances to prevent the escape of fire, which were in good repair at the time, and that the engineer and firemen were competent, and ran the locomotive under a light head of steam, and were not running over six miles an hour, and were not guilty of negligence, then the defendant had discharged his whole duty to the owners and insurers of the cotton, and no recovery can be had, even though the fire was set out by the locomotive.

(d) If the jury believe from the evidence that the fire in controversy was actually set out by a locomotive of the defendant and that it was at the time within the corporate limits of the city of W. and was running more than six miles an hour, and while, if nothing more appeared, the plaintiff under the law would be entitled to recover, yet, if more does appear from the evidence, and all the facts and circumstances in evidence before the jury, then they should take into consideration, in arriving at their verdict, all such facts and circumstances, and if from all these they believe that there was proper care in the proper and reasonable equipment and management of the locomotive, and that such excess of speed had nothing to do with the fire, and that the fire was in no way caused or contributed to by such excess of speed, they will find for the defendant on that issue.

(e) If the jury believe from the evidence that the cotton in con-

troversty was set on fire by the locomotive of the defendant which was at the time running more than six miles an hour within the corporate limits of the city of W., but if they further believe from the evidence that the faster a locomotive drawing a train runs, the less liable it is to emit sparks or to set fire to contiguous objects, and that the locomotive in controversy was in fact less liable to throw out fire or sparks by reason of the fact that it was running more than six miles an hour, then they are authorized to disregard the rate of speed; and if they further believe from the evidence that otherwise there was no want of care in the proper usual and reasonable equipment or management of the locomotive, they are entitled to find for the defendant.

(f) The court instructs the jury for the defendant, that although you may believe from the evidence that the defendant ran its engine and trains past the property of the plaintiff at the time the fire occurred at a rate of speed exceeding six miles an hour, yet unless you are satisfied from the evidence that the fire was caused by sparks from one of their engines or trains, you must return a verdict for defendant railroad.²⁹

§ 1997. Reasonable Care Required to Prevent Spread of Fire. (a) It is the duty of a railroad company to take all reasonable precautions to prevent the spread of fire from its locomotives. And while property owners adjoining take the risk of injuries unavoidably produced by fire used for generating steam, yet, for any negligence in the use of it, the company will be liable.

(b) Proof of the destruction of property, by fire escaping from a locomotive, raises a *prima facie* case of negligence, which the defendant must rebut by showing the absence of negligence, by a preponderance of evidence, or that the plaintiff's own fault or negligence contributed to the injury.³⁰

§ 1998. Must Provide Most Improved Apparatus to Prevent Escape of Fire. (a) The jury are instructed, that railroad companies are required by law to keep constantly in use the most approved machinery and apparatus to prevent the escape of fire from their engines, to the injury of property along their lines, so far as this can be done by the exercise of all reasonable care, skill and vigilance.³¹

(b) If you find by a preponderance of the evidence that the fire was started by sparks emitted and thrown from one of the defendant's engines while being operated on defendant's railroad, the defendant will be liable, unless you further find that at that time it had in use on said engine the best appliances for the preventing of the setting out of fires, and that the said engine was at the time properly handled.³²

²⁹—*Clisby v. Mobile & O. R. Co.*, 78 Miss. 937, 29 So. 913 (915).

³⁰—*Coale v. Hannibal, etc., R. Co.*, 60 Mo. 227.

³¹—*T. P. & W. R. Co. v. Pindar*, 53 Ill. 447; *C. & A. R. Co. v. Pen-*

nell, 94 Ill. 449; *C. & A. R. Co. v. Quaintance*, 58 Ill. 389.

³²—*German Ins. Co. v. C. & N. W. Ry. Co.*, 128 Ia. 386, 104 N. W. 361 (363).

(c) The law does not require a railroad company to provide and use the very best known appliances that mechanical skill and ingenuity have been able to devise and construct to prevent the escape of sparks from its locomotives, but they are required to use all reasonable means to that end, and where a new improvement of such appliances has been made, or a new invention introduced, which has been tested and generally approved as better than that it is using, it is required to adopt and use the better appliances.³³

(d) The court instructs you, that the defendant was not bound to furnish the very best or most improved kind of machinery or apparatus to prevent the escape of fire from its engine; and if you believe, from the evidence, that the engine, etc., connected with the same were reasonably safe, and such as are ordinarily used for the purpose for which these were intended, and that the defendant was not otherwise guilty of negligence, then the defendant would not be liable in this case.

(e) Although you may believe, from the evidence, that an improvement has been made and patented upon engines similar to the one in question, or upon the apparatus used in connection therewith, for preventing the escape of fire, yet the defendant was not, on that account, bound to purchase or use such improvement; the defendant was only under obligation to use reasonable and ordinary care in providing suitable and safe machinery, and to provide such as was reasonably safe.³⁴

(f) The court charges the jury that if they believe from the evidence that one of the defendant's engines threw sparks upon plaintiff's shed, or directly against it, and that the sparks so thrown themselves set fire to the shed, and that the burning shed communicated the fire to the plaintiff's other property; and, further, that such engine was furnished with a spark arrester and other appliances of approved character to prevent, so far as possible, throwing sparks, and was properly handled by the engineer, and that such spark arrester and other appliances were in good condition, then they ought to find a verdict for the defendant.³⁵

(g) If you believe from the evidence that fire was communicated from a locomotive or locomotives of the defendant to the premises of plaintiffs and interveners at a point or points without defendant's right of way, as alleged in their petition and plea, and that said fire or fires burned over the premises of plaintiffs and interveners, or part or parts thereof and destroyed any grass, cane, or wood thereon, or destroyed or injured any grass turf, or destroyed or injured any timber thereon, as alleged in plaintiff's petition and interveners' plea, and if you further believe from the evidence that the defendant had used ordinary care to have its locomotives equipped with the best appli-

33—Toledo, W. & W. Rd. Co. v. Corn, 71 Ill. 493.

34—Camp Point Mfg. Co. v. Ballou, 71 Ill. 417.

35—Louisville & N. R. Co. v. Sullivan T. Co., 138 Ala. 379, 35 So. 327 (331).

ances in general use by railway companies for preventing the escape of fire and sparks, and that defendant had used ordinary care to keep such appliances in repair and serviceable condition, and that defendant's employes in charge of its locomotives used ordinary care to operate the said locomotives, so as to prevent the escape of fire and sparks, then upon all claims made by plaintiffs and interveners in their pleadings for damages, if any, resulting from fires so communicated at points without defendant's right of way, you will find for defendant.³⁶

(h) You are instructed that if you find from the evidence that the plaintiff's lands were burned over by fire at or about the time, as alleged in his petition, and that said fires were set out by sparks emitted from the engines of the defendant company, and you further find that the engines of the defendant company were properly equipped with the most approved spark arresters and appliances determined by practical railroad men to be among the best in use on railroads for the prevention of the escape of sparks, fire, and cinders from locomotives, and that such apparatus and appliances were in good order and repair and that the engines were carefully and properly handled by competent employes of the defendant company at the time of the alleged setting out of the fires complained of by said plaintiff, then you are instructed that although you may believe that the fires were set out by the defendant's engines the burden of proof is upon the plaintiff to show that the damages complained of was the result of the negligent act or omission of the defendant or its employes; and if you find from the evidence that the said fires (if any) were so caused by the negligence of said defendant or its employes, then you will find for the plaintiff such an amount as damages as you find from the evidence he has sustained; but if you find from the evidence that said fires (if any) were caused or originated from some other source than from the defendant or its employes or its engines, and was not set out by defendant's engines or by it or its employes, or

36—St. L. S. W. Ry. Co. v. Connally, — Tex. Civ. App. —, 93 S. W. 206 (208).

"It is contended that a charge that requires a railroad company to have its locomotives equipped with the best appliances in general use by railway companies for preventing the escape of fire and sparks, and that requires such company to use ordinary care to keep said appliances in repair and serviceable condition, imposes a burden on such company not warranted by law. We understand, where fire is communicated by the locomotives of the defendant to the premises of the plaintiff lying outside of the right of way, the law is that the defendant, to make out its defense, must show that

it has used ordinary care to have its locomotives equipped with the best appliances in general use by railway companies for preventing the escape of fire and sparks, and that it has used ordinary care to keep such appliances in repair, and that defendant's employes in charge of its locomotives used ordinary care in operating the said locomotives to prevent the escape of fire and sparks. *Biering v. Railway*, 79 Tex. 586, 15 S. W. 576; *Dillingham v. Whittaker*, — Tex. Civ. App. —, 25 S. W. 723; *Gulf C. & S. F. R. Co. v. Reagan*, — Tex. Civ. App. —, 32 S. W. 846; *St. L. S. W. R. Co. v. Gentry*, — Tex. Civ. App. —, 74 S. W. 607. The charge was in accord with this principle and is correct."

if you find that said fires (if any) were set out by the defendant or its employes or engines, but that neither said defendant nor employes were guilty of negligence in so setting out said fires (if any) then the plaintiff should not recover, and you will find for the defendant.³⁷

§ 1999. **Effect of Failure to Use Most Approved Apparatus to Prevent Escape of Fire or to Use Ordinary Care in Preventing Escape of Sparks.** (a) The court instructs the jury that if, from the evidence, they believed that sparks of fire escaped from the defendant's engine, and set fire to the bed and clothing of the plaintiff, J., and that said fire was communicated to said plaintiff, and injured her, then such facts constitute a *prima facie* case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such *prima facie* case of negligence, will render the defendant liable for the injury occasioned thereby. If, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff's injuries, but if, from the evidence, they believe that the engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of escape of sparks, and fire resulting therefrom, is rebutted, and, if they so believe, they will find for the defendant; but if, from the evidence, they believe that the defendant failed to equip its engine from which the sparks escaped that caused the fire, with the most improved spark arresters in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of sparks escaping and causing the fire has not been rebutted.³⁸

(b) If you believe from the evidence that sparks escaped from

37—St. L. S. W. Ry. Co. v. Connelly, — Tex. Civ. App. —, 93 S. W. 206 (208).

"This special charge applied the law to the facts, and affirmatively submitted the defenses which the evidence in any way tended to support."

38—Gulf C. & S. F. Ry. Co. v. Johnson, 92 Texas 591, 50 S. W. 563.

"The charge in this case did not shift the burden of proof from the plaintiff to the defendant, as is claimed, but, as in every other case where a *prima facie* right is established, it called upon the defendant to meet the case made in order to defeat the plaintiff's right of recovery. As a general rule of practice, it is not permissible for the court to instruct the jury that the proof of certain facts will es-

tablish the fact of negligence upon which the action may be maintained; but in this class of actions a different rule has been established by the decisions of the supreme court of this state, and the charge before copied is not subject to the objection that it is upon the weight of the evidence. Int. & G. N. R. Co. v. Timmermann, 61 Tex. 660; Ryan v. M. K. & T. R. Co., 65 Tex. 13; Mo. Pac. R. Co. v. Bartlett, 69 Tex. 79, 6 S. W. 549; Gulf C. & S. F. R. Co. v. Benson, 69 Tex. 407, 5 S. W. 322, 5 Am. St. 74; Gal. H. & S. A. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440; Campbell v. Goodwin, 87 Tex. 273, 23 S. W. 273; Tex. & P. R. Co. v. Levine, 87 Tex. 437, 29 S. W. 466; Railroad Co. v. McDonough, 1 White & W. Civ. Cas. Ct. App. 354."

one of defendant's engines and set out a fire which destroyed plaintiffs' property, and if you further believe from the evidence that the plaintiffs did not contribute to the starting of said fire, then you will find for plaintiffs the market value of all their property so destroyed at the date of its destruction, with interest thereon at the rate of six per cent. per annum from the 25th day of August, —, unless you find from the evidence that said engine was equipped with the most approved spark arresters in use, in good order, and that the agents and employes of defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks therefrom.³⁹

§ 2000. **Dry Weeds and Grass.** (a) If the jury believe, from the evidence, that the defendant, negligently and carelessly, allowed dry grass, weeds, and other combustible material, to accumulate on its right of way adjoining plaintiff's premises so as to unnecessarily increase the hazard from fire, and that by reason of such accumulation of combustible material, the fire was kindled, and communicated to the fence and field of the plaintiff, and further, that the plaintiff's own negligence in no manner contributed to the kindling or the spreading of the fire, then the jury should find for the plaintiff the amount of damages, if any, which are proved to have resulted from said fire. And in such case it makes no difference whether the best appliances to prevent the escape of fire were or were not used on the engine from which the fire escaped, if the jury believe, from the evidence, that the fire did escape from defendant's engine.⁴⁰

(b) That if the jury find from the evidence that the defendant company permitted dead grass and straw, dried-up leaves, and an accumulation of combustible matter to exist on its right of way, so near the track as to catch fire from the engine, and it did catch from the engine, and the fire spread across the lands of another person to plaintiff's lands, defendant company would be liable to plaintiff for damages sustained. There is no evidence of contributory negligence upon the part of plaintiff.⁴¹

(c) The jury are instructed, that in determining the question, whether or not the defendant was guilty of negligence, which contributed to the fire in question, in permitting grass, dry weeds or leaves to accumulate within its right of way at the point where the fire in question occurred, the jury should consider and determine from the evidence, whether the defendant permitted such an accumulation of dry grass, weeds and leaves or other combustible material upon its right of way at the point in question, as would not have been

39—Tex. & P. R. Co. v. Woolbridge, — Tex. Civ. App. —, 63 S. W. 905 (907).

40—Flynn v. San Francisco R. Co., 40 Cal. 14; Martin v. W. U. R. Co., 23 Wis. 437; Hewey v. Nourse, 54 Me. 256; Ingersoll v. Stockridge,

etc., R. Co., 8 Allen 438; I. C. R. Co. v. Nunn, 51 Ill. 78; Poepper v. M., etc., R., 67 Mo. 715; Jones v. M. C. R. Co., 59 Mich. 437, 26 N. W. 622.

41—Blue v. Aberdeen & W. E. R. Co., 116 N. C. 955, 21 S. E. 299 (300).

likely to be permitted by an ordinarily careful and prudent man upon his own premises, if his property were exposed to the same hazard.⁴²

(d) If you find from the evidence that the defendant negligently and carelessly permitted dry grass, weeds and other combustible materials to accumulate on its right of way adjoining the plaintiff's premises, so as to unnecessarily increase the hazard from fire, and that by reason of such accumulation of combustible materials, fire escaping from the defendant's engine was kindled therein, and thence communicated to plaintiff's property, which was thereby destroyed, without the negligence of the plaintiff in any manner contributing thereto, you should find for the plaintiff, even though the escape of the fire from such engine was without any fault on defendant's part.⁴³

(e) If you believe from the evidence that the defendant negligently permitted grass and weeds to accumulate and become dry on its right of way, and that fire was communicated from locomotives of defendant to such grass and weeds and spread therefrom to premises of plaintiffs and interveners or any of them, and burned over part or parts of said premises, and destroyed grass and cane thereon, and destroyed any cord wood thereon and damaged and injured or destroyed grass, turf or trees thereon, as alleged in their petition and plea, then you will find for the plaintiffs and interveners for all such damages, if any, so caused.

(f) If you believe from the evidence that the fire was communicated from defendant's locomotive or locomotives to the premises of plaintiffs and interveners, or either of them, at a point or points without defendant's right of way, and that such fire burned over the premises of plaintiffs and interveners, or a part or parts thereof, and destroyed any cane or grass growing thereon, and destroyed any cord wood, corded thereon, or damaged and injured plaintiffs' or interveners' land by destroying or injuring the grass turf thereon, or destroying and injuring any forest trees thereon, as alleged in their petition and plea, then you will find for plaintiffs and interveners all such damages, if any, as were caused by fire communicated, unless you find for the defendant under other instructions hereinafter given.⁴⁴

(g) If, at the time the property in question was destroyed, the defendant's right of way at the place where the fire started, if it started on the right of way, was free and clear from dry grass, weeds and other combustible materials, then in that case the defendant would not be liable in this action on the second ground above mentioned.⁴⁵

(h) Although a railroad company has the right to use fire in gen-

42—*Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14.

43—*Union Pac. R. Co. v. Ray*, 46 Neb. 750, 65 N. W. 773.

"The correctness of the general principle stated in this instruction is established by *Railroad Co. v. Westover*, 4 Neb. 268, and was

again recognized in *Omaha F. & Ex. Ass'n v. Mo. Pac. R. Co.*, 42 Neb. 105, 60 N. W. 330."

44—*St. L. S. W. R. Co. v. Connelly*, — Tex. Civ. App. —, 93 S. W. 206.

45—*Union Pac. R. Co. v. Ray*, 46 Neb. 750, 65 N. W. 773 (774).

erating steam, yet if, by negligence in the condition of its property, which contributed to the damage by reason of such fire, such railroad is liable for any damage that may so result.

(i) A railroad has a right to use its property in the running of its trains. It has also the right to use fire to generate steam for the purpose of running its trains. But, while this is true, I charge you that the railroad must so use its property and the fire necessary for the generating of steam, in such manner, as to prevent injury to adjoining property, if it can reasonably do so.

(j) If the jury should believe from the evidence that this fire was caused by sparks from the engine of the railroad company, then, though they should further find that the engine was properly equipped with improved spark arresters, and was in all respects properly managed, should the proof satisfy the jury that the railroad company failed to keep its track and right of way clean of grass, likely to be ignited by sparks, this fact, if it be a fact, will make the defendant liable for the damage resulting from the fire.

(k) It is a matter of common knowledge that, in the month of February, Bermuda grass, in this latitude, is not in a green or growing state.

(l) If it be a fact shown in this case that the railroad company permitted dry grass to be and remain on its right of way, liable to be ignited by sparks from its engine, then I charge you that this fact may be overlooked by the jury to determine whether the railroad company was guilty of negligence.

(m) If the jury find from the evidence that the fire was discovered immediately after the passing of the engine along where the fire was, then the burden of proof is cast upon defendant to show that the fire did not originate from its engine, or that its engine and property were in good order and properly managed.

(n) If it be a fact shown in this case that the railroad company permitted dry grass to be and remain on its right of way, liable to be ignited by sparks from its engine, then I charge you that this was negligence on the railroad company.⁴⁶

§ 2001. Damages to Turf from Which Grass Is Burned. If you find that the turf, from which the grass was burned, was injured by said fire, you will find for the plaintiffs such additional damages, if any, as the evidence may show will compensate plaintiffs for such injury to the turf.⁴⁷

46—*Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989 (990).

47—*Texas & P. R. Co. v. Rice*, 24 Tex. Civ. App. 374, 59 S. W. 833 (834).

"The objection assigned to this charge is that the proper measure of damages is not given; that, injury to the turf being injury to the land itself, the true measure of damages is the difference in the

market value of the land immediately before the injury and immediately thereafter. This is the general rule, but in this case, where the allegations and proofs were as to damages resulting from the diminished power of the turf to produce grass for pasturage purposes the succeeding year, we think the court's charge was correct, and the rule as given therein

§ 2002. **Degree of Care Required of Land Owner.** (a) The court instructs the jury, that the owner of land adjoining a railroad track is as much bound to keep his land free from unusual and dangerous accumulations of combustible matter as a railroad company is its right of way. And if the owner or occupant permits an unusual and dangerous accumulation of dead grass, dry leaves, or other combustible material to accumulate on his land next to the company's right of way, and a fire is ignited on the right of way, and is thence communicated to the fields adjoining, by means of such unusual and dangerous accumulations of combustible material, then the negligence of the owner will be held to have contributed to the loss and injury, and in such a case the owner of the property injured cannot recover for such injury, unless the jury believe, from the evidence, that his negligence was but slight, and the negligence of the railroad company was gross, as explained in these instructions.⁴⁸

(b) While the owner of property in danger of loss is charged with the duty of saving it from destruction if he can do so with the exercise of reasonable care and precaution, yet he is not bound to use unusual care and caution in anticipation that it may be negligently destroyed by another, so that if in this case the plaintiff's property was negligently set on fire by sparks from one of the locomotives of the defendant, while it was the duty of appellant to save it from destruction if he could do so by the exercise of reasonable care and caution, yet it was not bound to use the care and precaution of providing waterworks and appliances as means of extinguishing the fire, and its failure to do so would not constitute contributory negligence.⁴⁹

(c) The court instructs you, as a matter of law, that it is not negligence on the part of the owner, or occupant, of property injured by fire escaping from an engine passing along a railroad, that he has used the property in the manner, or permitted the same to be used, or remain in the condition in which it would have been used or remained, had no railroad passed through or near it.⁵⁰

(d) If you believe from the evidence that plaintiff, knowing that the straw in question was easily set on fire, placed same, in an unprotected condition, nearer defendant's railroad tracks, where he knew it was daily operating trains, than a man of ordinary prudence and caution would do, then plaintiff would be guilty of contributory negligence, and would not be entitled to recover in this case.⁵¹

(e) But if you believe from the evidence that the said engine

more appropriate to the case alleged and proved than the rule contended for would have been. *Gulf C. & S. F. R. Co. v. Jagoe*, — Tex. Civ. App. —, 32 S. W. 717; *Ft. W. & N. O. R. Co. v. Wallace*, 74 Tex. 581, 12 S. W. 227; *Gulf C. & S. F. R. Co. v. Jones*, 1 Tex. Civ. App. 372, 21 S. W. 145."

48—*C. & N. W. R. Co. v. Si-*

monson, 25 Ill. 504; *Ohio & M. R. Co. v. Shanefeet*, 47 Ill. 497.

49—*Indiana Clay Co. v. B. & O. S. W. R. Co.*, 31 Ind. App. 258, 67 N. E. 704.

50—*Flynn v. S. F. & S. J. R. Co.*, 40 Cal. 14; *Kellogg v. C. & N. W. R. Co.*, 26 Wis. 223; *Del. L. & W. R. Co. v. Salmon*, 39 N. J. L. 299.

51—*Ft. Worth & R. G. R. Co. v.*

was equipped with the most approved spark arresters in use, in good order, and that the agents of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then you are instructed that plaintiffs cannot recover unless you believe from the evidence that the defendant company, by failing to use ordinary care, had permitted combustible material to be and accumulate on its right of way, and that sparks escaping from said engine set fire to the combustible material on said right of way, and communicated to and destroyed the plaintiffs' property. If you find from the evidence that the plaintiffs or their employes, through want of proper care, as above defined, negligently caused or permitted shucks or other combustible material to be on or about their premises in close proximity to their buildings, or to accumulate on defendant's right of way, and if you believe that such negligence on the part of plaintiffs or their employes, if it was negligence, aided or contributed in starting the fire, then you will find for the defendant, even though you may find that the defendant company was guilty of all the negligence charged against it.⁵²

§ 2003. Effect of Plaintiff's Building Being on Defendant's Right of Way. (a) If you should find that the plaintiff's building which was burned was on the defendant's right of way, and was not used as a warehouse for storing goods awaiting shipment, and that plaintiff, or the one of whom he purchased the building, was ordered by the defendant to remove the building from the ground, and neglected and refused to comply with such order, he cannot recover, and you must find for the defendant, for, after being warned to remove from the right of way, the law presumes he took all the risk upon himself of loss in not complying with the demand, and, remaining there, did so at his own risk. You cannot presume that he was ignorant of the danger and exposure to fire.

(b) If you find that the plaintiff was on the defendant's right of way by virtue of a lease, either verbal or written, made with the defendant, or from any one as a sublessee, to whom it had rented the ground, and that one of the conditions of the lease was that the lessee assumed all risks of damage by fire caused by defendant as a part of the consideration, he cannot recover and you must find for the defendant. Such a release from damages would be valid, and constitute a bar to plaintiff's recovering.⁵³

§ 2004. Reasonable Care and Diligence Only Required by the Company. Although the jury may believe, from the evidence, that the injury complained of was caused by sparks escaping from defendant's locomotive, this alone is not sufficient to prove negligence on the part of defendant. In order to warrant a verdict in this case, the jury must believe, from the evidence, not only that the injury

Dial, — Tex. Civ. App. —, 85 S. W. 22 (24).
52—Texas & P. R. Co. v. Wool-

bridge, —Tex. Civ. App. —, 63 S. W. 905 (907).
53—Union Pac. R. Co. v. Keller, 36 Neb. 189, 54 N. W. 420.

was caused by sparks escaping from defendant's engine, but it must further appear from a preponderance of the evidence, that the defendant was guilty of negligence in permitting such sparks to escape, or in permitting (as alleged in the declaration).⁵⁴

OBSTRUCTING HIGHWAYS.

§ 2005. Obstructing Highway by Leaving Cars Standing on Track. You are instructed that if you believe from the evidence that the servants and employes of the defendant railroad company obstructed said public highway by leaving cars or a car standing on its tracks, where the track intersects or crosses said H. street, at the times mentioned in the declaration, and that the cars were not standing there for the purpose of receiving or discharging passengers, or to receive necessary fuel and water, then the railroad company is liable and you will find for the plaintiff for each offense proven by the evidence, such a sum as you may think proper, not to exceed one hundred dollars, nor less than ten dollars for each offense so proven.⁵⁵

DEDICATION OF LANDS.

§ 2006. Dedication of Lands for Use by Railroads. (a) The court instructs the jury that a railroad corporation is a public corporation, and is an ever existing grantee, capable of taking lands by conveyance or by dedication by plat by the owner for railroad purposes.

(b) The court instructs the jury that the word "dedication" used in these instructions means an appropriation or division or setting apart by the former owners of the land in question for railroad purposes by a plat. The dedication may be made by plat and survey alone, without any declaration, either oral or on the plat, when it is noted on the face of the plat that it was intended to set apart certain grounds for the use of the public or for the use of a certain corporation.⁵⁶

SWITCHES AND FARM CROSSINGS.

§ 2007. When Switch Presumed to be Permanent—Measure of Damages for Removal. If you find from the evidence that plaintiff made an agreement with the defendant to place a switch track on its right of way near his farm, and that in pursuance of such an agreement plaintiff did, with defendant's consent, and by the terms of said agreement, furnish ties and did grading for said switch, then,

54—*Ruffner v. C., etc., R. Co.*, 34 Ohio St. 96.

55—*I. C. R. Co. v. People*, 59 Ill. App. 256 (258).

56—*L. E. & W. R. Co. v. Whitman*, 155 Ill. 514 (526), 40 N. E. 1014, 28 L. R. A. 612.

in the absence of evidence to the contrary, you are to presume that said switch was to be permanent; and if defendant removed the same without plaintiff's consent, plaintiff is entitled to recover the amount expended by him in obtaining said switch, not to exceed sixty dollars.⁵⁷

§ 2008. **Establishment of "Necessary" Plantation Roads Under Terms of Statute.** (a) While the crossing must be over a necessary plantation road, the word "necessary" is not to be construed in the sense that the road must be absolutely essential to the use of the plantation. The jury will take into consideration the size and location of the plantation, the uses to which it is devoted, the location of the railroad, and all the other facts in evidence, in determining whether the road was a necessary one for the plaintiff in the reasonable use of her plantation.

(b) Under the second count in her declaration, the plaintiff sues for the penalty prescribed by section 3561 of the Code of 1892, which requires railroad companies to make and maintain convenient and suitable crossings over its tracks for necessary plantation roads. This statute does not require the defendant to make an indefinite number of crossings for any particular person, nor that the number of crossings shall be increased to suit the caprice or promote the convenience of any single proprietor. The crossing must be for a necessary plantation road; and the plaintiff, to recover, must show an actual necessity for the plantation road; mere convenience to her is not sufficient to sustain a claim to the penalty prescribed by the law, which is to be strictly construed.⁵⁸

57—*Scholten v. St. L. & S. F. R. Co.*, 101 Mo. App. 516, 73 S. W. 915 (916).

"If it be conceded that by implication the railroad was accorded the right to remove the switch, when its operation had ceased to be profitable and plaintiff had ceased to furnish shipments of freight sufficient to warrant its further maintenance, yet it is but just that the railroad make restitution to plaintiff of that portion of the cost of its construction contributed by him, and this is attained by the verdict of the jury for plaintiff in the amount of the value of the cross-ties furnished by him (which the testimony shows the defendant removed and converted) together with the cost of the grading paid by him."

58—*Ala. & V. R. Co. v. Odeneal*, 73 Miss. 34, 19 So. 202 (203).

"The second instruction for plaintiff is a very clear and accurate expression of the law upon this subject; and the appellant's fourth instruction, in connection

with it, certainly put the law on this point, to the jury, as favorably to appellant as could reasonably be asked. *Dubbs v. Railroad Co.*, 148 Pa. St. 66, 23 Atl. 883, is a case strikingly in point, and in support of our view. There, as here, it was urged that, by making a detour of half a mile, the crossing already established could be reached, and would thus be made to serve all necessary uses. But the court said: "Thus by making a detour of half a mile, he can reach the southern side of his farm. If it were a detour of five miles, the principle would be the same. The plain object of the act of 1849 was to compel railroad companies to give the owners of farms a convenient mode of access from one part to the other, when divided by a railroad. While it may not be impossible for a farmer, in gathering his crops, to make a detour of half a mile in getting from one field to an adjoining field, it would manifestly be intolerably inconvenient."

§ 2009. Less Degree of Care Required at Farm Crossings than at Public Crossings. (a) The court instructs the jury that railroad companies are not required to make and maintain in repair farm crossings or private crossings in the State of Illinois for the convenience of adjoining land owners so that the same will be safe for persons on foot at all times, but such farm crossings or private crossings for the convenience of adjoining land owners are erected and maintained to facilitate the business of farming, and the law does not require that such crossings shall be kept in repair for the benefit of foot passengers to the same extent and in the manner as public crossings, the duty of the railroad company in such case being only to use ordinary care in the construction and maintenance of the same with respect to the uses and purposes for which such crossings are maintained, namely for farm purposes.

(b) The court instructs the jury that the law requires of persons using a farm crossing over a railroad the exercise of a higher degree of care and caution in the use of such farm crossing to avoid injury from trains being operated along such railroad than it requires of persons using a public crossing at a public highway, and the jury are instructed that the law imposes upon the railroad company a correspondingly less degree of care in the operation of its trains over a farm crossing than if the place was a public crossing.⁵⁹

§ 2010. Injuries to Stock at Farm Crossings. The court instructs the jury that it was the duty of the defendant, prior to and at the time of the accident referred to in evidence in this case, to erect and maintain lawful fences on the sides of its railroad where the same passed through, or along, or adjoining, inclosed or cultivated lands, or uninclosed lands, with openings and gates therein to be hung and having hooks or latches so that they could be easily opened and shut, at all necessary farm crossings on its road; and if you believe from the evidence that the plaintiff's mare on or about ———, 19—, while lawfully upon inclosed lands through which defendant's road ran in B. township, P. county, Missouri, entered upon the defendant's railroad track, through an open gate in defendant's fence along its railroad, at a necessary farm crossing where the defendant, if such is the fact, had failed or neglected to erect and maintain a gate having a latch or hook thereon, and that the same was not inside the limits of any city, town, or village, nor at the crossing of any public road and that said mare, while on said railroad track, was struck by defendant's passing locomotive or cars, and was thereby so crippled and mangled as to become entirely worthless. And if you further believe that said mare got upon said track and was crippled as above stated by reason of the failure and neglect, if any, of the defendant to provide and maintain a gate having a latch or hook as aforesaid, then your verdict must be for the plaintiff for the value of the mare at the time of the injury.⁶⁰

59—B. & O. S. W. R. Co. v. 60—Roberts v. C. & A. R. Co., 119
Keck, 84 Ill. App. 159 (168), *aff'd* Mo. App. 372, 94 S. W. 838 (839).
185 Ill. 400, 57 N. E. 197.

§ 2011. **Defective Bridge Over Farm Crossing—Duty of Railroad Company to Repair It.** If the crossing was reasonably well constructed, the next question will be this: Was it permitted to become unsafe through the negligence of the railway company? Negligence, gentlemen, is the omission to do something which a reasonable person, guided by these considerations which ordinarily regulate human conduct, would do, or the doing of something which a reasonably prudent person would not do. In other words, one who fails to use the care and caution ordinarily used in like occasion by reasonably careful and prudent persons is negligent. In this case, was the defendant reasonably careful and prudent in caring for the crossing in question after its construction? So long as the bridge remains standing, and so long as the gates were not nailed up or otherwise permanently closed, or no notice given of imperfection in the bridge, it was the duty of the railway company to have kept it in reasonably good repair, considering the place at which it was situated, and the use to which it might naturally and reasonably be put. It is not necessary as suggested by counsel for the railway company, to keep men in constant attendance upon or any watch over a bridge, nor to take extraordinary care of one. It is, however, required to be reasonably careful. Now, then, considering the age of the bridge, its manner of construction, the character of the stringers and sills, the ordinary life of similar kinds of timber, the use to which it has been subjected, and any other facts in evidence pertinent to the question, it is for you to find whether the railway company was or was not reasonably vigilant or careful in the premises, and whether it did or did not act as a reasonably prudent person would have acted under like circumstances.⁶¹

61—Stewart v. C. W. & M. R. Co., 89 Mich. 315, 50 N. W. 852 (856).

CHAPTER LXX.

NEGLIGENCE—STREET RAILROADS.

See Erroneous Instructions, same chapter head, Vol. III.

IN GENERAL.

- § 2012. Street railroad companies not liable for injuries due to mere accident.
- § 2013. Negligence complained of must be proximate cause of injury—Effect of prior disability of person injured.
- § 2014. Effect of change of jurisdiction over highway from county to city.
- § 2015. No duty rests on plaintiff to inform defendant of injury.
- § 2016. But a failure to inform defendant of injury may be considered by jury.
- § 2017. No prejudice should exist against street railway corporations as such—Reading of instruction by the lawyers.
- § 2018. When fact of injury admitted and assumed on both sides.
- § 2019. Withdrawing portions of ordinance from consideration of jury by agreement.
- § 2020. Degree of care due passengers—Varying statements of different courts—Negligence defined.
- § 2021. Although not insurers of safety of passengers, street railroads must exercise highest degree of care reasonably consistent with practical operation of vehicle.
- § 2022. When burden of proof as to degree of care used shifts to defendant.
- § 2023. Street railroad company not liable when passenger is injured by his own misconduct.
- § 2024. Injury to passenger through negligent equipment, management or operation of vehicle.
- § 2025. High rate of speed—Attending circumstances.
- § 2026. High rate of speed—Jumping from car to avoid danger—Overcrowding—Thrown from platform.
- § 2027. Collision between cars of same company.
- § 2028. Collision between cars of street car company and other vehicles—Fire department engines and wagons.
- § 2029. Injuries to passengers through defective condition of vehicles.
- § 2030. Inspection of vehicle.
- § 2031. Presumptive liability when car derailed.
- § 2032. Presumptive liability when passenger injured through collision.
- § 2033. Injury through panic of passenger produced by explosion on car.
- § 2034. Slowing down car for passenger to board—Car suddenly started.
- § 2035. Burden of proof on plaintiff to show slowing down of car could be construed as invitation to board.
- § 2036. Negligently starting car while plaintiff is in act of boarding it—Taking hold of hand rail.
- § 2037. Motorman must act under directions of conductor—Knowledge of either motorman or conductor that plaintiff is boarding car sufficient.
- § 2038. Effect of failure of conductor to see intending passenger.
- § 2039. Effect of stranger ringing bell and starting car.
- § 2040. Negligently starting car while passenger is alighting.

- § 2041. Slowing car up and then starting suddenly when passenger is in act of alighting.
 - § 2042. Movement of car must be attributable to act of men in charge.
 - § 2043. Conductor must see that no passenger is in act of alighting.
 - § 2044. Ringing bell to go ahead while passenger is alighting.
 - § 2045. Failure of conductor to warn passenger of danger known to conductor, but unknown to passenger.
 - § 2046. Passenger alighting near parallel track.
 - § 2047. Alighting passenger struck by car coming from opposite direction.
 - § 2048. Duty of motorman on approaching cars.
 - § 2049. Failure to check reckless rate of speed of approaching car.
 - § 2050. Passenger raising umbrella while alighting.
 - § 2051. When relation of passenger and carrier ceases—Injury through backward movement after alighting.
 - § 2052. Carrying passenger past destination.
 - § 2053. Injury through over-crowding of car.
 - § 2054. Assaults on passenger by company's servants.
 - § 2055. Wrongful ejection of passenger from car—Presumption that natural and probable consequences of wrongful act are intended.
 - § 2056. Use of more force than necessary in ejection.
 - § 2057. Posted warnings in cars.
 - § 2058. Separation of white and colored passengers—Series.
 - § 2059. Regulations as to transfers.
 - § 2060. Giving wrong transfer.
 - § 2061. Entering car without transfer—Negligence of first conductor.
 - § 2062. Contributory negligence of passengers—In general.
 - § 2063. States holding burden of proof is on plaintiff to prove freedom from contributory negligence.
 - § 2064. States holding burden of proof is on defendant to show contributory negligence of plaintiff.
 - § 2065. Deafness of passenger.
 - § 2066. Standing on platform when car is overcrowded.
 - § 2067. Leaving seat and standing on platform to accommodate lady passengers.
 - § 2068. Standing on platform by direction of employes in charge of car.
 - § 2069. Riding on running board.
 - § 2070. Obeying instructions to move to another part of the car.
 - § 2071. Getting on car while in motion.
 - § 2072. Getting off car while in motion.
 - § 2073. Jumping from moving car at command of conductor.
 - § 2074. Failure to move away after alighting—Injury by trailer.
 - § 2075. Injury to passenger while trying to escape from apparently imminent danger.
 - § 2076. Payment of fare in genuine coin.
- LIABILITY FOR INJURIES TO PERSONS OTHER THAN PASSENGERS OR EMPLOYES.
- § 2077. Degree of care due pedestrians.
 - § 2078. Not liable for mere accident or misadventure.
 - § 2079. Degree of care due persons riding in wagons or other vehicles along tracks.
 - § 2080. Degree of care due infant trespasser.
 - § 2081. Statutory, municipal and other regulations of the public authority.
 - § 2082. Joint liability with other individuals or corporations.
 - § 2083. Care of roadbeds and tracks.
 - § 2084. Cars and appliances.
 - § 2085. Sounding bells and gongs.
 - § 2086. Use of proper brakes.
 - § 2087. Allowing running board to extend over sidewalk.
 - § 2088. Rate of speed.
 - § 2089. As to infant trespassers.
 - § 2090. Frightening animals—Car operated in ordinary manner.
 - § 2091. Car not operated in ordinary manner.
 - § 2092. Right of way of street cars over other vehicles along track—Collision with same.
 - § 2093. Street crossings — Pedestrians.
 - § 2094. Street crossings — Vehicles crossing track.
 - § 2095. Street crossings — Fire engines crossing track.
 - § 2096. Collision with other street cars.

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| <p>§ 2097. Collision with persons on or near track.</p> <p>§ 2098. Child run over by car—Series.</p> <p>§ 2099. Failure to check speed of car when danger imminent to person on track.</p> <p>§ 2100. Contributory negligence of persons other than passengers or employees—In general.</p> <p>§ 2101. Rule that burden of proof is on defendant to prove contributory negligence.</p> <p>§ 2102. Rule as to children.</p> <p>§ 2103. Rule as to intoxicated persons.</p> <p>§ 2104. Rule to stop, look and listen.</p> <p>§ 2105. Bicyclist—Collision with car.</p> | <p>§ 2106. Failure of driver of vehicle passing along or near track to use reasonable care.</p> <p>§ 2107. Care due by driver of vehicle crossing track—Ordinary care defined.</p> <p>§ 2108. Pedestrian suddenly going upon track without warning to motorman.</p> <p>§ 2109. Injury avoidable notwithstanding contributory negligence of plaintiff.</p> <p>§ 2110. Negligence of driver of vehicle.</p> <p>§ 2111. Imputable negligence—Rule in Illinois.</p> <p>§ 2112. Imputable negligence—Rule in Wisconsin.</p> <p>§ 2113. Imputable negligence—Parent and child.</p> |
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This chapter does not include instructions relative to railroads as carriers of passengers. For such instructions see Chapter on NEGLIGENCE—RAILROADS — PASSENGER CARRIERS.

IN GENERAL.

§ 2012. Street Railroad Companies Not Liable for Injuries Due to Mere Accident. (a) The court instructs the jury that the plaintiff can in no event recover in this case unless you believe from the evidence that she was injured, and that her injuries were directly due to negligence on the part of defendant's servants; and if you believe from the evidence that the injuries sustained by plaintiff were not due to negligence on the part of defendant's servants, but were due to mere accident or misadventure, then and in that case your verdict must be for the defendant.¹

(b) The court instructs the jury that the mere happening of the accident together with proof of the exercise of ordinary care by the plaintiff does not raise a presumption of negligence on the part of the defendant.

(c) The court further instructs the jury that the burden of proof is not upon the defendant to show that it is not guilty of the specific negligence charged in the declaration or some count thereof, but the burden is upon the plaintiff to prove that the said defendant was guilty of such negligence, and this rule, as to the burden of proof, is binding in law and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in weighing the evidence and coming to a verdict the jury should apply said rule and adhere strictly to it. No presumption that the defendant was negligent arises from the mere fact that the accident happened.²

(d) The court instructs the jury that, if they believe from the evidence that the injury to the plaintiff was the result of an acci-

1—Johnson v. St. L. & S. Ry. 2—Wolf v. Chi. U. Traction Co., Co., 173 Mo. 307, 73 S. W. 173 (176). 119 Ill. App. 481 (482).

dent which occurred without the negligence of the defendant, as charged in the declaration, they should return a verdict of not guilty.³

(e) If you believe from the evidence that the injury to the plaintiff in this suit happened to him by mere accident, and without any fault on the part of defendant or its employes, then the plaintiff cannot recover in this action. The defendant is not an insurer of safety of its passengers, and it is only liable when injuries are incurred without fault on the part of the person injured, and because of negligence on the part of the defendant.⁴

(f) If the jury believe, from the evidence, that the injuries sustained by the plaintiff were merely the result of accident, then your verdict must be for defendant.⁵

§ 2013. Negligence Complained of Must Be Proximate Cause of Injury—Effect of Prior Disability of Person Injured. (a) The jury are instructed that even though the defendant was liable for the accident in question, still you are instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find, from the evidence, she sustained injury at the time of the accident; and if you find, from the evidence, that the plaintiff has now, or has had, any other disability resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted, by law, to allow her anything for such disability, and should not do so from motives of sympathy or any other motive.⁶

(b) Before the plaintiff can have a verdict in this case, the law requires him to prove to your satisfaction, by a preponderance or greater weight of the evidence, negligence (of the kind submitted to you) on the part of defendant, and also that such negligence (if any is proved) was a proximate cause of the accident and hurt received by plaintiff; and if the plaintiff has not so proved negligence of the kind submitted to you on the part of defendant, or its motorman in charge of the mail car, and that such negligence was a proximate cause of the accident, then your verdict must be for the defendant.⁷

§ 2014. Effect of Change of Jurisdiction Over Highway from County to City. If you find that at the time said track was placed in said highway the territory at the point in controversy was not in said city, and that said track was so placed by consent of and contract with the board of county commissioners, but that thereafter said territory was annexed to and became part of said city, and the

3—N. C. St. R. R. Co. v. Smadraff, 89 Ill. App. 411 (416), 189 Ill. 155, 59 N. E. 527.

4—Fitch v. Mason City & C. L. T. Co., 124 Iowa 665, 100 N. W. 618 (622).

5—Feary v. Met. St. Ry. Co., 162 Mo. 75, 62 S. W. 452 (458); Logan v.

Met. St. Ry. Co., 183 Mo. 582, 82 S. W. 126.

6—C. C. Ry. Co. v. Saxby, 213 Ill. 274 (280), 72 N. E. 755, 104 Am. St. 218.

7—Deschner v. R. R. Co., 200 Mo. 310, 98 S. W. 737 (743).

city undertook, by ordinance, to name terms and conditions for the maintenance of said track for the purpose of preserving the public highway at that point in a reasonably safe condition for public use and travel, and said street railroad company accepted the terms of said ordinance, then the ordinance terms would be binding on said company, and any violation of the terms of said ordinance rendering said highway dangerous to travelers would be negligence; and if said condition proximately caused the death of B., and he was at the time using due care, the defendant company would be liable therefor.⁸

§ 2015. No Duty Rests on Plaintiff to Inform Defendant of Injury. Plaintiff owed defendant no duty to inform defendant that plaintiff had been hurt before the filing of the suit. Neither plaintiff nor his counsel owed defendant any duty to give defendant any information before the filing of this suit, to enable defendant to get witnesses or gather information.⁹

§ 2016. But a Failure to Inform Defendant of Injury May Be Considered by Jury. (a) In arriving at your verdict in this cause, I charge you, gentlemen of the jury, that, in connection with all the other evidence in this case, you have the right to consider that the plaintiff did not inform the defendant that he had been hurt, before the filing of the complaint, if from the evidence you believe that the plaintiff did not give the defendant such information before the commencement of this suit.

(b) In arriving at your verdict in this case, I charge you that, in connection with all the other evidence in this case, you have the right to consider that the plaintiff's counsel did not inform the defendant that the plaintiff had been hurt, before the filing of the plaintiff's complaint, if from the evidence you believe that the plaintiff's counsel did not give the defendant such information before the commencement of this suit.¹⁰

8—Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729 (731).

"We fail to see wherein this instruction is objectionable. Even if the street railway was built under a contract with the county commissioners, when the highway became a part of the city, it was the duty of the company to maintain its track so as to preserve the public highway in a reasonably safe condition for public use and travel; and it was its duty to do this whether there was any ordinance requiring it to be done or not. It was the duty of the company to keep its tracks in such condition as not to render the highway unsafe for the public, regardless of any privilege granted or attempted to be granted by the board of commissioners; and this duty continued as long as the

highway remained a public highway, no matter within what jurisdiction it might be. The instruction is directed simply to the duty of the company to keep the track in such condition as not to render the street unsafe for public use and travel."

9—Birmingham Ry. & E. Co. v. Wildman, 119 Ala. 547, 24 So. 548 (549).

10—Birmingham Ry. & E. Co. v. Wildman, 119 Ala. 547, 24 So. 548 (549, 550).

"At the request of the plaintiff the court properly instructed the jury that neither the plaintiff nor his counsel owed defendant any duty to inform it that plaintiff had been injured, but, when requested by defendant, refused to charge, that in connection with all the other evidence in the case, the

§ 2017. No Prejudice Should Exist Against Street Railway Corporations, as Such—Reading of Instructions by the Lawyers. This case should be considered by the jury the same as if it were a contest between two persons of equal standing in the community. The fact that one of the parties is a corporation should not affect your minds in any way; but the rights of the parties should and must be determined upon the evidence introduced in the case, and the instructions given to the jury, which is the law, and only law to guide you in your deliberation. These instructions, although read to you by the lawyers, are the court's instructions, and must be taken and considered by the jury as if they had been read by the judge from the bench.¹¹

§ 2018. When Fact of Injury Admitted and Assumed on Both Sides. The court instructs the jury that, if you believe, from the weight of the evidence, that the injuries complained of by the plaintiff in his declaration were caused by the negligence or carelessness of the servants or employes of the defendant or any of them, in the course of their employment as such servants or employes, in manner and form as charged in the declaration, and without any fault on the part of the plaintiff, which contributed to the injury complained of, then the defendant is liable in this case.¹²

§ 2019. Withdrawing Portions of Ordinance from Consideration of Jury by Agreement. The jury are instructed that the plaintiffs in this case make no claim that the car which ran over the child was not stopped within the shortest time and space possible after any of the defendant's employes became aware of the presence of danger, and that plaintiffs do not base any charge of negligence upon the failure of the gripman in charge of the car to stop the car in the shortest time and space possible after he first became aware of any danger to the child, A.; and you are therefore instructed that that portion of the ordinance of the city of S. read in evidence which provides that on the first appearance of danger to persons, either on the track or moving towards it, the car should be stopped in the short-

jury had a right to consider that plaintiff did not inform defendant that he had been injured. As stated above, the fact that no notice or information concerning the accident had been given defendant being in evidence, the jury had a right to consider this fact. The latter charge should therefore have been given, as, in a sense, explanatory of the former."

11—*Logan v. Met. St. Ry. Co.*, 183 Mo. 582, 82 S. W. 126 (129); *Feary v. Met. St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452 (458).

12—*North C. St. R. Co. v. Rodert*, 105 Ill. App. 314 (315), *aff'd* 203 Ill. 413, 67 N. E. 812.

"The objections are: That the instruction assumes that the plain-

tiff suffered the injuries complained of in his declaration. That he was injured to some extent is admitted and assumed on both sides. The law is that where a fact is admitted or assumed by each party to the trial, the court, in giving an instruction may assume such fact as proven. It is further objected that the instruction reads without any 'fault' on the part of the plaintiff, instead of without any 'negligence' upon his part. The substitution of the word 'negligence' for the word 'fault' would not materially change the sense or the meaning of the instruction. *Chicago & N. W. Ry. Co. v. Ryan*, 70 Ill. 215."

est time and space possible, has no application to the facts of this case, and the jury are instructed to disregard that portion of the said ordinance, and that portion of said ordinance is withdrawn from your consideration at the request of plaintiffs.¹³

LIABILITY FOR NEGLIGENCE AS CARRIERS OF PASSENGERS.

§ 2020. **Degree of Care Due Passengers—Varying Statements of Different Courts—Negligence Defined.** (a) The court instructs the jury, as matter of law, that it is the duty of a railroad company to use the highest degree of care and caution, reasonably consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported.¹⁴

(b) The court instructs the jury that if the defendant's servants and employes exercised all the care and foresight that was reasonably practicable, then there was no negligence, and in determining any issue as to negligence on defendant's part, submitted to you in these instructions, you are instructed that, if there was exercised all the care that was reasonably practicable, then there was no negligence.¹⁵

(c) The court instructs the jury that the defendant is required to use all reasonable means, care, vigilance and foresight, in view of the character and modes of conveyance adopted by it, to prevent injury to passengers, and while said company is not an insurer of absolutely safe carriage of its passengers, yet it is held to the exercise of the highest degree of care, skill and diligence practically consistent with the operation of its road.¹⁶

13—Schmidt v. St. Louis R. Co., 163 Mo. 645, 63 S. W. 834 (835).

14—W. C. St. R. R. Co. v. Johnson, 180 Ill. 285 (286), 54 N. E. 334, aff'g 77 Ill. App. 142.

"This instruction states an abstract proposition of law correctly. The principle announced in this instruction has been held to be the law in I. C. R. R. Co. v. O'Connell, 160 Ill. 641, 43 N. E. 704, and N. C. St. R. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899."

Practically the same instruction was given in the case of W. C. St. R. R. Co. v. Kromshinsky, 86 Ill. App. 17 (19).

15—Feary v. Met. St. Ry. Co., 162 Mo. 75, 62 S. W. 452 (460).

"This instruction is claimed to be erroneous, because the care and foresight required by it is such as is 'reasonably practicable,' and it is insisted it should have exacted of defendant the 'utmost practicable human skill, diligence,

and foresight.' The instruction under consideration requires 'all the care and foresight that was reasonably practicable.' The law requires nothing that is unreasonable. If a carrier exercises the care so required, there will be no injuries, except in cases of inevitable or unavoidable accident or casualty. The instruction is as broad as the liability of the carrier should be made."

This same instruction was also upheld in Logan v. Met. St. Ry. Co., 183 Mo. 582, 82 S. W. 126 (129).

In Abbitt v. St. L. T. Co., 106 Mo. App. 640, 81 S. W. 484, the court upheld an instruction requiring "the highest practical degree of care of a very prudent person engaged in that business, in the same circumstances as those shown in evidence at and immediately preceding the time of the alleged injury to said plaintiff."

16—N. Chl. St. R. R. Co. v.

(d) The law requires of carriers of passengers that they exercise not only ordinary care but that they exercise the highest practicable degree and kind of care for the safety of their passengers, and any failure in this respect constitutes negligence.¹⁷

(e) It was the duty of the B. Company and its employes in charge of the car to use the utmost care to prevent injury to plaintiff's wife, if she were, as alleged, a passenger on said car at the time she is alleged to have been injured; and if, through lack of care, she was injured, defendant is liable in this case for damages arising from such injuries.¹⁸

(f) By the term "negligence," as used with reference to said motorman, is meant a failure to use that high degree of care that a very prudent person would have used under like circumstances.¹⁹

(g) Negligence, when applied herein to the defendant's servants, means the failure to exercise that high degree of care that a very cautious and prudent person would have exercised under the same or similar circumstances.²⁰

(h) The court instructs you that a common carrier of persons, such as a street car corporation, is bound to use the highest degree of care for the safety of its passengers.²¹

Schwartz, 82 Ill. App. 493 (496); C. U. T. Co. v. O'Brien, 117 Ill. App. 184; C. U. T. Co. v. Kalberg, 107 Ill. App. 90.

17—Crump v. Davis, 33 Ind. App. 88, 70 N. E. Rep. 886 (887), the court upheld the above instruction, citing Citizens' St. Ry. Co. v. Hoffbauer, 23 Ind. App. 614 (620), 56 N. E. 54; Louisville N. A. & C. Ry. Co. v. Snyder, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; Terre Haute & T. Ry. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; 4 Elliott on Ry. 1585.

18—Knauff v. San Ant. T. Co., — Tex. Civ. App. —, 70 S. W. 1011.

"The requested charge of appellant embodies the law as applicable to carrier and passenger. It has been held a number of times in Texas that common carriers are required to exercise the 'utmost care' for the safety of their passengers. Gallagher v. Bowie, 66 Tex. 266, 17 S. W. 407; Int. & G. N. Railway Co. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. 829; Ft. Worth & D. C. Railway Co. v. Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335; Gulf C. & S. F. Railway Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608. In the case of Int. & G. N. Railroad Co. v. Halloren, 53 Tex. 53, 37 Am. Rep. 744, the rule is announced as follows: 'Railroad companies, however, are not insurers of the safety of their passengers further than could be

required by the exercise of such high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent and competent persons under similar circumstances.' This rule was commended in Railway Co. v. Welch, above cited, and it seems to have been the intention in that case to hold that the rule in the Halloren case was the same as the rule announced in Gallagher v. Bowie. The court quoted approvingly the following from Hutchinson on Car.: 'Although the form of expression is sometimes varied, and the rule is stated as requiring "the greatest possible care and diligence," "the utmost care and diligence of very cautious persons," "the most perfect care of a cautious and prudent man," and other similar phrases, the real meaning intended by them all is that the care and circumspection to be required is the utmost which can be exercised under all the circumstances short of a warranty of the safety of the passengers.'"

19—San Ant. T. Co. v. Warren, — Tex. Civ. App. —, 85 S. W. 26.

20—Denison & S. Ry. Co. v. Freeman, — Tex. Civ. App. —, 85 S. W. 55 (56).

21—Ilges v. St. L. T. Co., 102 Mo. App. 529, 77 S. W. 93 (94).

"Defendant contends, not that

(i) Defendant was not an insurer of the safety of plaintiff, L., nor was it required to exercise any degree of care of foresight that was not reasonably practicable. Therefore you are instructed that the mere fact that an accident occurred and plaintiff was injured, if you

the instruction erroneously declares the law in the abstract, but that the term 'the highest degree of care' should have been defined, or the instruction modified, and cites *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Smith v. C. & A. Ry. Co.*, 108 Mo. 243, 18 S. W. 971; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; and *Freeman v. Railway*, 95 Mo. App. 94, 68 S. W. 1057, in support of its contention. *Dougherty v. Mo. R. Co.*, supra, was a suit by a passenger for damages caused by a sudden, violent start of the defendant's horse car. Instruction No. 3 given for the plaintiff told the jury that, under the circumstances of the case, it was the duty of the manager or driver of the car to exercise the 'utmost human foresight, knowledge, skill and care.' The instruction was approved, but on a rehearing the majority of the Supreme Court were of the opinion that the instruction stated the abstract proposition too broadly as to the degree of care incumbent on the defendant. In *Smith v. C. & A. Ry. Co.*, supra, it is said an instruction that 'the law imposes on a common carrier of passengers the utmost care in carrying them safely is not erroneous, where an instruction is also given that the carrier is not an insurer of the safety of passengers, and that negligence on the part of its servants must be shown.' In *Jackson v. Railroad*, 118 Mo. loc. cit. 225, 24 S. W. 192, the *Dougherty* and *Smith* cases are approvingly cited. In *Freeman v. Met. St. Ry. Co.*, 95 Mo. App. 94, 68 S. W. 1057, an instruction which declared the defendant (a passenger carrier) 'guilty of negligence, unless he exercised the utmost human skill, diligence and foresight to prevent the accident' to the passenger, was held erroneous. *Leslie v. St. L. & P. Ry. Co.*, 88 Mo. 50, was a suit by a passenger for damages occasioned by the negligence of the carrier. In respect to the duty of the carrier to the passenger, the court instructed the jury that the defendant was bound to use the highest degree of care. The court

held that, as a general statement of the liability of the carrier, the instruction was not objectionable, and that the fact that the instruction proceeded to state hypothetically the facts upon which the plaintiff might recover, sufficiently qualified the general proposition. The instruction under consideration is not qualified in any manner, nor is there any other instruction given in the case which hypothetically sets out facts upon which the plaintiff might recover. The second instruction, in general terms, tells the jury that if the motorman was negligent, and his negligence caused the car to lurch, etc., the plaintiff could recover. The two instructions, when considered together, in effect, told the jury that it was the duty of the motorman to exercise the highest degree of care, and if he failed to exercise such high degree of care, and the car lurched, and plaintiff was thrown into the street, she could recover. In *Furnish v. Railroad*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. 781, an instruction defining the skill, diligence and foresight required of a passenger car driver was defined as 'such skill, diligence and foresight as is exercised by a very cautious person under like circumstances.' In *Feary v. Railroad*, 162 Mo. 75, 62 S. W. 452, an instruction telling the jury 'if defendant's servants and employees exercised all the care and foresight that was reasonably practicable, then there is no negligence,' was approved. The court, through Marshall, J., said: 'The instruction under consideration requires all the care and foresight that was reasonably practicable. The law requires nothing that is unreasonable.' The highest degree of care signifies nothing short of the exercise of the utmost human skill and care. There can be no degree of care higher than the highest. 'Carriers of passengers,' says Story (*Story on Bailments* (2d ed.), par. 600), 'bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, with the utmost care and diligence

believe he was, does not of itself entitle plaintiff to recover in this case; and if you find that defendant had used all the care and foresight that were reasonably practicable under all the circumstances, and that the accident happened without negligence on the part of defendant, then the plaintiff cannot recover under any circumstances, but your verdict must be for defendant.²²

§ 2021. **Although Not Insurers of Safety of Passengers, Street Railroads Must Exercise Highest Degree of Care Reasonably Consistent With Practical Operation of Vehicle.** The court instructs the jury that the fact that the law does not make a common carrier an insurer of the safety of its passengers does not even to the slightest extent relieve such common carriers of its legal duty to exercise the highest degree of care for the safety of its passengers, reasonably consistent with the practical operation of its vehicle. In this case, if the jury find from the evidence, by a preponderance thereof, that the plaintiff became a passenger of the defendant and was injured because of the negligence of the defendant, while he was in the exercise of ordinary and reasonable care for his own safety, as alleged in his declaration, then you should find the defendant guilty.²³

of very cautious persons.' In *Gilson v. Railway Co.*, 76 Mo. 282, the court said: 'The care required is that care, prudence and caution which a very competent and prudent person would use and exercise in a like business and under like circumstances.' In *Shearman & Redfield Neg.* (4th ed.), par. 405, it is said: 'The obligation of a common carrier is said to be the utmost care and skill which prudent men are accustomed to use under similar circumstances.' In *Dodge v. Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541, the words 'utmost care and skill' were held not to mean the utmost care and diligence which men are capable of exercising, but to mean the utmost care, consistent with the carrier's undertaking, and with due regard for all the other matters which ought to be considered in conducting the business. In *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812, it is said: 'A common carrier of passengers, although not an insurer, must do all that human care, vigilance and foresight can do, under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers.' While, as an abstract proposition, common carriers of passengers are bound to use the utmost care and skill to prevent

injuries to their passengers, yet the rule should be applied in a practical manner. That it may be so applied, the text-books and many of the cases have set up some standard (usually the standard of care, skill and foresight which a very competent and prudent person would be expected to use and exercise under like or similar circumstances) by which the jury may measure the degree of care required. And it seems to us that some such standard should somewhere be incorporated in the instructions to the jury in this class of cases, so that they may not be left to set up a standard of their own, and to run it up as high as their imaginations will allow them. But if it is not done, the omission has never, so far as we are informed, been held to be reversible error. This very question has, at the present term of this court, in the case of *Fillingham v. St. Louis Transit Company*, 102 Mo. App. 573, 77 S. W. 314, been so fully and exhaustively treated in an opinion by Goode, J., that nothing remains to be said."

22—*Logan v. Met. St. Ry. Co.*, 183 Mo. 582, 82 S. W. 126 (129).

23—*Chi. U. T. Co. v. O'Brien*, 117 Ill. App. 184 (189, 190).

"It is objected to above instruction that it assumes that defendant was negligent, and that it permits the jury to find the defendant

§ 2022. When Burden of Proof as to Degree of Care Used Shifts to Defendant. The court instructs the jury that while the burden of proof is upon the plaintiff to show the negligence of defendant, yet if you find from the evidence introduced upon the trial that plaintiff was not guilty of contributory negligence, as explained in these instructions, and that plaintiff was thrown from the car substantially as claimed by him, and that such accident would have happened under ordinary circumstances, had the defendant, its officers and employes, exercised the utmost care and foresight, as explained in another paragraph hereof, a presumption of negligence against the defendant is raised, and the burden is then cast on the defendant to rebut this presumption. To this end, the defendant must prove that, as the matter which the circumstances indicate were the cause of said incident, its officers and employes exercised that high degree of care which the law requires of them.²⁴

§ 2023. Street Railroad Company Not Liable When Passenger Is Injured by His Own Misconduct. If the railroad company on its part is properly discharging with due diligence and in a suitable manner its duties, and a passenger is hurt from a cause disconnected, over which the railroad has no control, or if the passenger is hurt by reason of his own conduct or misconduct, and the act or doing of the railroad company in no way contributed towards it, or if the passenger's conduct was the primary or real reason of his or her injury, the railroad company would not be responsible.²⁵

§ 2024. Injury to Passenger Through Negligent Equipment, Management or Operation of Vehicle. The jury are instructed that it is the duty of defendant not to expose its passengers to any danger which human care and foresight could reasonably anticipate and provide against, and to exercise the highest degree of care and diligence reasonably consistent with the practical operation of its railroad and the conducting of its business. And, if from the evidence introduced upon the trial, you believe that the plaintiff, while a passenger on the car of defendant, received an injury, resulting from the careless-

gully, if they find certain facts from the evidence, without requiring them to find such facts under the instructions of the court. Neither of these objections is tenable. The instruction concludes with the following sentence: 'In this case, if the jury find from the evidence, by a preponderance thereof, that the plaintiff became a passenger of the defendant, and was injured because of the negligence of the defendant, while he was in the exercise of reasonable care for his own safety, as alleged in the declaration, then you should find the defendant guilty.' Manifestly, the instruction submitted to the jury, as a question of fact,

whether the defendant was guilty of negligence. The words, 'if the jury find from the evidence, by a preponderance thereof,' apply to the 'negligence of the defendant' equally as to the words 'that the plaintiff became a passenger of the defendant.' It is not necessary for the court to state in every instruction that the jury, in passing on the facts, must be governed by the instructions of the court." But see § 3966.

24—Fitch v. Mason C. & C. L. T. Co., 124 Iowa 665, 100 N. W. 618 (620).

25—Wade v. Columbia El. St. R. L. & P. Co., 51 S. C. 296, 29 S. E. 233 (235), 64 Am. St. 676.

ness or negligence of the defendant or its employes in providing a seat without any guards, substantially as alleged, or in running, managing, and operating said car, or in constructing or maintaining its track at the place alleged, you should find for the plaintiff, provided you further believe from the evidence that plaintiff's own negligence did not contribute to such injury.²⁶

§ 2025. **High Rate of Speed—Attending Circumstances.** (a) The court instructs the jury that high rate of speed of a railway train will not of itself establish or prove negligence of the railway company. Railway companies may run their cars at such speed as, under all the circumstances, shall comport with the rule of law which requires them to exercise the utmost care and foresight for the safety of their passengers reasonably consistent with the practical operation of their roads and the conducting of their business. And whether a given rate of speed comports with the rule depends on the circumstances, such as the condition and curvature of the track, the danger, if any, to passengers occupying any and all seats where passengers are accustomed and permitted to ride, of being thrown from the car by the movement thereof, and all the facts and circumstances surrounding the particular time and place in question, as you find same to be shown by the evidence introduced upon the trial.²⁷

(b) The court instructs the jury that the defendant owed the plaintiff the duty to exercise the utmost care and skill which prudent persons exercise under similar circumstances to prevent said car from running at a rate of speed which was dangerous, and that their failure to exercise such care is, in law, negligence.²⁸

§ 2026. **High Rate of Speed—Jumping from Car to Avoid Danger—Overcrowding—Thrown from Platform.** (a) If you believe from the evidence that the defendant at or about the time and place mentioned in the plaintiff's petition was operating one of its electric cars on which the plaintiff was riding as a passenger at a high and dangerous rate of speed, and that at said time the trolley wires and guy wires stretched over the line of its track at said point broke and fell upon the car or ground, and the trolley poles were thrown down and fell along the side of the car, and that the speed at which said car was being propelled, in connection with the breaking and falling of the trolley wires and guy wires and poles, caused said car to pitch and jump with such force and violence upon the track as to throw the plaintiff from the car upon the ground, or if you believe that the breaking of said wires and said poles appeared to the plaintiff to render his position in the car dangerous, and that plain-

26—Fitch v. Mason C. & C. L. T. Co., 124 Iowa 665, 100 N. W. 618 (621).

27—Fitch v. Mason C. & C. L. T. Co., 124 Iowa 665, 100 N. W. 618 (621).

28—In South Cov. & C. St. Ry. Co. v. Constans, 25 Ky. L. 155, 74 S. W. 705 (706), the above instruc-

tion was said to state the law correctly, although it might have been couched in language less subject to criticism.

See also in this connection Alton L. & T. Co. v. Oller, 119 Ill. App. 181 (189, 190), aff'd 217 Ill. 15, 75 N. E. 419.

tiff, acting upon apprehension of immediate danger of injury to himself, and in order to avoid danger attempted to escape therefrom, in so doing then and there jumped from said car and fall upon the ground, or in such attempt to escape did then and there fall from the same on or against the ground, and that as a proximate cause of said fall, was thereby injured in one or more particulars, substantially as alleged in his petition, you will find for plaintiff, and assess his damages, if any, as hereinbefore directed, unless you should find for the defendant under other portions of this charge.²⁹

(b) You are instructed that if you believe from a preponderance of the evidence that the deceased, N. P. H., was permitted to ride by the defendant upon the platform of defendant's car; that the defendant carelessly and negligently failed and neglected to provide and have on said car a gate, railing or other protection around the platform thereof, and that thereby said car was rendered an unsafe and dangerous conveyance, in that passengers on said platform were unprotected and liable to be thrown therefrom; and you further believe that defendant permitted said car to become overcrowded with passengers, and failed to provide said H. with a seat on said car, but permitted him to be crowded and jostled by other passengers likewise upon said platform; and if you further believe that said car ran into said curve at a high rate of speed, without warning or notice to said H.; that thereby said car was caused to lurch and jerk as it went around said curve, causing said H. to be thrown therefrom, and to receive injuries of which he died, then your verdict will be for plaintiff, etc.³⁰

§ 2027. **Collision Between Cars of Same Company.** The court instructs the jury that if you believe from the evidence that a collision occurred between the car on which plaintiff was riding and another car, and that plaintiff by said collision had his wrist sprained or dislocated, and that said collision and injury would not have occurred if the motorman of defendant company had been in the exercise of the care and skill hereinbefore defined, and that the collision was the result of the motorman's negligence, if he was guilty of negligence, your verdict will be for the plaintiff.³¹

§ 2028. **Collision Between Cars of Street Car Company and Other Vehicles—Fire Department Engines and Wagons.** (a) Although the jury should find from the evidence in this case that the employes of the city fire department did not exercise ordinary care in driving the hook and ladder wagon, and although the jury should find from the evidence that such want of care, if there was such want of care, directly contributed to cause the collision by which the plaintiff was injured, yet if the jury find from the evidence that defendant's servants in charge of its car in which the plaintiff

29—Houston El. St. Ry. Co. v. 35 Wash. 600, 77 Pac. 1058 (1062).

Elvis, 31 Tex. Civ. App. 280, 72 S. W. 216.

31—Galveston C. Ry. Co. v. Chapman, 35 Tex. Civ. App. 551, 80 S. W. 856.

30—Halverson v. Seattle El. Co.,

was such passenger, if they had exercised a high degree of care, such as would have been exercised by very prudent, careful and skillful railroad men under the same or similar circumstances, would have averted said collision and injury, then plaintiff is entitled to recover.

(b) The court instructs the jury that if they believe from the evidence that the gripman, as the train was approaching N. street, was exercising that high degree of care described in another instruction, and was looking ahead and attending to his duties, as defined in the instructions, and before he reached it he did not see or hear any persons signaling to him to stop, and did not hear the gong of the hook and ladder wagon, and did not know that the hook and ladder wagon was approaching, and that as soon as he got to N. street he saw the hook and ladder wagon coming, and he then, while exercising that high degree of care described in other instructions (if the jury believe from the evidence he was exercising such care), had good reason to believe, under all the circumstances, and did believe, that from the speed at which the hook and ladder was coming, and the train was going, if he stopped the train, or tried to stop it, it would place the train in N. street, and in front of the approaching hook and ladder wagon, and there would be a collision between it and the hook and ladder wagon, and that if he went ahead at full speed he might avoid a collision; then the court instructs the jury that it was his duty to go ahead, and the jury will find their verdict for the defendant, notwithstanding the hook and ladder wagon ran into the trailer car, and the plaintiff was injured thereby.

(c) The court instructs the jury that the defendant, by its servants in charge of its cars, in one of which the plaintiff was a passenger, was bound, in law, to exercise a high degree of care, as defined in the instruction, to watch and listen for any approaching vehicle at the crossing of N. street, where defendant's car crossed such street, and was bound, also, to use such care to avoid collision with any such vehicle. And if the defendant's servants in charge of the said cars failed, even in a slight degree, to use such care, and thereby directly contributed to cause plaintiff's injury, then defendant is liable, although the jury should find from the evidence that the employees of the city fire department also failed to exercise ordinary care, and thereby contributed to cause said collision.³²

(d) If the jury believe from the evidence that C. R. while riding on the footboard of the defendant's, C. C. Ry.'s, car in question, was injured by reason of a wagon coming in contact with the side of the said car, and if the jury further believe from the evidence that the servants in charge of said car, under all the circumstances shown by the evidence, could not have avoided the collision between the said wagon and the said car by the exercise of the highest degree of care and caution reasonably consistent with the practical operation

of said car, and if the jury further believe from the evidence that the said collision was caused by the swinging or turning of said wagon after the front of the car had passed it, so that some part of said wagon swung into or struck against the side of the said car and caused the injury complained of, then the jury should find the defendant, C. C. R. Co., not guilty.³³

(e) If the jury believe, from the evidence, that the plaintiff while in the exercise of ordinary care, if you believe from the evidence he was in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendants, if you believe from the evidence defendants were negligent, as charged in the declaration, then you should find the defendants guilty.³⁴

(f) The court instructs the jury that if they believe from the evidence that the grip car in question was suddenly and without negligence on the part of the defendant's servants, placed in a position of danger, then in order to charge the defendant with a duty to avoid injuring the persons on the said grip car the plaintiff must show by the greater weight of the evidence that the circumstances were such that the gripman had time and opportunity, by the exercise of the highest degree of practicable care on his part, to become conscious of the facts giving rise to such duty, and further that he had a reasonable opportunity to perform said duty. And if the jury further believe from the evidence that the circumstances as shown by the evidence did not charge the defendant with a duty as thus defined, or if the jury believe from the evidence that said gripman did not have a reasonable opportunity to perform, by the exercise of the highest degree of practicable care on his part, such duty as thus defined, then they should find the defendant not guilty.³⁵

33—C. C. Ry. Co. v. Math, 114 Ill. App. 350 (352). The plaintiff was injured by a collision of the car with a wagon while plaintiff was riding on the footboard of the car.

34—C. U. T. Co. v. Mee, 119 Ill. App. 332, 336, aff'd 218 Ill. 9, 75 N. E. 800. Passenger was injured by a collision of the car with a hay wagon.

35—Wolf v. C. U. T. Co., 119 Ill. App. 481 (483). A chemical engine of the fire department struck a car.

Commenting on the instruction as given, the appellate court said:

"It is insisted by the attorneys for plaintiff in error that the mere fact of the collision causing an injury to plaintiff while he was riding as a passenger on defendant's car, and himself in the exercise of ordinary care, raises a presumption of negligence; and that hence the instructions above set forth were erroneous and should not have been given. Such pre-

sumption is caused by agencies wholly under the control of the carrier. Under such conditions a prima facie case of negligence may be made by showing the happening of the accident and a consequent injury to the passenger, himself in the exercise of ordinary care. The duty would then be imposed upon the carrier to explain or account for the accident and to show in defense that it resulted from a cause for which the carrier was not responsible. But where the plaintiff's own evidence shows the accident to have been due to a cause beyond the control of the carrier, as vis major or the tort of a stranger, the reason for presuming it to have been caused by negligence on the part of the carrier is entirely wanting. Where a collision occurs between cars of the same company, such presumption may be indulged. But where some vehicle unconnected with and beyond the control of a railroad

§ 2029. **Injuries to Passengers Through Defective Condition of Vehicles.** (a) The court instructs the jury that the defendant owed to its passengers the duty of exercising great care and caution to keep the machinery and appliances of its cars in a reasonably safe condition and repair, and to exercise like caution in the operation of its cars.³⁶

company has collided with one of the latter's cars on its own track no such prima facie case is ordinarily made out as suffices to throw the burden upon the carrier to prove itself not guilty of negligence. In *Chi. C. Ry. Co. v. Rood*, 163 Ill. 477-483, 45 N. E. 238, it is said: 'It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury, and of explaining how it occurred, while the injured party is generally ignorant of the facts. But where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowledge may not be and is not necessarily better than those of the passenger.' To the same effect are *Federal St. & P. V. Ry. Co. v. Gibson*, 96 Pa. St. 83; *Potts v. Chicago C. Ry. Co.*, 33 Fed. 610 (611); *C. City Ry. Co. v. Catlin*, 70 Ill. App. 98-99; *Elwood v. C. C. Ry. Co.*, 90 Ill. App. 398 (399); *N. C. St. R. R. v. O'Donnell*, 115 Ill. App. 110. The question as to when the presumption against the defendant carrier arises and when the burden is upon the plaintiff to prove the defendant guilty of the negligence charged, seems to have depended in some cases on the facts of the particular case. Thus in *L. & N. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, cited in *W. C. St. R. R. Co. v. Martin*, 154 Ill. 523-529, 39 N. E. 140, the plaintiff was a passenger on a street car which was run into by a train while passing a railroad crossing at night. It was held the burden of proof was on the street car company to show, if such was the case, that the injury did not result from its own want of diligence, but from the negligence of the railroad company. See also *Osgood v. Los Angeles T. Co.*, 137 Cal. 280 (283), 70 Pac. 169."

36—*Dallas C. Elec. St. Ry. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315 (318).

"The objection made to the above charge is that it imposes upon the defendant a higher degree of care than is required by law. In the case of *Levy v. Campbell*, — Tex. —, 19 S. W. 438, the court charged that the defendant was required to use the 'utmost care.' This charge was held to be correct. In the case of *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407, the same expression, 'the utmost care,' was used by the trial judge in the charge to the jury, and the charge was sustained as correct by our supreme court. In the latter case, Justice Robertson says that 'the degree of care required of carriers is generally described by the authorities as the utmost, and the use of this expression in the charge was not objectionable.' In the case of *Gulf C. & S. F. Railway Co. v. Smith*, 87 Tex. 352, 353, 28 S. W. 522, it was held that the expression 'great care and prudence' was too high a degree of care in the case of an employee suing his master; that in such case the defendant is only required to use ordinary care. In discussing that expression used in the charge, the court said, speaking through Justice Brown: 'This imposed the highest degree of care known to the law, which is that degree of care prescribed for the government of railroad companies toward their passengers;' citing *Shear. & R. Neg. par. 51*. *Houston & Tex. C. R. Co. v. Gorbett*, 49 Tex. 573.

In the *Gorbett* case, the language used in the charge was 'greatest care and prudence.' As to this charge Justice Gould said: 'The charge required the greatest degree of care and prudence of defendant as being a carrier of passengers, and at the same time held defendant not responsible if the injury was the result of a mere accident or casualty, there being no

(b) If the jury believe and find from the evidence in this case that on or about the _____ day of _____, —, plaintiff was a passenger on a west-bound car of defendant; that on said date, while rounding a curve between C. avenue and R. place in a north-westerly direction, the car on which plaintiff was a passenger was being run at a high rate of speed, and that the said car left or jumped the track, and ran across the ties and along the ground for a space of about fifty feet, and against a large pole with great force and violence, causing plaintiff's injuries described in the testimony; and that the said car left or jumped the track by reason of the flange on one of the wheels of said car being in a worn or broken condition, which rendered it unsafe and dangerous as a vehicle for the transportation of passengers; and that that condition, if you believe and find from the evidence it was in such condition, was known to the defendant, or its agents, servants and officers in charge of said car and railroad, or could by the exercise of reasonable care and diligence have been known to them a sufficient length of time prior to said car's leaving the track to have prevented it so doing—if you believe and find these facts, then and in that event your verdict should be for plaintiff.

(c) The court instructs the jury that plaintiff is not entitled to recover in this case merely because one of defendant's cars was derailed by the breaking of the flange of a wheel. That if you believe from the evidence that the derailment of the car in question at the curve near F. avenue was due solely to the breaking off of pieces to have flange immediately in said curve, and that said breaking could not be foreseen or anticipated upon close examination by a competent inspector, then and in that case the defendant was guilty of no negligence in connection with the breaking of such flange, and you will find your verdict for the defendant.

(d) The court instructs the jury that if you believe from the

want of care or skill on the part of the company or its agents.' The charge was sustained, and the judgment of the court below affirmed. In the case of *Levy v. Campbell*, supra, it was held that the use of the term 'utmost care' in the charge, without defining the same, was not error. It was also held that, if any explanation of such expression was deemed necessary, a special charge should have been asked to that effect. In the case of *Gallagher v. Brown*, above cited, wherein the same expression 'utmost care' was used, Judge Robertson said: 'If it needed explanation or qualification, appellant should have requested a special charge.' In the language quoted above from the *Lauricella* case, *Mex. Cent. R. Co. v. Lauricella*, 87 Tex. 278, 28 S. W. 278, 27 Am. St.

103, the degree of care due to a passenger by a carrier is stated to be 'the utmost care and foresight reasonably compatible with the prosecution of its business.' In the case at bar, the charge required the exercise by the carrier of 'great care and caution' in keeping its machinery in repair and in the operation of its cars. We are of the opinion that the charge does not impose a higher degree of care upon the carrier than is required by law.

Again, complaint is made of the court's failure to define the words 'great care and caution' as used in the charge. If there was any error in this respect, it was one of omission, and the plaintiff in error cannot be heard to complain in the absence of a special charge designed to correct such omission."

evidence that, when defendant's car reached S. street, it was examined by an inspector, who found that a small piece of flange of one wheel had chipped out; and if you further believe from the evidence that there was no danger of derailing on account of such portion of the flange being out of said wheel; and that it was impossible for defendant's said inspector to discover by examining said wheel, any defect that would lead a competent inspector to suspect or infer that other pieces of said flange would break out during the running of said car in its ordinary course to D.; and if you further believe from the evidence that, after examining said car, the inspector told the motorman to proceed with said car, and that thereafter when said car was going round a curve at C. avenue, other and larger pieces of such flange broke out, and that thereby said car was derailed, then and in that case the defendant was guilty of no negligence, and your verdict must be for the defendant.³⁷

§ 2030. Inspection of Vehicle. If the jury find from the evidence that prior to the accident in question here defendant had employed competent inspectors to inspect the controller and motors, and other electrical appliances in use on defendant's cars, and that such inspector had used a very high degree of care in making reasonable inspection of the car upon which plaintiff was injured a short time prior to the time of her injury, and that such inspection failed to disclose any defect in the said controller, motors or electrical appliances, and that said car and its appliances were apparently in a reasonably safe condition for the purposes for which it was being used by defendant, and that the accident in question here could not have been reasonably anticipated, foreseen, or prevented by defendant by the exercise of a very high degree of care in inspecting said car, and its appliances, then plaintiff cannot recover in this action and your verdict must be for the defendant.³⁸

§ 2031. Presumptive Liability When Car Derailed. (a) The jury are instructed that if you believe, and find from the evidence, that on or about the — day of —, defendant was operating a street railway, and engaged in the business of carrying passengers thereon for hire; that plaintiff was a passenger, having taken passage upon one of defendant's cars on said road, and that while he was so a passenger, being carried thereon upon defendant's road, the said car was thrown from or left the track upon which it was running, and suddenly stopped, at or near the intersection of N. and M. streets, in K. C., Mo., and that plaintiff was then himself exercising ordinary care, and that he was by such stopping and derailment of the car thrown from said car and injured thereby—then the law presumes that such injury to plaintiff was caused by defendant's negligence, and such facts, if proved by a preponderance of the evidence,

37—Johnson v. St. Louis & S. Ry. Co., 173 Mo. 307, 73 S. W. 173, 176, 177. The first instruction was given

for the plaintiff and the two last for the defendant.

38—Brod v. St. Louis T. Co., 115 Mo. App. 202, 91 S. W. 993 (996).

make out a presumptive case for the plaintiff, and you should find a verdict for the plaintiff, unless you further believe from the evidence that, notwithstanding this presumption, the defendant at the time of the happening of the injury in fact had then fully performed, or was then fully performing, its duty as defined and stated in other instructions herein towards plaintiff as such passenger, or that such injury to plaintiff, if any, did not occur because of any failure of the defendant in such respect.³⁹

(b) Defendant is not required to prove what caused the train to leave the tracks or come to a standstill, and even if the jury cannot find from the evidence the exact cause, or if such is unknown and has not been shown, still if, after considering all the testimony in the case, not only that offered by defendant, but that offered by

39—*Logan v. Met. St. Ry. Co.*, 183 Mo. 583, 83 S. W. 127.

"If there is anything well settled by the courts of this state, it is that, where a passenger for hire upon a train of cars is injured, the fact of the derailment of the cars and his injury makes out a prima facie case of defendant's negligence, which, unless explained, entitles him to a recovery; and in order to overcome this prima facie case and right to recover, it devolves upon the carrier to explain how these things occurred, in some way not inconsistent with its duties to the plaintiff as such carrier. In other words, when a passenger for hire shows the derailment of the train upon which he is traveling, and as a result thereof he is injured, he makes out a prima facie case, and the burden then rests upon the carrier to explain how these things occurred, and in a way not inconsistent with its duty to the plaintiff as a passenger.

In the case of *Furnish v. Mo. Pac. Ry. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, it is said: 'Regarding the instruction (marked "D") placing the burden of proof upon defendant to show that the injury did not occur through any omission to discharge its legal duty in the premises, it should be remarked that the same instruction first required plaintiff to establish that the car in which she was a passenger "ran off the track of defendant's railroad and fell down the embankment thereof," and that she was thereby injured. Thus framed, the instruction correctly expressed the law on the subject. The mere injury of plaintiff while a passenger did not call for explanation or proof from de-

fendant. It first devolved on plaintiff to show some fact with reference to it from which negligence on defendant's part as a carrier might be fairly inferred. Here it was shown that the car ran off the track and over the embankment. The condition of the roadway at that point warranted the inference that the injury was occasioned thereby. In that state of the case, if the jury found that plaintiff had been injured by the derailment of the car and her fall down the embankment, it then devolved on defendant to explain how these things occurred without breach of its duty to plaintiff as a carrier. This is what the court said in effect, and it committed no error in so doing. *Hipsley v. Railroad*, 27 Am. & Eng. R. Cas. 287, 88 Mo. 348; *Breen v. Railroad*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. 450; *Seybolt v. Railroad*, 95 N. Y. 562, 47 Am. Rep. 75.' It may not be entirely in accord with technical nicety to instruct that the burden of proof shifts to defendant in the course of such a trial. It might be more accurate to say (in proper form for the purposes of a jury trial) that the facts of the derailment of the cars and of plaintiff's injury thereby make out a prima facie case of defendant's negligence, which, unexplained, would justify a recovery; but, in the ordinary course of administering law, it has become usual to declare that on a certain showing by plaintiff in such cases the burden of proof then rests on defendant to prove that it has not been negligent. *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *Clark v. Railway Co.*, 127 Mo. 197, 29 S. W. 1013."

plaintiff, you find there was not any negligence on the part of the defendant of the character submitted for your consideration, then defendant must have the verdict, even though L. was its passenger, and received his injury, if any, without any fault upon his part.

(c) Even though the plaintiff, L., was hurt without any fault upon his part, still under no circumstances can a verdict be rendered against the defendant unless the jury find that the train left the track or came to a sudden stop by reason of the negligence of defendant's agents, servants, or employes. If the train by reason of an unavoidable casualty or accident got off the tracks or came to a sudden standstill, in that way causing plaintiff's injury, if any, then there was no negligence, and your verdict must be for defendant.⁴⁰

(d) The court instructs the jury that the defendant in this case was, at the time of the injury complained of, a carrier of passengers for hire in —, and as such it was bound to provide reasonably safe track, roadbed, and roadworthy cars, and careful employes to manage the same, so far as practicable human skill, diligence, and foresight could provide; and it is responsible for all injuries to passengers resulting from negligence on the part of its agents or servants. If therefore, the jury believe from the evidence that on or about the — day of —, the plaintiff, —, boarded one of defendant's cars on its line of road, and paid his fare to be transported to defendant's depot at — avenue, in said —; and you further find that there is a descent in defendant's track or roadbed from a point near — street, down to defendant's depot at — avenue; and you further find and believe from the evidence that said train (by the carelessness and negligence of defendant's servants, agents, and employes) got beyond the control of the servants of defendants, and ran rapidly down said descent, and the car upon which the plaintiff was a passenger left the track and was overturned, and plaintiff was thereby injured without fault or negligence on his part,—then it devolves upon defendant to prove to your satisfaction that the accident was caused by inevitable accident, that could not have been detected or known to its agents or servants by the exercise of the utmost practicable human skill, diligence, and foresight, and unless it is so shown you should find for plaintiff.

(e) If the jury find and believe from the evidence that the plaintiff boarded one of the cars of defendant in K. City, to be carried by it as a passenger from W. street to its depot at U. avenue, on or about the 27th day of —, and that said car and train was carelessly and negligently permitted to rapidly run down a descent on defendant's road with unusual speed and force, that the car was derailed and turned over, and that plaintiff received injuries by reason thereof, without fault on his part, then the burden of proof is shifted upon the defendant to show to the satisfaction of the jury that the accident occurred through no fault, negligence, license, or care-

⁴⁰—Logan v. Metropolitan St. Ry. Co., *supra*.

lessness of defendant's agents or servants, and unless it is so shown the jury should find a verdict for plaintiff.

(f) By the utmost practicable human skill, diligence, and foresight used in these instructions is meant such skill, diligence, and foresight as is exercised by reasonably cautious persons under like circumstances.

(g) What the court says in the instructions read by plaintiff's counsel as to the burden being on defendant does not mean that you are confined to the testimony offered by defendant in determining whether the burden has been established. You are to consider all the facts and circumstances in evidence, whether developed in the examination of plaintiff's or defendant's witnesses, and, if you find therefrom that there was no negligence of the character submitted, then the burden has been sustained by the defendant, and it is entitled to the verdict, even though you find that F. was a passenger, and was injured without fault on his part.

(h) Defendant is not required to prove what caused the train to get beyond the control of the trainmen; and even if the jury can not find from the evidence the exact cause, or if such cause is unknown and has not been shown, still if, after considering all the testimony in the case, not only that offered by defendant, but also that offered by plaintiff, you find that there was not any negligence on the part of defendant of the character submitted to your consideration, then the defendant must have the verdict, even though F. was its passenger, and received his injury without any fault upon his part.

(i) Even though the plaintiff,——, was hurt without fault on his part, still under no circumstances can a verdict be rendered against the defendant, unless the jury find that the train went down the incline by reason of the negligence of defendant's agents, servants, and employes. If the car, by reason of an unavoidable casualty, got from the control of the gripman, then there was no negligence, and your verdict must be for the defendant.⁴¹

§ 2032. Presumptive Liability When Passenger Injured Through Collision. (a) If the jury find from the evidence in that case that the defendant, on the —— day of —— was operating the cars mentioned in the evidence for the purpose of carrying passengers for hire as a street railway; and if the jury further find from the evidence that the defendant, by its servant in charge of one of said cars, received plaintiff as a passenger thereon at or near W. Station, to be carried as such passenger upon said car to a point on defendant's railroad at or near —— race track in St. L., Mo., and that the plaintiff paid his fare as such passenger; and if the jury further find from the evidence in this case that whilst the plaintiff was such passenger on said car, being so carried to his point of destination aforesaid, and before he reached his said point of destination, the car in which he was such passenger was collided

⁴¹—The above six instructions Ry. Co., 162 Mo. 75, 62 S. W. 452—were upheld in *Feary v. Met. St.* 460.

with by another of defendant's cars going the opposite direction on the same track, and that thereby plaintiff was injured—then the defendant is liable in this case, if the defendant's servants in charge of its said car could have prevented said collision by the exercise of a high degree of care, such as would have been exercised by careful, skillful road employes under the same and similar circumstances.

(b) The jury are instructed that if the jury believe from the evidence that plaintiff was a passenger lawfully on board of the defendant's street car at the time of the collision appearing in evidence, and received injuries therein, then the burden of proof is shifted upon the defendant to show to the satisfaction of the jury that said collision was caused through no negligence or carelessness of defendant's agents, and unless it is so shown the jury should find a verdict for plaintiff.⁴²

§ 2033. **Injury through Panic of Passengers Produced by Explosion on Car.** The court instructs the jury that if you believe and find from the evidence that the plaintiff was a passenger on one of the defendant's cars, and while such passenger, as she was in the exercise of ordinary care for her own safety, an explosion occurred on said car by reason of which a panic was caused among the passengers on said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a *prima facie* case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance and foresight could reasonably do consistent with the mode of conveyance and the practical operation of the road.⁴³

§ 2034. **Slowing Down Car for Passenger to Board—Car Suddenly Started.** (a) The court instructs the jury that if they find from

42—Robinson v. St. Louis & S. Ry. Co., 103 Mo. App. 110, 77 S. W. 493 (495).

"In what particular the above instructions are erroneous is not specifically pointed out by defendant. That they properly declared the law of the case we have no doubt. The collision of the cars running in opposite directions on the same track was *prima facie* evidence of defendant's negligence. When shown, the burden was shifted on defendants to show by a preponderance of the evidence that the collision was not due to its fault. Malloy v. Railway, 173 Mo. 75, 73 S. W. 159; Clark v. Railroad Co., 127 Mo. 197, 29 S. W. 1013."

43—Chi. U. T. Co. v. Newmiller, 116 App. Ill. 625 (629), *aff'd* 215 Ill. 383, 74 N. E. 410.

"The objection urged to above instruction is that 'the element of the defendant's alleged negligence,

is taken from the jury, and the mere fact of the explosion itself is treated as sufficient evidence of negligence.' Conceding that the instruction, technically considered, should have contained the element that the controller was in the control of the appellant, as by the use of the words, in the controller of the car, or in the appliances of the car, immediately next after the words, 'explosion occurred on said car,' this cannot prejudice appellant, because it is an uncontested fact, and is admitted in the argument of appellant's counsel, they saying: 'Suddenly there was a flash and a report from the controller, on the front platform of the car.' It is not error for the court, in instructing the jury, to assume the existence of an uncontroverted and admitted fact."

the evidence in this case that on the — day of —, the defendant was operating the car mentioned in the evidence for the purpose of carrying passengers for hire; and if the jury further find from the evidence that on said day the plaintiff, at the crossing of D. street and G. avenue, in the city of —, signaled the motorman of said car of his intention to become a passenger on said car at said place; and if the jury further find from the evidence that said place was where the defendant received passengers on its eastbound car; and if the jury further believe from the evidence that defendant's said motorman on said car, in obedience to said signal, slowed said car down, approaching and at said place, to enable the plaintiff to get upon said car as a passenger, and that the plaintiff, whilst said car was so slowed down for said purpose, attempted to get upon said car as a passenger—then it was the duty of defendant's motorman in charge of said car to use a high degree of care, such as would be exercised by a skillful and careful motorman under like circumstances, to so control and manage said car as to enable the plaintiff to safely get upon said car, and reach a place of safety as a passenger.

(b) If the jury believe from the evidence in this case that on the — day of —, the defendant was operating the car mentioned in the evidence for the purpose of carrying passengers for hire from one point to another in the city of St. L. by street railway; and if the jury further find from the evidence in this case that on the — day of —, the plaintiff was on the east crossing of G. avenue and D. street, in the city of —, intending to become a passenger upon defendant's eastbound car at said place, and said place was where the defendant received passengers on its eastbound car; and if the jury further find from the evidence that whilst so at said crossing the plaintiff signaled defendant's motorman in charge of its eastbound car, approaching said point, of his intention to become a passenger upon said car at said place; and if the jury further find from the evidence that said motorman, in obedience to said signal slowed said car down as it approached said crossing for the purpose of receiving the plaintiff as a passenger on said car while it was so slowed down and moving slowly at said crossing; and if you further find from the evidence in this case that, after said car was so slowed down, it was so moving slowly at said crossing, and while so moving slowly the plaintiff stepped upon the step of the rear platform of said car for the purpose of becoming a passenger on said car, and that whilst the plaintiff was so getting upon said car, and before he had a reasonable time or opportunity to get upon said car as a passenger, defendant's motorman in charge of said car caused or suffered said car to suddenly go forward with increased speed and shock, and that thereby the plaintiff was caused to be thrown and fall from said car and sustain injuries; and if the jury believe from the evidence that the defendant's motorman so in charge of said car, while plaintiff was in the act of getting on the car, failed to exercise such high degree of care as would be exercised by a skillful and

careful motorman under the same or similar circumstances, and thereby directly caused said movement of said car, and plaintiff's injuries; and if the jury find from the evidence that the plaintiff was exercising ordinary care at the time in so getting upon said car, and whilst on said car—then the plaintiff is entitled to recover.

(c) If the jury find from the evidence that the car was slowed down while passing around the curve leading from G. avenue to D. street for the purpose of making it safe in getting around said curve, and that such slowing down was not done for the purpose of enabling the plaintiff to get upon the car, then such slowing down of the car was not an invitation to plaintiff to attempt to get upon the same, and if the motorman did not know, and had no reasonable cause to think, that the plaintiff was attempting to get on said car while it was in motion, then it was not negligent or improper in the motorman to accelerate the motion of said car when leaving said curve, and such facts, if you find them to be true from the evidence, do not authorize the plaintiff to recover.⁴⁴

§ 2035. Burden of Proof on Plaintiff to Show Slowing Down of Car Could Be Construed as Invitation to Board. The court instructs the jury that the charge of negligence made against the defendant in the plaintiff's petition is that the motorman of defendant's car slowed down the said car to a stopping point, inducing plaintiff to believe that said car had stopped to receive him as a passenger, and that while plaintiff was in the act of boarding said car the same was suddenly, and in violation of the ordinances of the city of —, started, throwing plaintiff to the ground and injuring him. With respect to the foregoing charge of negligence, you are instructed that the burden is upon the plaintiff throughout the whole case of establishing to your satisfaction, by the preponderance or greater weight of testimony, that the defendant's car did slow down, either for the purpose of receiving plaintiff as a passenger, or to so slow a speed as to cause the plaintiff to believe that it was slowing down for the purpose of receiving him as a passenger, and that the same was so suddenly started while plaintiff was in the act of boarding the same as to cause him to be injured; and unless the plaintiff has so proven he is not entitled to recover, and your verdict must be for defendant.⁴⁵

§ 2036. Negligently Starting Car While Plaintiff Is in Act of Boarding It—Taking Hold of Hand Rail. (a) The court instructs the jury that if you find and believe from the evidence that on or about the — day of —, the defendant was operating certain lines of street railroads in the city of St. L., Mo., and particularly a double-track line of railroad running east and west on M. avenue, past the intersection of M. and E. avenues, in said city; and if you further find and believe from the evidence

44—The above instructions approved in *Eikenberry v. St. Louis T. Co.*, 103 Mo. App. 442, 80 S. W. 360 (361, 362).
45—*Maguire v. St. L. T. Co.*, 103 Mo. App. 459, 78 S. W. 838, 840.

that the plaintiff attempted to board one of the defendant's eastbound cars on M. avenue, at the intersection of said M. and E. avenues, and on the east side of said E. avenue, and south side of said M. avenue, at a place where defendant's cars were in the habit of stopping to receive passengers, and that plaintiff, at said time and place, had reason to believe, and did believe, that said car was stopping for passengers to board said car at said place; and if you further believe and find from the evidence that the plaintiff took hold of the hand rail of said car at the rear end thereof for the purpose of becoming a passenger on said car; and if you find from the evidence that the defendant's servants in charge of said car knew, or by the exercise of ordinary care should have known, that plaintiff was attempting to board said car as a passenger; and if you further believe from the evidence that after the plaintiff had so taken hold of the handrail of said car at the rear end thereof for such purpose the said servants in charge of said car suddenly started the same before the plaintiff had a reasonable time to get upon said car and to a place of safety therein, and that the injury complained of was caused by the failure to stop the car and by such sudden starting of the car under such circumstances; and if you further believe from the evidence that the plaintiff at the time exercised ordinary care in attempting to board the car in the manner shown by the evidence—then your verdict should be for the plaintiff.⁴⁶

(b) If the jury find from the evidence that on the — day of — the plaintiff was standing at the corner of E. and A. avenues in the city of —, intending to board one of the cars operated by defendant along and upon E. avenue; and if you further find from the evidence that a car of the defendant stopped at the corner of E. and A. avenues at the usual stopping place for taking on passengers, and that while said car was so stopped the plaintiff took hold of the hand rail with the purpose and intention of boarding said car and become a passenger thereon, and raised one foot towards or onto the step of the platform of said car, and, while in such position, the car started before the plaintiff had reasonable time to get aboard, if you find that it did so start; and if you further find that in consequence of such starting the plaintiff was injured—your verdict should be for the plaintiff.⁴⁷

46—Maguire v. St. L. T. Co., 103 Mo. App. 459, 78 S. W. 838 (840).

47—Shanahan v. St. L. T. Co., 109 Mo. App. 228, 83 S. W. 783 (784).

The court said:

"Error is imputed to this in that it authorized a verdict for plaintiff, ignoring any evidence of contributory negligence, and without limiting the right of recovery to the absence of such contributory negligence on his part. This fallacious doctrine was enunciated in Sullivan v. Railroad, 88 Mo. 169, but

speedily overturned, and the reasonable proposition adopted that instructions in a case are to be taken as a whole, and can be understood by the jury, as composed of men of common sense, in no other way, and that a single instruction need not cover the whole case. Owens v. Railway, 95 Mo. 169, 8 S. W. 359, 6 Am. St. 39."

"Nor does this instruction predicate a right of recovery upon an act of negligence not the proximate cause of the accident, as af-

§ 2037. Motorman Must Act Under Directions of Conductor—Knowledge of Either Motorman or Conductor That Plaintiff Is Boarding Car Sufficient. If you believe from the evidence that the plaintiff was standing upon the rear platform of defendant's car for the purpose of requesting passage thereon from the conductor, while the same was stopped and standing at —, that said car was in charge of and being operated by its motorman and conductor, and that in operating the same the motorman had control of the power which caused its motion, and so controlled the stopping, starting and speed of the car, and said motorman was under the direction of the conductor, and was required to stop and start said car upon signals from the conductor by means of a bell to be rung by the conductor; that either of them—the said conductor or motorman—knew, or by the exercise of ordinary care would have known that plaintiff was so standing upon said platform, and failed to exercise ordinary care for the safety of the plaintiff in the starting of said car, and that such failure caused the said car to be started suddenly, and without notice or warning to plaintiff, at a rapid rate of speed, upon a curve in the track, and thereby caused the plaintiff to be thrown from the said platform of the car and injured, as the result of such failure in the exercise of ordinary care—then you should find that such failure constituted negligence.⁴⁸

§ 2038. Effect of Failure of Conductor to See Intending Passenger. If the jury believe from the evidence that the plaintiff came up to the car from the rear, and was not upon the car, but was in a position where the conductor, in the exercise of ordinary care in looking for intending passengers, at the rear step of his car, would not ordinarily see plaintiff, and the conductor, in the exercise of ordinary care in looking for intending passengers at the rear step, did look there, and in so looking saw no intending passenger, and at once gave the signal to go ahead, and the car thereupon started, then there could be no recovery in this case, and your verdict will be for the defendant.⁴⁹

§ 2039. Effect of Stranger Ringing Bell and Starting Car. If the jury believe, from the evidence, that some person not in the employment of the defendant company rang the bell which started the

firmed by appellant. "The joint specifications of negligence in starting the car before the plaintiff was afforded a reasonable opportunity to safely get on, and in not stopping subsequently to avert the peril impending in his jeopardous situation of being dragged and clinging to the car, in themselves are not inconsistent, and both find abundant support in the testimony."

48—Brock v. St. L. T. Co., 107 Mo. App. 109, 81 S. W. 219 (222).
"It might be pertinent to inquire,

in view of the objection, if the motorman was not under the direction of the conductor, how the car could be run orderly, and with safety to passengers? It is a matter of common knowledge that motormen stop and start street cars in response to signals given by the conductor, and that such cars could not be operated with any degree of safety in any other manner."

49—Gaffney v. St. Paul C. Ry. Co., 81 Minn. 459, 84 N. W. 304 (305).

train at the time in question, still that fact will not exempt the defendant company from liability in this case; provided the jury believe, from the evidence, that the conductor could, by use of due care and diligence, have countermanded the unauthorized signal for starting the train in time to have prevented any injury to the plaintiff, if he, the conductor, had exercised due care and diligence in the discharge of his duties; and provided the jury believe, from the evidence, that the plaintiff at the time in question was in the exercise of reasonable care and diligence for his own safety.⁵⁰

§ 2040. Negligently Starting Car While Passenger Is Alighting.

(a) The jury are instructed that the law requires the employes of street railways to do more than to stop reasonably long enough for passengers to safely alight from cars. They are bound and required to ascertain and know that no passenger is in the act of alighting from the car before putting it in motion again. If an employe fails in that respect, then such failure is imputed to his employer, and is actionable negligence on the part of the employer, and it is no excuse for the employe or his employer to show that the car on the particular occasion was operated in the usual manner.⁵¹

(b) The court instructs the jury that if they believe from the evidence that on or about — the plaintiff, Mrs. A., was a passenger upon one of defendant's street cars running north on B. street in the city of —, and had paid her fare; and that said car stopped at B. avenue, or near that point, for the purpose of permitting said Mrs. A. to alight therefrom, and that while she was in the act of alighting from said car the said car was without warning started forward with a sudden movement which caused Mrs. A. to be thrown to the ground and injured, while she was exercising ordinary care on her part; and if you further find and believe from the evi-

50—N. C. St. R. R. Co. v. Cook, 145 Ill. 551 (557), 33 N. E. 958.

"We see no objection to the instruction. It was the duty of the appellant to stop its car a sufficient length of time to enable appellee to get fully and safely on same. City R. Co. v. Mumford, 97 Ill. 560; 2 Shear. & Red. Neg. sec. 508; Thompson on Car. Pass., sec. 16; Dougherty v. Mo. Pac. Ry., 81 Mo. 330, 51 Am. Rep. 239; C. & A. R. R. Co. v. Wilson, 63 Ill. 167; Chi. W. D. Ry. Co. v. Mills, 105 id. 63; C. & A. R. R. Co. v. Arnot, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313.

Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill and diligence for the safety of the passenger that is consistent with the mode of conveyance employed. The car or train was in the control of the conductor, and he was required to know, if by the exercise of due care, caution and diligence

in the discharge of his duties he could know, whether any person was attempting to get on or off his train or car before permitting the same to start in such manner as would be likely to injure a person so getting on or off the same. It was a duty appellant owed to the public to be discharged through its conductors or other agents whom it might select to afford its passengers time and opportunity to board and depart from its cars in safety. The fact, therefore, if it be conceded that the signal for starting was given by an unauthorized person would not exempt the railroad company from liability if the conductor or agents of the railway company in charge by the exercise of due care and diligence could have prevented the moving of the car and thereby avoided the injury."

51—Crump v. Davis, 33 Ind. App. 88, 70 N. E. 886, 887.

dence that said sudden movement of said car was directly produced by the defendant's agent or employe in charge of the movement of said car, and that his said act in so causing the said car to be suddenly started, as aforesaid, amounted to a want of such care as devolves on a carrier of passengers (as defined in another instruction), and that as a direct consequence of such omission of such care by said agent of defendant Mrs. A. received injury—then your verdict should be for the plaintiffs.⁵²

(c) If the jury believe, from the evidence, that the defendant controlled and operated, for the purpose of carrying passengers for hire, certain street cars upon — avenue in the city of —, — County, —, and that the plaintiff, on or about the — day of — was a passenger for hire on one of the said cars of the defendant, and that the defendant, by its servant, caused the said car to be stopped for the purpose of allowing passengers to alight therefrom, and the plaintiff was in the act of alighting from said car while said car was so stopped, and while in the act of alighting from said car was using all reasonable care and caution to avoid the injury complained of in the declaration, and that the defendant, through its servant, negligently and carelessly caused said car to be set in motion while the plaintiff was so alighting from said car, and that thereby the plaintiff was injured, then the jury should find the defendant guilty.⁵³

(d) If you believe from the evidence that on or about the — day of — plaintiff boarded one of defendant's street cars, and became a passenger thereon, and that she attempted to alight therefrom after said car had been stopped, and if you further believe from the evidence that while she was in the act of alighting from said car the car was suddenly put in motion, without giving her sufficient time to alight, and if you further find from the evidence that the defendant was guilty of negligence in failing to give the plaintiff sufficient time

52—*Abbitt v. St. L. T. Co.*, 106 Mo. App. 640, 81 S. W. 484.

"It seems to us that it would be quite difficult, if not impossible, to embody in an instruction a more accurate expression of the law as applicable to any given case than that embodied in that of plaintiff. *Dawson v. Transit Co.*, 102 Mo. App. 277, 76 S. W. 689; *Batten v. Transit Co.*, 102 Mo. App. 285, 76 S. W. 727."

53—*N. C. St. R. R. Co. v. Brown*, 178 Ill. 187 (188), *aff'g* 76 Ill. App. 654, 52 N. E. 864.

The court, in its opinion, said: "It may be conceded that plaintiff could not recover unless she was in the exercise of ordinary care at the time of the accident, and if there was no evidence whatever in the record tending to show ordinary care on her part, the argu-

ment that there was no evidence upon which the instruction should be predicated might be regarded as well taken. But, upon examination of the record, it will be found that there is evidence tending to prove ordinary care on the part of the plaintiff. The objections that the instruction entirely omits the question as to whether the negligence was the proximate cause of the injury, and that it required the plaintiff to exercise reasonable care but did not instruct the jury as to what was reasonable care, are obviated in other instructions given by the court."

For a similar instruction, see *Springfield Ry. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884, *aff'g* 71 Ill. App. 162.

to alight from its car, and in suddenly starting said car, if you so find the facts to be, and that such negligence, if any, directly caused plaintiff to fall, and that she was injured thereby, then your verdict should be for the plaintiff, unless you find, under the charge herein-after given you, that the plaintiff was guilty of negligence herself that contributed to her injury.⁵⁴

(e) I instruct you also, gentlemen, that it is the duty of a railway company such as this to use the degree of care which I have defined as being the duty of railway companies, to see to it that passengers intending to alight have a reasonable time in which to alight and detach themselves in safety from the car in which they are traveling.

(f) And that it is also the duty of such railroad companies, in the event that a passenger is alighting, or is in the act of alighting, to use that same high degree of care that I have defined, to prevent injury to that passenger, in not starting the car while that passenger is in a position of danger, and when the employes of the company either know, or ought to know by the exercise of the same degree of care that the laws impress upon them, that the passenger is in that condition of danger or apparent danger. Any breach of the performance of his duty which I have thus more specifically defined would be such negligence, under the issues in this case, that the jury could take cognizance of.⁵⁵

§ 2041. Slowing Car Up and Then Starting Suddenly While Passenger Is in Act of Alighting. (a) If you find from the evidence that, before the injuries complained of were received, plaintiff notified the conductor of the train that she desired to leave the same at C. street, that the conductor notified the gripman of this fact; and you find that, while crossing C. street, the defendant let go the cable, and put on the wheel brake, and slowed down so that after arriving on the straight track, north of the north line of C. street, said train was then moving at a rate of from two to three miles per hour; and if you find from the evidence that plaintiff then arose, and stepped on the platform, as if to descend from the car, that the gripman turned once or twice to observe her; and if you further find that about this time, or before plaintiff left her position, the gripman suddenly let off the brake, and permitted the car to start with a sud-

54—San Ant. T. Co. v. Welter, — Tex. Civ. App. —, 77 S. W. 414.

The court said in part: "It is urged under the assignment, as an objection to the charge, that it 'assumed the fact to be that defendant's car had stopped when plaintiff undertook to alight therefrom,' when the existence of such fact was an issue made both by the pleadings and the evidence. We do not think the charge obnoxious to the objection. In our opinion, the question of the existence of such fact, as well as all others essential

to plaintiff's recovery, is submitted by the charge for the jury's determination. San Ant. & A. P. Ry. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 610; G. H. & S. A. Ry. Co. v. Waldo, — Tex. Civ. App. —, 32 S. W. 783; and authorities cited. A charge should be taken as a whole, and when the part complained of is taken and considered with the fourth paragraph, it is too clear for argument that it does not assume such fact."

55—Gilmore v. Seattle & R. Ry. Co., 29 Wash. 150, 69 Pac. 743 (745).

den jerk, by reason whereof plaintiff was violently thrown to the ground and received the injuries complained of; and, if you find that, at the time the plaintiff arose to get off the car, she had reasonable ground to believe that the car was about to stop, and that her position did not contribute to her fall and injuries,—then the defendant would be liable to plaintiff in such sum as the evidence shows you she sustained, not exceeding the amount claimed in the petition, unless you further find from the evidence that plaintiff could, by the exercise of due care, have avoided the consequence of the negligent act of the defendant, if you find it was so negligent, and if you find such to be the facts.

(b) If you, gentlemen of the jury, find from the testimony in this case that the plaintiff, A., was a passenger on the defendant's cars at the time alleged in the petition, that the servants of the company in charge of those cars knew at what point she desired to alight, she was entitled to be carried by the defendant company, with proper and reasonable care, to the place where she desired to alight, and have the cars stop at that point a sufficient length of time to permit her to alight with reasonable care and diligence. And if you further find from the testimony that, when the defendant's cars reached that point, they had commenced slowing up, but did not stop, but passed beyond such point, and then continued to slow up, and while going very slow, as if to immediately stop, the plaintiff, A., arose from her seat and stepped upon the platform or guard on the side of the car, which platform or guard was used for alighting from the car, and that as she stepped on that platform or guard, for the purpose of alighting when the car should stop, the gripman propelling the car saw her, and moved the cars suddenly forward, with a jerk, before stopping them and giving A., the plaintiff, an opportunity to alight, and that by such sudden movement forward she was thrown to the ground and injured, and that she herself was free from blame, under all the circumstances of the case, then your verdict should be in favor of the plaintiff.⁵⁶

§ 2042. Movement of Car Must Be Attributable to Act of Men in Charge. The jury are instructed that, if they believe from the evidence that there was a sudden movement of the car at the instant of time when the plaintiff was attempting to get off from the car, such fact alone does not show negligence on the part of the railway company; for, in order to show negligence on the part of the railway company, there must be some evidence of a sudden movement of the car, attributable to some act or action of the men in charge of the train, and that such act of negligence on the part of the men in

⁵⁶—*Omaha St. Ry. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209 (213).

"The complaint made of these instructions is that they fail to state what would have constituted contributory negligence on — part. But we are of the opinion

that the instructions were correct in every particular. As has been stated above, it was not for the court to say what acts or omissions of — rendered her guilty of contributory negligence. That was for the jury."

charge of the train cannot be determined by the jury from mere conjecture.⁵⁷

§ 2043. Conductor Must See That No Passenger Is in Act of Alighting. The jury are instructed that it is the duty of a conductor of a street car operated by electricity, when his car has been stopped for passengers to alight, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts the car in motion.⁵⁸

§ 2044. Ringing Bell to Go Ahead While Passenger Is Alighting.

(a) If you find in this case that while the plaintiff was attempting to alight from the car the conductor rang the bell, and the car started up, and the accident occurred in that manner, then the plaintiff would be entitled to recover, because it would amount to actionable negligence on the part of the conductor to ring the bell while the plaintiff was in the act of alighting. There can be no question about that.

(b) If you believe the plaintiff's theory, and believe that the accident occurred by reason of the negligence of the car conductor, by ringing the bell while he was in the act of alighting, then he is entitled to recover such damages as the evidence shows you he has suffered.

(c) If on the contrary you believe the plaintiff attempted to alight from the street car of the defendant while holding a large package in his left hand and before the car was brought to a standstill, and in consequence thereof suffered the injury shown, then the plaintiff cannot recover, and your verdict must be for the defendant, because, obviously, it would be an act of negligence on his part to alight from a car which was in motion, and if he did that thing, the proximate cause of the injury would be his own negligence, and not negligence on the part of the company.⁵⁹

§ 2045. Failure of Conductor to Warn Passenger of Danger Known to Conductor, but Unknown to Passenger. If you believe from the evidence that the plaintiff was a passenger as claimed, and was about to alight at the time and place he claims, and had not safely alighted, and that the conductor of the car upon which plaintiff is claimed to have been riding saw and knew that plaintiff was exposed to danger in alighting from the car, which danger plaintiff was ignorant of, and could not, in the exercise of ordinary care, perceive, nevertheless allowed plaintiff to alight and be injured; and if you believe that in so doing, if he did, the conductor was guilty of negligence (that is, failed in the exercise of extraordinary diligence) and that such negli-

57—*Omaha St. Ry. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209 (215).

58—*Birmingham Ry. & El. Co. v. Wildman*, 119 Ala. 547, 24 So. 548 (549).

59—*Kirchner v. Detroit C. Ry. Co.*, 91 Mich. 400, 51 N. W. 1059 (1060).

"The charge must be taken as a whole, and we think the jury must have understood the charge to mean that it would be negligence on the part of the conductor to ring the bell and start the car while the plaintiff was attempting to alight."

gence, if there was such negligence, caused plaintiff's injury, and that plaintiff could not by ordinary care have avoided the consequences to himself of defendant's negligence, if shown,—the plaintiff would be entitled to recover.⁶⁰

§ 2046. **Passenger Alighting Near Parallel Track.** If you believe from the evidence that the plaintiff was a passenger as claimed, at the time and place, and was about to alight as claimed, and had not safely alighted from the car; and if you believe from the evidence that it was dangerous, and that defendant knew it, or ought to have known it in the exercise of extraordinary diligence, to allow a passenger to alight on the side of the car next a parallel track and took no steps to prevent it; and if you believe that that was negligence (that is the failure to exercise extraordinary diligence) and thereby plaintiff was injured and that plaintiff could not by the exercise of ordinary care have avoided the consequences to himself of defendant's negligence, if shown,—the plaintiff would be entitled to recover.⁶¹

§ 2047. **Alighting Passenger Struck by Car Coming from Opposite Direction.** If you believe from the evidence that on or about —, at the place alleged in this suit, the plaintiff was a passenger on one of the defendant's electric cars, and that as the plaintiff was in the act of alighting from the car, and just before he had safely landed, another car of the defendant approached from the opposite direction, running at a reckless and unusual rate of speed, struck and injured plaintiff; and if you believe such running of said car was negligent (that is the absence of extraordinary diligence) and that such negligence, if you find it to be negligence, caused plaintiff's injury, and that by ordinary care plaintiff could not have avoided the consequences to himself of defendant's negligence, if you find that to have existed as explained—the plaintiff would be entitled to recover.⁶²

§ 2048. **Duty of Motormen on Approaching Cars.** If you believe from the evidence that at the place alleged, and at the time the plaintiff was a passenger on defendant's electric car and that as the plaintiff was in the act of alighting from the car, and before he had safely landed, the employes on the car which it is claimed struck plaintiff saw that the car on which plaintiff is claimed to have been riding had stopped to let a passenger off, if you believe they did see and know that the car had stopped for that purpose, or could in the exercise of extraordinary diligence have so seen and known, and failed to stop the car, which is claimed to have struck plaintiff, or check up and get same well under control; and if you believe that in the exercise of extraordinary diligence they could have stopped said car, or checked up and got the same well under control, and that in the exercise of such diligence they ought to have done so, and their failure to do so, if there was such a failure, was slight negligence; and if

60—Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41 (46).

61—Atlanta Cons. St. Ry. Co. v. Bates, supra.

62—Atlanta Cons. St. Ry. Co. v. Bates, supra.

you believe that such negligence, if you find it to have existed, caused plaintiff's injury, and that by ordinary care plaintiff could not have avoided the consequences to himself of defendant's negligence, if shown,—the plaintiff would be entitled to recover.⁶³

§ 2049. Failure to Check Reckless Rate of Speed of Approaching Car. If you believe from the evidence that the plaintiff was a passenger, as claimed, at the time and place, and was about to alight, as claimed, and had not safely alighted from the car, and the officers (motorman and conductor, one or both) on the car which it is claimed struck the plaintiff became aware of plaintiff's danger, if he was in danger, and then continued to go forward at a reckless rate of speed, under the facts and circumstances of the case; and if you believe that doing so was slight neglect towards the plaintiff, and that thereby plaintiff was injured, and that by the exercise of ordinary care he could not have avoided the consequences to himself of defendant's negligence, if shown, then the plaintiff would be entitled to recover.⁶⁴

If you believe from the evidence that the plaintiff was a passenger as claimed at the time and place, and was about to alight as claimed; and had not safely alighted, and if you believe from the evidence that the car which is claimed to have run against the plaintiff, was not provided with a proper brake chain, so as to enable it to be checked up with sufficient quickness, and that therein the defendant was guilty of slight neglect towards the plaintiff, and that such negligence caused plaintiff's injury, if injured, and that by ordinary care plaintiff could not have avoided the consequences to himself of defendant's negligence, if shown, then the plaintiff would be entitled to recover.⁶⁵

§ 2050. Passenger Raising Umbrella While Alighting. The plaintiff contends that on that occasion he did all that in the exercise of ordinary care he should have done, and he claims that his observation of the defendant in letting off passengers under similar circumstances led him to act as he did, and not to anticipate danger in getting off the car; that his attention for the moment was withdrawn by the rain, and in raising or preparing to raise his umbrella, and that in all of these facts, if they appear from the evidence, and all the surrounding circumstances, he was not negligent, but exercised all the care that the law required of him—exercised ordinary care. To determine the truth of this issue, you will examine all the evidence and facts of the case that will illustrate the question and find the truth; the rule of law being the precise thing which every prudent person who is a passenger is bound to do before stepping from an electric street railroad car in a city at a street crossing, when the car had stopped to let him off, on the side next a parallel track, as

63—Atlanta Cons. St. Ry. Co. v. Bates, *supra*.

64—Atlanta Cons. St. Ry. Co. v. Bates, *supra*.

65—Atlanta Cons. St. Ry. Co. v. Bates, *supra*.

near the track on which the stopped car is standing as the evidence may show in the case, is that which every prudent man who is a passenger would do under like circumstances. If prudent men who were passengers would look and listen so must everyone else who is a passenger, or take the consequences, so far as the consequences might have been avoided by that means.⁶⁶

§ 2051. **When Relation of Passenger and Carrier Ceases—Injury Through Backward Movement After Alighting.** The court instructs the jury that, after the plaintiff alighted in the street from the defendant's car, so as to be free from injury by its forward movement, the defendant ceased to owe the plaintiff any further duty, except to use ordinary care to avoid injuring him; and if the jury believe from the evidence that the plaintiff was injured by a backward movement, or movement towards the car, on his part, caused by an approaching vehicle in the street, or from any other cause over which the defendant had no control, and that by ordinary care on the part of the defendant's employes in charge of said car the injury to the plaintiff could not have been avoided after they discovered, or could by ordinary care on their part have discovered, plaintiff's peril, and by the exercise of ordinary care could then have avoided injuring him by stopping the car, the law is for the defendant, and the jury should so find.⁶⁷

§ 2052. **Carrying Passenger Past Destination.** (a) The jury are further instructed that any failure of the defendant company, if such there was, to stop at the exact point where the company is accustomed to stop its cars, is not of itself negligence on the part of the company.

(b) The jury are further instructed that, if the plaintiff believed that the train was about to pass the place of her destination without stopping, such fact did not justify her in attempting to get off of the car while it was still in motion.

(c) The jury are further instructed that under no circumstances can the plaintiff recover, unless the defendant, by its agents and servants in charge of the train, did some act, or was guilty of some negligence, which contributed to the injury.⁶⁸

§ 2053. **Injury Through Over-crowding of Car.** (a) The court instructs the jury that the acts of negligence charged against the

66—Atlanta Cons. St. Ry. Co. v. Bates, *supra*.

67—Louisville Ry. Co. v. Meglery, 25 Ky. 1587, 78 S. W. 217 (218).

"The above instruction, which was refused by the court, states the law correctly, and, with this instruction before them, the mind of the jury would have been brought more directly to the issue they were to try. It defines the duty owing by the defendant to plaintiff, and shows when and un-

der what circumstances the duty would cease. It presented to the jury the theory of the case on which alone all the testimony introduced by the defendant was given, and, on the whole case, we conclude that the refusal to give the instruction was prejudicial to the substantial rights of the defendant."

68—Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209 (215).

defendant in plaintiff's declaration are negligence in permitting its cars on which the plaintiff rode to be over-crowded, and negligence in running its car on which the plaintiff rode at an excessive rate of speed.

(b) The court instructs the jury that if you believe, from the preponderance of the evidence in this case, that the plaintiff, F., on the — day of —, 19—, became a passenger on one of defendant's cars, and that while he was a passenger of such car, he, while exercising due care for his own safety, was injured by the negligence of the defendant, as charged in plaintiff's declaration or some count thereof, then, in law, the defendant is liable for such injury, and the jury should so find by their verdict.⁶⁹

§ 2054. **Assaults on Passengers by Company's Servants.** (a) The court instructs the jury that if you believe from the evidence that on or about the — day of —, the plaintiff was a passenger on one of defendant's cars running on F. avenue, in this city, and that while plaintiff was on said car as a passenger, the conductor in charge of said car, and while in the discharge of his duties as such conductor without cause, excuse, or provocation therefor, did strike, assault, beat or mistreat plaintiff, thereby knocking plaintiff down, and ejecting him from said car, by reason of which plaintiff was hurled to the pavement on said street, and by reason of which plaintiff sustained injuries to his person, then your verdict should be for the plaintiff.⁷⁰

69—*Alton Lgt. & T. Co. v. Oller*, 217 Ill. 15 (18), 75 N. E. 419.

"Counsel says that No. 4 (b), standing by itself, was not objectionable, but that considered in connection with No. 3a (a) it was seriously hurtful to the appellant company. Counsel insists that instruction 3a applies to both counts of the declaration, and does not state fully the essential elements of the negligence charged in either count; that the jury were likely to understand from instruction 4 (b) considered in connection with instruction 3a (a), that proof that the car was overcrowded, merely, would sustain the issue made under the first count. Both counts of the declaration charged that the company was guilty of negligence in causing and permitting the car to be overcrowded. The first count charged that the motion of the car forced the other passengers against the appellee and thus pushed him from the car. The second count charged like negligence in overcrowding the car, and that the motion of the car, the speed being rapid and dangerous, threw the appellee from the car. The overcrowding of the car and the motion or movement of the car were

elements of negligence in both counts, and the manner in which the motion operated to throw the appellee from his place on the steps was stated differently in the two counts. The first count was based upon the theory that the appellant company induced and permitted the car, the platforms and the steps thereof to be so crowded with passengers that the movement or motion of the car at an ordinary rate of speed was dangerous to passengers, and that therefore the appellant company failed in its duty towards its passengers by attempting to run the car so overcrowded, in the same manner and the same speed and motion as would have been employed had it contained no more passengers than it was intended to accommodate and convey in safety. The second count charged the same negligence as to the overcrowding of the car, and alleged in addition, that the company negligently propelled its car at even a greater than the ordinary rate of speed. Instruction No. 3a (a) therefore, though not carefully drawn, did not misdirect the jury as to the issues."

70—*Sonnen v. St. L. T. Co.*, 102 Mo. App. 271, 76 S. W. 691 (692).

(b) I charge you, gentlemen of the jury, that abusive language or opprobrious epithets alone never justify the commission of an assault by a conductor in charge of a train upon a passenger.⁷¹

(c) If the jury find from the evidence that, while the conductor in charge of defendant's car, was in the orderly discharge of his duties, plaintiff provoked or brought on a difficulty with said conductor, and by striking or threatening to strike said conductor, so aroused his passions that he assaulted and injured said plaintiff, then and in that event the court declares to you that said conductor alone is responsible to plaintiff for whatever injuries he may have inflicted upon said plaintiff, and the plaintiff cannot recover in this case.

(d) The court instructs the jury that while plaintiff was on defendant's car, riding as a passenger thereon, it was his duty to deport himself orderly and obey all reasonable requests that might be made of him by the conductor in charge of said car for the benefit or convenience of other passengers. And if you believe from the evidence that the plaintiff took a position on the rear platform of said car, in a place where his presence would and did interfere with other passengers in getting on or off of said car, then it was his duty, when requested by the conductor so to do, to remove to some other part of said car, where he would not obstruct the passage or interfere with passengers getting on or off the car, and if plaintiff refused when so requested to so change his position upon said car, then the conductor in charge of said car had a right to remove the plaintiff out of the passageway, and if in so doing he used no more force than was reasonably necessary to accomplish such purpose, and plaintiff because of such effort on the part of the conductor to so remove him from such position on the platform, either struck or attempted to strike the conductor, then the conductor had a legal right to defend himself against such assault, in whatever manner, and with whatever means were apparently necessary to prevent plaintiff from doing him, the conductor, bodily harm. And if the jury find that the assault complained of by plaintiff occurred under the circumstances and in the manner above set forth, then your verdict must be for the defendant.⁷²

(e) If the jury find from the evidence that the plaintiff intended to end his journey as a passenger at Sixth street and W. avenue, and went to the rear platform of the car for the purpose of alighting and was given reasonable opportunity to alight at that point, but because a controversy arose between the plaintiff and the conductor about the past occurrence of the conductor refusing a transfer to plaintiff, and that the plaintiff remained upon said car for the purpose of continuing the controversy, and that when the car reached S. and L. streets the plaintiff was in the act of alighting, and the con-

71—Birmingham Ry. L. & P. Co.* 72—Sonnen v. St. L. T. Co., 102 v. Mullen, 138 Ala. 614, 35 So. 701 Mo. App. 271, 76 S. W. 691 (692). (702).

ductor put his hand upon the plaintiff, pushed him off, and that thereupon the plaintiff again got upon the car, struck and assaulted the conductor, then the conductor had lawful right to use such force as was reasonably necessary in resisting the plaintiff to prevent injury to himself; and if, while the conductor and plaintiff were engaged in their struggle and scuffle, the motorman came to the rear platform, and the plaintiff struck him or attempted to strike him, then the motorman had the lawful right to use such force as was reasonably necessary to prevent injury to himself in resisting the plaintiff; and if the jury find from the evidence that the alleged assault upon plaintiff occurred substantially under these circumstances, and that neither said conductor nor said motorman used any more force than was reasonably necessary to protect themselves against the plaintiff, then the plaintiff is not entitled to recover for the alleged assaults made upon him.⁷³

§ 2055. Wrongful Ejection of Passenger from Car—Presumption That Natural and Probable Consequences of Wrongful Act Are Intended. The jury are instructed that the gist of this action is the alleged wrongful ejection of the plaintiff from the defendant's car. He cannot recover upon proof of mere negligence, however gross such negligence. The cause of action alleged by the plaintiff is not for negligence, and does not require proof of plaintiff's freedom from negligence. The plaintiff's only right of recovery under his complaint is for willful injury, if proven. A willful injury is that which flows from an injurious act, purposely committed, with the intent to commit injury. In determining whether the injury, if any, was committed willfully, you may consider, with other circumstances of the case, the manner of the conductor, the force, if any, used by him, and the effects of his acts, together with the presumption that every person intends the natural and probable consequences of his wrongful acts; and an unlawful intent may be inferred from the conduct which shows a reckless disregard of consequences, and a willingness to inflict injury by purposely and voluntarily doing the act, with knowledge that some one is in a situation to be unavoidably injured thereby.⁷⁴

73—Murphy v. St. L. T. Co., 96 Mo. App. 272, 70 S. W. 159.

74—Citizens' St. R. Co. v. Willoebay, 134 Ind. 563, 33 N. E. 627 (628).

"This instruction, we think, states the law correctly. It puts the case upon the theory outlined in the complaint as we construe it, and announced correct rules for arriving at a just conclusion on this theory. The rule that every one is presumed to intend the natural and probable consequences of his own wrongful acts is elementary. The definition of a willful injury is correct, under all the authorities upon that subject. Palmer v. C. St. L. & P. R. Co., 112 Ind. 250, 14 N. E. 70. It is contend-

ed, however, that the use of the article 'the' preceding the word 'conduct' in this instruction, conveyed to the mind of the jury the idea that the court was characterizing the conduct of the conductor who is alleged to have inflicted the injuries for which suit is brought as reckless, and in disregard of consequences, and as exhibiting a willingness to inflict an injury by doing an act purposely and voluntarily, with a knowledge that someone was in a situation to be unavoidably injured thereby. We cannot agree with counsel in this construction of the language used in this instruction. It is plain, we think, when the whole instruction

§ 2056. **Use of More Force Than Necessary in Ejectment.** The jury are instructed that, even if the jury believe, from the evidence, that the plaintiff did not pay his fare or someone pay it for him when riding on the defendant's car, and the conductor of the said defendant's car then in charge of the car did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while the car was in motion, and without any immediate warning, and he was injured thereby, then the defendant is liable for such injury and damage.⁷⁵

§ 2057. **Posted Warnings in Cars.** The court instructs the jury that the fact that no notices were posted in the cars warning passengers to keep off the inner footboard was not of itself such negligence as authorizes the plaintiff to recover in this action.⁷⁶

§ 2058. **Separation of White and Colored Passengers—Series.**

(a) If you believe from the evidence that the conductor used no more force than was reasonably necessary to enforce in a proper manner a rule requiring colored passengers to sit in the front part of the car, then I charge you that your verdict must be for the defendant.

(b) If you believe from the evidence that, at the time plaintiff claims she was ejected from the car, the defendant had in force on its railroad a rule requiring colored passengers to sit in the front part of the car, and white passengers to sit in the rear part of the car, and if you further believe from the evidence that the conductor used no more force than was reasonably necessary to enforce such rule in a proper manner, you must find for the defendant.

(c) If you believe from the evidence that the conductor requested the plaintiff to take a seat in the forward end of the car; that she refused to comply with the request; that she could have found in the forward end of the car a vacant seat; that at the time there was a rule in force requiring colored passengers to sit in the forward end of the car; that the conductor used no more force than was necessary to reasonably enforce such rule in a reasonable and proper manner,—you must find for the defendant.

(d) The court charges the jury that the defendant was not re-

is taken together that the court was announcing to the jury a general proposition of law, leaving them to determine from the evidence in this case whether such principle was applicable to the conduct of the conductor who is alleged to have inflicted the injury of which the appellee is making complaint."

75—Chicago C. Ry. Co. v. Pelletier, 134 Ill. 120 (123), 24 N. E. 770.

"The instruction was not directed to the right to eject appellee, but to the manner of doing it, and it could not have been understood as excluding from the jury a consideration of the testimony tending to

show misconduct on his part. Other instructions told the jury that the conductor would be justified in putting appellee off the car for using vulgar and indecent language in a voice loud enough to annoy or disturb other passengers. While this would be true, the law would not justify unreasonable or excessive force, or permit his removal from the car at a place or under circumstances dangerous to his life or limb. The instruction complained of went only to that branch of the case, and correctly stated the law."

76—Allen v. St. L. T. Co., 183 Mo. 411, 81 S. W. 1143 (1148).

quired to keep and maintain separate compartments or cars for its white and colored passengers.

(e) If you believe from the evidence that the motorman did not aid or assist in the ejection of the plaintiff, you must find for the defendant.

(f) I charge you, gentlemen of the jury, that under the law the defendant was not required to provide a separate car for the colored race on its E. railroad; nor was the defendant, under the law, required to divide its cars on such railroad by partitions, so as to secure for the races separate accommodations.

(g) If you believe from the evidence that on and before the — day of —, there was in force on the defendant's E. railroad a rule requiring colored passengers to sit in the front part of the car, and for white passengers to sit in the rear part of the car; that the conductor requested the plaintiff to take a seat in the front end of the car, and that the plaintiff refused to take a seat in the front end of the car when so requested, and there was room for her to take a seat in the front part of the car; that no more force was used than was necessary to have her comply with such rule,—then I charge you that you must find for the defendant.

(h) If you believe from the evidence that on and before the — day of —, there was a rule in force on the defendant's railroad requiring colored passengers to sit in the front part of the car, and for white passengers to sit in the rear part of the car, I charge you that such rule was reasonable.

(i) I charge you, gentlemen of the jury, that if, under the evidence in this case, if you believe it, you should find that there was in force, at the time plaintiff claims to have been injured, a rule on the defendant's line of street railroad requiring negro passengers to ride in the front end of the car, and white passengers to ride in the rear end of the car, such rule is reasonable, and you are not authorized from the evidence to find that it was the duty of the defendant to put in its car a partition to separate negro and white passengers, instead of such reasonable rule.⁷⁷

77—*Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 27 So. 1016, 82 Am. St. 247, 50 L. R. A. 632.

"The question here presented was ably considered in an opinion delivered by Justice Agnew, of the supreme court of Penn. in the case of *R. Co. v. Miles*, 55 Pa. St. 209, from which we quote at length, as the reasons he gave for sustaining the reasonableness of the regulation are so forcibly stated, and the status of the two races with reference to each other as stated by him to exist in Pennsylvania in 1867 is the status of the two in Alabama today. The facts of that case were these: M., a colored woman (the plaintiff), got into the

car of the defendant at Philadelphia to go to Oxford, and took a seat at or near the middle of it. A rule of the road required the conductor to make colored persons sit at one end of the car. He got a seat for her at the place fixed by the rule, and asked her to take it. She declined, positively, and persistently to do it. The conductor told her of the rule, requesting her to take the other seat, warned her that he must require her to leave the cars if she refused, and at last put her out. The simple question is whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate

§ 2059. **Regulations as to Transfers.** (a) The court instructs the jury that the regulation of the defendant company that persons transferred from one car to another can ride upon the second car without paying fare only upon the production of a transfer check from the conductor of the first car is a reasonable, valid, and binding regula-

passengers by any other well-defined characteristic than that of sex. The ladies' car is known upon every well-regulated railroad, implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none. This question must be decided upon reasonable grounds. If there be no clear and reasonable difference to base it upon, separation cannot be justified by mere prejudice. Nor is merit a test. The negro may be proud of his service in the field as a defender of his country. But it is not thought indefensible to separate even white soldiers from other passengers. There was a clear and well-founded difference between the civil and military character, and the separation of soldiers from citizens implied no want of equality, but a sound regulation of the right of transit. The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interest of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and illustration are found in the case of an inn-keeper, who, if he have room, is bound to

entertain proper guests; and so a carrier is bound to receive passengers. But a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would maintain that it is reasonable regulation, either of an inn or a vessel, to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public, but not a whit beyond. The public also has an interest in the proper regulation of conveyances for the preservation of the public peace. A railroad company has the right, and is bound, to make reasonable regulations to preserve order in its cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the unruly and tumultuous. He cannot interfere in the quarrel of others at will, merely. In order to preserve and enforce his authority as the servant of the company, he must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their separation, than it is to quell them. The danger of breach of the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. These views are sustained by high authority. Judge Story, in his *Law of Bailments*, stating the duty of passengers 'to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests,' says, 'The importance of

tion; and if the plaintiff knew of it, and transferred from one car to another without asking the conductor for a transfer check, and without his telling her none was necessary, she cannot recover.

(b) The court instructs the jury that if, by the custom or regulation of the defendant company, passengers paying on one car could

the doctrine is felt more strikingly in cases of steam boats and railroad cars.' Story, Bailm. sec. 591a. See also, Id. sec. 476a; Angell Carr. sec. 528; 1 Am. Ry. Cas. 393, 394. The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and black races within this state, resulting from nature, law, and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that he shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, is not necessary to speculate, but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman. That would be to draw

the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts. Never has there been an intermixture of the two races, socially, religiously, civilly, or politically. By uninterrupted usage the blacks live apart, visit and entertain among themselves, occupy separate places of public worship and amusement, and fill no civil or political stations; not even sitting to decide their own causes. In fact, there is not an institution of the state in which they have mingled indiscriminately with the whites. Even the common-school law provides for separate schools when their numbers are adequate. In the military service, also, they were not intermixed with the white soldiers, but were separated into companies and regiments of color; and this is not by way of disparagement, but from motives of wisdom and prudence, to avoid the antagonisms of variant and immiscible races. Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. We cannot say there was no difference in fact, when the law and the voice of the people had said there was. The laws of the state are found in its constitution, statutes, institutions, and general customs. It is to these sources judges must resort to discover them. If they abandon these guides, they

ride on another one by presenting upon the second car a transfer check procured from the first, and the plaintiff failed to procure such transfer check and present it on the car to which she transferred, then she was not entitled to ride on the car to which she transferred, without the payment of fare. The conductor was not authorized to

pronounce their own opinions, not the laws of those whose officers they are. Following these guides, we are compelled to declare that at the time of the alleged injury there was that natural, legal, and customary difference between the white and black races in this state which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of carriers and passengers.'

"In *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547, which was a suit by a negro woman against the owner of a steamboat for refusing her accommodations, on account of her color, in the cabin specially set apart for white persons, the court after citing approvingly the case above quoted from, said: 'Where the passenger embarks without making any special contract, and without knowledge as to what accommodations will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments of special accommodations. Substantial equality of right is the law of the state and of the United States; but equality does not mean identity; as, in the nature of things, identity is the accommodation afforded to passengers, whether colored or white, is impossible, unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin; nor can all be accommodated, if the company is large, in the state rooms. Passengers are entitled to proper diet and lodging, but the laws of the United States do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other. Steamers carrying passengers as a material part of their employment are common carriers, and as such enjoy the rights and

are subject to the duties and obligations of such carriers; but there was and is not any law of congress which forbids such a carrier from providing separate apartments for his passengers. What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and, in locating his passengers in apartments and at their meals, it is not only the right of the master, but his duty, to exercise such reasonable discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company.'

"Booth, *St. Ry. Law*, Sec. 325, says: 'The doctrine that, in the absence of statutory inhibition, a common carrier may lawfully make color a basis of classification, but require its white and colored passengers to occupy separate cars or different parts of the same car when like accommodations are provided, has received the support of many of the courts, both state and federal, and is the rule which has been followed in the greater number of decisions heretofore rendered.' See, also, cases cited by Booth, *St. Ry. Law*, note 3, p. 443, and note 1, p. 444; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

"The other question presented is whether the reasonableness of the rule is a mixed question of law and fact, or purely a question of law for the court. The principle upon which the reasonableness of the rule is sustained in this case is that the carrier's right of property in the means of the conveyance and the public interest is best subserved by a separation of negro and white passengers; that their separation tends to secure order, promote comfort, preserve the peace, and maintain the rights of both carrier and passengers. When the rule is established by the evidence, and its violation shown by a passenger, undisputed-

allow her to ride on his car without the payment of fare or the presentation of such transfer check.⁷⁸

§ 2060. **Giving Wrong Transfer.** (a) The court instructs the jury that if you believe from the evidence that the agents of the defendant made a mistake in giving to the plaintiff a transfer ticket and instead of giving him a P. Avenue transfer gave him an S. Street transfer, the plaintiff is entitled to recover, and in assessing the damages the plaintiff is entitled to have reasonable damages compensatory for the treatment which he received. The defendant company was bound to see to it that the plaintiff was provided with a proper transfer, and if a mistake was made the responsibility therefor rested upon the company and not upon the plaintiff.

(b) And the court further instructs the jury that if, upon the other hand, they believe that the conduct of the agents of the company was wanton and malicious, and that they purposely gave him the wrong transfer, and that they maliciously and wantonly ejected him from the car because of personal dislike or animosity, then the plaintiff is entitled to recover, and in assessing damages, in that view of the case, the plaintiff is entitled to recover not only compensatory but vindictive damages.⁷⁹

§ 2061. **Same Subject—Entering Car Without Transfer—Negligence of First Conductor.** The jury are instructed that if you believe from the evidence that it was the rule or custom of the company to require a transfer ticket at the point at which plaintiff made the change, but if you should further find that her entering the car without procuring a transfer ticket was the result of the negligent conduct of the conductor of the first car, and that the plaintiff, as a reasonably prudent person, had a right, under the circumstances, to assume from the conduct and statements of the first conductor that she would be carried on W. M. without such transfer ticket or further payment of fare, then she was entitled to be carried by the second car without further payment of fare.⁸⁰

§ 2062. **Contributory Negligence of Passengers—In General.** (a) The court instructs the jury that the plaintiff was bound to use reasonable care on her part to avoid injury, to which defendant's negligence, if any, may have exposed her. Reasonable care may be defined

ly, it is a question of law for the court. It is of no consequence that the defendant company operated other lines, and no such regulation is enforced by it upon them. The fact that it does not exercise the right to establish and enforce such a regulation upon its other lines affords no reason for saying that the regulation established and enforced in this case is unreasonable, or that the company has no right to establish such a rule.

"On this phase of the case the court could have instructed the jury affirmatively, if requested in

writing; leaving for consideration by the jury, as it did, the single question whether the conductor used more force than was necessary in enforcing the rule, under the circumstances."

78—Little Rock T. & E. Ry. Co. v. Trainer, 68 Ark. 106, 56 S. W. 789 (790).

79—Carpenter v. Washington & G. R. Co., 121 U. S. 474 (476), 7 S. Ct. 1002.

80—Little Rock T. & Elec. Ry. Co. v. Trainer, 68 Ark. 106, 56 S. W. 789 (790).

to be that degree of care which a prudent person would have exercised under the circumstances in which the plaintiff found herself at that time. By this test, was the plaintiff free from negligence? Might she, situated as she was, by the exercise of ordinary prudence, have avoided injury to herself, notwithstanding the negligent conduct of the defendant? If so, she cannot recover, if she failed to exercise such care. In considering this question, all the evidence bearing upon the points indicated in the foregoing instruction as to defendant's negligence is proper to be considered also. If, in the light of all of these circumstances in evidence, a reasonably prudent person, exercising her faculties of sight and hearing, would have seen or heard and avoided the danger, or if the danger was apparent and easily avoidable to a person exercising reasonable care as before defined, the plaintiff cannot recover, if she negligently failed to avoid it, and must suffer the consequences of her own carelessness.⁸¹

(b) The court instructs the jury that if the plaintiff on the occasion complained of, acted in a manner which an ordinarily prudent person would not have acted and this conduct was the cause of or contributed materially to her injury, she cannot recover.⁸²

(c) The court instructs the jury that if you believe that F. was injured by reason of the U. T. C.'s carelessness, or the carelessness of its employes, and that his injuries were not contributed to by carelessness or negligence on his own part, he would be entitled to a verdict; otherwise he would not.⁸³

(d) The court further instructs you that a person who enters a street car to be transported to a certain place, and pays his fare, is a passenger, and that there is a corresponding obligation on the part

81—*Prothero v. Citizens' St. Ry. Co.*, 134 Ind. 431, 33 N. E. 765 (767).

"Persons traveling, entering cars or vehicles or structures of the character of the one in this case, are required to use their senses of sight and hearing to avoid the apparent danger. In all cases, a person is required to exercise ordinary prudence to avoid danger. Such prudence may require more or less exercise of the senses, owing to the situations and surroundings. In some instances, a person of ordinary prudence would give but little heed to the things surrounding him; in others, where danger was quite apparent, he would exercise a much higher degree of diligence to avoid danger. The extent to which one's faculties must be exercised to constitute ordinary care depends upon the particular surroundings. The instruction in this case lays down the rule that the appellant was required to exercise such care and diligence in the observation of the things around her,

and to avoid danger, as an ordinarily prudent person would under the circumstances; leaving it for the jury to take into consideration all facts and circumstances developed by the evidence in the case, and say whether or not the appellant was guilty of negligence which contributed to the injury. The instruction does not go to the extent of holding that appellant was required to exercise her faculties of sight and hearing and mental power to their full extent and capacity, or to any particular degree, but that she was required to exercise them to the extent which a reasonably prudent person would have done under all the circumstances. The instructions correctly stated the law. *Stewart v. Penn. Co.*, 130 Ind. 242, 29 N. E. 916."

82—*Selma St. & S. Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598 (600).

83—*Foster v. Un. T. Co.*, 199 Pa. 498, 49 Atl. 270.

of the passenger to act with prudence, and to use the means provided for his safe transportation with the same reasonable circumspection and care that is required on the part of the carrier, for the law does not prescribe a different rule or measure of care with respect to parties, and, if his negligent act solely contributes to bringing about the injury of which he complains, he cannot recover.⁸⁴

(e) The court instructs the jury that to escape the responsibility of contributory negligence, a plaintiff, in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which such plaintiff belongs.⁸⁵

§ 2063. Same Subject—States Holding Burden of Proof Is on Plaintiff to Prove Freedom from Contributory Negligence. The court instructs the jury that before the plaintiff is entitled to recover, he must establish three things by a fair preponderance of the evidence: (1) That he received the injuries or some part thereof alleged in his complaint; (2) that the carelessness and negligence of the defendant company, its agents or servants, were the proximate cause of said injuries; (3) that he himself was free from any carelessness or negligence which contributed to said injury. If he has established by such preponderance of the evidence all three of said propositions, then he would be entitled to recover in this action. If, however, plaintiff has failed to establish either one of said propositions by such preponderance, then he is not entitled to recover.⁸⁶

84—*Memphis St. Ry. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713 (714).

"The criticism is in the use of the word 'solely,' and the contention is that the court should have told the jury that, if both plaintiff and the company were negligent, the plaintiff could not recover. To give to the word 'contribute' its legal signification would make the charge unintelligible, as one act cannot 'contribute' solely to effect a given result, but only in connection with some other act, and there can be no sole contributory cause of an accident. We may assume therefore, that the trial judge meant, if the negligence act of the plaintiff produced or was the sole cause of the injury, she could not recover."

85—*Normile v. Wheeling T. Co.*, 57 W. Va. 132, 49 S. E. 1031 (1033).

"There is no objection pointed out to this instruction, and it seems to have been taken from the case of *Dimmey v. Ry. Co.*, 27 W. Va. 32, 55 Am. Rep. 292, in which the court gave to the jury an instruction in substantially the same language, and also the court laid down the law in that case to be:

"To escape the responsibility of contributory negligence, the plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs." We think this instruction correctly propounds the law applicable to this case. All persons are not chargeable with the same degree of care, and the jury, in passing upon the care that the plaintiff should exercise at the time of the accident, had the right to consider the class to which she belonged, and had the right to take into consideration all the circumstances surrounding the accident, as they would appear to a person of her class."

86—*Citizens St. Ry. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491 (493).

"The burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that at the time of the accident and injury to the plaintiff's intestate he (the plaintiff's intestate) was in the exercise of such care as a prudent man would have exercised under all the circumstances; and in determining this proposition the jury

§ 2064. **Same Subject—States Holding Burden of Proof Is on Defendant to Show Contributory Negligence of Plaintiff.** (a) The jury are instructed by the court that if the defendant relies upon the contributory negligence of the plaintiff to defeat the plaintiff's action, the burden of proving such contributory negligence rests upon the defendant, and it will not avail the defendant unless it has been established by preponderance of the evidence.⁸⁷

(b) Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or by some other cause which human care and foresight could not prevent.⁸⁸

(c) While the burden of proof is upon the defendant to establish the contributory negligence of the plaintiff, yet this does not relieve the plaintiff of the burden of proving that her injuries were solely caused by the negligence of the defendant, as stated in these instructions. The burden of proving the fact rests upon the plaintiff throughout the entire case, and if the jury find that her negligence, either in whole or in part, caused or directly contributed to cause her injuries, then plaintiff is not entitled to recover, and your verdict must be for the defendant.⁸⁹

§ 2065. **Same Subject—Deafness of Passenger.** The court instructs the jury that on the question of ordinary care required of the plaintiff himself to avoid the consequences to himself of defendant's negligence, if such is shown, the fact that he was partially deaf, if such was the fact, would not affect or lessen the degree of care required of him; that care being the degree of care which every prudent man would exercise under the same or similar circumstances.⁹⁰

have the right to take into account the darkness of the night, the position which the plaintiff's intestate was sitting or standing upon the running board of the car at the time of the accident and injury to him, and the fact whether or not a prudent man, would, under all the circumstances, have been riding upon the running board of the car at the time and place of the accident."

Approved in *Stone v. Lewiston B. & B. St. Ry.*, 99 Me. 243, 59 Atl. 56 (58).

87—*Washington, A. & Mt. V. E. Ry. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391 (394).

88—*Boone v. Oakland T. Co.*, 139 Cal. 490, 73 Pac. 242 (244).

89—*Gharst v. St. L. T. Co.*, 115 Mo. App. 403, 91 S. W. 453 (457).

"The instruction given, we think, fairly submitted the issue of plaintiff's contributory negligence to the jury, not with as much detail and particularity as would have the one refused, but it is equally comprehensive, and, we think, correctly states the law."

90—*Atlanta C. St. Ry. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41 (49).

"The charge is altogether as favorable to the defendant company as could be asked. The instruction was to the effect that

§ 2066. **Same Subject—Standing on Platform When Car Is Overcrowded.** You are instructed that it is the duty and obligation of common carriers for hire to furnish passengers with seats for their accommodation, and, if you believe from the evidence in this case the defendant received the said N. as a passenger, the said N. thereby became entitled to a seat; and, if he was prevented from obtaining a seat by reason of the car being overcrowded, you are instructed that it was not negligence for said N. to stand or be upon the platform of said car, providing you believe that in standing upon said platform the said N. was exercising ordinary care and prudence, and would have been safe from injury if the car had been run in a careful manner.⁹¹

§ 2067. **Same Subject—Leaving Seat and Standing on Platform to Accommodate Lady Passenger.** The court instructs the jury that if you find from the evidence in the cause that the plaintiff was a passenger on one of defendant's cars, and was occupying a seat inside in a safe place; and you further find that said car was crowded with passengers, and all the seats were taken, and that the plaintiff arose and vacated his seat to accommodate some lady passengers who entered the car, and that on account of the crowded condition of said car, instead of standing therein, he voluntarily left it and passed out to the platform, and remained standing on the outside, where the accident occurred,—then as to whether or not in so conducting himself he was guilty of negligence is a question of fact, which I submit to you. If his conduct in this respect, in doing what he did under the circumstances, was the conduct of an ordinarily prudent and cautious man, then he was not guilty of negligence. If, on the other hand, in going out upon the platform, under the circumstances, he did that which a prudent and cautious person would and ought not to do, then he would be guilty of negligence.⁹²

plaintiff's deafness could not lessen the degree of care required; that, notwithstanding his defect he should exercise the same caution 'which every prudent man would exercise under the same or similar circumstances.' This did not imply that he was required to exercise only that care which a prudent man who could hear would use, but which a prudent man in the same condition as to the impairment of his hearing would exercise."

91—Halverson v. Seattle El. Co., 35 Wash. 600, 77 Pac. 1058 (1961).

"The obligation of street car companies to furnish seats for their passengers rests upon the same principle as that of steam railways, viz., the accommodation and safety of their passengers. No doubt, swiftly moving steam railway trains are more dangerous to standing passengers than electric

or other motor cars, running less swiftly, and for that reason greater care is necessary upon steam railway trains. But the principle is the same in both cases. Both must care for the safety of their passengers. It would not be negligence per se for a street car company to fail to furnish a seat to each of its passengers; but, where seats are not furnished, and passengers are permitted or required to stand upon cars, greater care is required in the operation of its cars than where all are provided with seats. Nor is it negligence per se for a passenger to ride or stand upon the platform of a car. Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121; T. & F. St. P. Ry. Co. v. Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707; Cattano v. Met. St. R. Co., 173 N. Y. 565, 66 N. E. 563."

92—Terre Haute E. Ry. Co. v.

§ 2068. **Same Subject—Standing on Platform by Direction of Employes in Charge of Car.** The court instructs the jury that it is the duty of the passengers on the car to follow the reasonable instructions and directions of those in charge of the car, in regard to moving from one point of the car to another, unless it is apparent to the passenger, in exercising ordinary care, that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with its operations, and that they have a reasonable knowledge of what is safe and prudent for the passenger, in giving such instructions or directions. Therefore if in this case one of the servants of the defendant,—the conductor in charge of the car,—directed the plaintiff to stand on the platform, where he was standing when the accident occurred, it was the duty of the plaintiff to do so, unless it was known and apparent to him at the time that it would be unsafe for him, in the exercise of ordinary care and prudence, to leave the car and stand upon the platform; and if, while standing upon the platform, you find he was injured without any fault of his, but while standing there at the direction of the servant of the company, then, under these circumstances, even though you should find that his position was an unsafe one, yet this would not defeat plaintiff's right to recover, provided the danger was not apparent to him when he obeyed the instructions given, and took his position on the platform.⁹³

§ 2069. **Same Subject—Riding on Running Board.** (a) The court instructs the jury that if they shall find that the plaintiff's intestate voluntarily assumed the position in which he was riding, sitting upon the running board of the car, and bringing portions of his body outside the line of the car and running boards, when he could have ridden upon the front or rear platform of the car, taking into account the rate of speed at which the car was going, the darkness of the

Lauer, 21 Ind. App. 466, 52 N. E. 703 (705).

93—Terre Haute El. Ry. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703 (705).

"The proposition that it is not negligence per se, but a question of fact for the jury, for a passenger on a street railway to ride upon the platform, has been decided in many decisions. Marion St. R. Co. v. Shaffer, 9 Ind. App. 486, 36 N. E. 861; Nolan v. Railroad Co., 87 N. Y. 63, 41 Am. Rep. 345; Maguire v. Railroad Co., 115 Mass. 239; Burns v. Railway Co., 50 Mo. 139; Chi. & A. R. Co., v. Fisher, 141 Ill. 614, 31 N. E. 406; Beal v. Railway Co., 157 Mass. 444, 32 N. E. 653.

Whether one rides on the platform of his own motion, or upon request of the conductor, would not be material. The rule would

be the same in either instance. We think it clear too that it is the duty of the passenger to follow the reasonable instructions and rely on the judgment of those in charge of the car, in regard to moving from one part of the car to another, unless it is apparent to the passenger that the movement would be attended with danger. Prothero v. Railway Co., 134 Ind. 431, 33 N. E. 765; Cincinnati, H. & J. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352; Louisville & N. R. Co. v. Kelly, 92 Ind. 371.

The fact that appellee responded to a general request, which appealed to him as directly as to anyone else in the car, should not deprive him of any right he would have had, growing out of a compliance with a request addressed to him individually."

night, and the insecurity of the plaintiff's intestate's position on the running board, the jury have the right to consider all of these facts as bearing upon the question whether at the time and place of the accident the plaintiff's intestate was in the exercise of such care and prudence as an ordinarily careful and prudent person would exercise under like circumstances.⁹⁴

(b) An act or a failure to act under such circumstances that a person of ordinary care, caution and prudence would not have apprehended danger therefrom, is not an act or failure to act, in law, as would amount to contributory negligence. So in this case, if you find from the evidence that the car upon which the plaintiff took passage was full of passengers, the seats being all filled; that after getting on said car he stood upon the running board of said car, holding to the handholds upon said car—such act of so riding upon said running board of said car would not constitute negligence upon his part, such as would bar a recovery in this action.⁹⁵

§ 2070. **Same Subject—Obeying Instructions to Move to Another Part of the Car.** The court instructs the jury that it is the duty of a passenger on a car to follow the reasonable instructions of those in charge of the car in regard to moving from one part of the car to another, unless it is apparent to passenger that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with the operations of the car, and that they have a reasonable knowledge of what is safe and prudent for the passengers, in giving such instructions. Therefore, if you find from the evidence that one of the servants of the defendant directed the plaintiff to move to that part of the car

94—*Stone v. Lewiston B. & B. Ry. Co.*, 99 Me. 243, 59 Atl. 56 (57).

In *C. C. Ry. Co. v. Schmidt*, 117 Ill. App. 213 (215), aff'd 217 Ill. 396, 75 N. E. 383, it was held that it was not negligence per se for a passenger to ride on the bumper of the car, and an instruction that it was negligence was held properly refused.

95—*Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 74 N. E. 35.

"The instruction correctly states an abstract proposition of law. *Marion St. Ry. Co. v. Shaffer*, 9 Ind. App. 486, 36 N. E. 861. In *Pomaski v. Grant*, 119 Mich. 675, 78 N. W. 891, the court said: 'Error is assigned on an instruction to the jury that it was not negligence for the plaintiff to ride on the running board of this car. We think in view of the testimony of the case, there was no error in this. The plaintiff testified that the car was full, and that he could not get inside, and this testimony was not

disputed.' In *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121, it was held that: 'It is not contributory negligence as a matter of law, for a passenger to stand on the platform, when the cars are full, in a position in which a person exercising ordinary care would be safe if the train was run in a careful manner.' To the same effect are the following cases: *Pendergast v. Union R. Co.*, 10 App. Div. 207, 41 N. Y. S. 927; *Met. Ry. Co. v. Snashall*, 3 App. D. C. 420; *Congswell v. West St. & N. E. El. Co.*, 5 Wash. 46, 31 Pac. 411; *Clark on 'Accident Law'* 37; *Nellis on 'Street Surface Railroads'*, 472. Upon the question as to whether appellee was guilty of contributory negligence, the court fully and correctly instructed the jury in its seventh and ninth instructions. These instructions were applicable to the evidence, and we cannot believe that the jury was misled by the above instruction."

where the accident occurred, it was the duty of the plaintiff so to do, unless it was known and apparent to her that it would be unsafe for her to do so, and, in the absence of apparent danger, she had a right to assume that it was safe for her to move to and stand at the place where the defendant's servants directed her to move to in the car. And if you find that it was an unsafe place for the plaintiff to stand, and that without her fault she was required by reason of her moving to stand at such place, then your finding should be for the plaintiff.⁹⁶

§ 2071. **Same Subject—Getting on Car While in Motion.** (a) The jury are instructed that it is not of itself in law an act of negligence for one intending to become a passenger on a street car to board the car while it is in motion. Whether or not it is an act of negligence to do so is a question of fact for the jury to determine; and in determining in this case whether or not the plaintiff boarded the defendant's car at the time and place in question, and, if he did, whether or not his doing was negligence on his part, the jury should consider all the evidence and all the circumstances established by the evidence, and from these determine that issue. And if the jury find from the evidence, by a preponderance thereof, that the management, operation and speed of the said car at the time in question were such as to invite passengers and to make it seem reasonably safe for a person exercising ordinary and reasonable care for his own safety to board the defendant's car, and if you also find from the evidence that at that time the plaintiff intended to become a passenger on said car and exercised ordinary and reasonable care for his own safety, then he was not guilty of contributory negligence; and if you further find that the defendant did not exercise the highest degree of care consistent with the practical operation of its car, for the safety of the plaintiff, and that his injuries, if any, resulted from such failure of the defendant to exercise such degree of care, then you should find the defendant guilty.⁹⁷

(b) The court instructs the jury that the plaintiff in attempting to enter the car in question was required by law to use ordinary care and caution to avoid injury to himself, and if the jury believe from

96—*Prothero v. Citizens' St. R. Co.*, 134 Ind. 431, 33 N. E. 765 (768).

97—*Chicago U. T. Co. v. O'Brien*, 117 Ill. App. 183 (190), rev'd 219 Ill. 303, 76 N. E. 341, for the giving of another instruction.

The Appellate Court said:

"This instruction is also claimed to be erroneous, first, because it assumes that the plaintiff was a passenger on the car; second, because it is misleading in stating that it is not, of itself, in law, an act of negligence for one intending to become a passenger on a street car, to board the car while it is in motion; and, third, that it is erroneous in stating that certain facts, if found by the jury, do not

constitute negligence. The first reason we have sufficiently considered in passing on the objections to instructions 7 and 9. We do not think the jury could have been misled by the first sentence of the instruction, which states the law as we understand it. By the second sentence of the instruction the jury were plainly told that whether or not the so boarding a car was an act of negligence was a question of fact for them to determine from all the evidence. The court also submitted to the jury, by appellant's instruction 13, the question whether appellee was or not exercising ordinary care when he attempted to enter the car."

the evidence that a person of ordinary prudence and caution, exercising ordinary care for his own safety, for one of his age, intelligence, capacity and experience, under such circumstances as attended the plaintiff's attempt to enter the car in question, as shown by the evidence, would not have attempted to enter such car while it was in motion, and if the jury further believe from the evidence that the plaintiff did attempt to enter the said car while it was in motion, and that he was injured in consequence of his attempting to enter said car while it was in motion, if he did so attempt to enter said car, then the jury should find the defendant not guilty.⁹⁸

(c) The jury are instructed that if they find that plaintiff signaled the car, and that its speed was slackened at or near a crossing where defendant was accustomed to receive passengers, and that it was apparently safe for him to board the car, it was not necessarily negligence as a matter of law for him to attempt to get on the car while it was in motion. The plaintiff had a right to rely upon the watchfulness and care which it was the duty of the conductor to bestow toward persons about to take passage, and that he was not bound to anticipate that the car would start rapidly or that he might be thrown against the pole and injured.

(d) The jury are instructed that it is not necessarily negligent for a passenger to get upon a street car, even though he knew the track was being repaired, or that there were iron poles in close proximity to the track on the side of the track on which he was about to enter; for if the car stopped or slackened its speed at his signal, and he was allowed to get on the running board, such acts on the part of the company were an invitation to the person to take passage; and he had a right to presume that the company would use due care to avoid danger to passengers incident to the dangerous condition of the track, and the close proximity of the poles thereto; that the passenger had a right to assume that the company's employes would warn him of any danger, and that they would exercise such care as a person of highest degree of skill and foresight, with knowledge of the existing circumstances, would use, in view of such dangers, to guard against accidents to passengers by reason thereof.

(e) Negligence of the defendant in running past the plaintiff upon the street, whether he had signaled or not, or whether he was at a station for receiving passengers or not, would not authorize or make it right for the plaintiff to commit an act of negligence in getting upon the car to prevent being left behind. And if you are of the opinion that, at the time of his accident, plaintiff voluntarily threw himself upon a known or perfectly apparent danger, or assumed a perfectly clear or palpable risk, he cannot now recover damages of the defendant, even though the servants of the defendant were also negligent.⁹⁹

98—Chicago U. T. Co. v. O'Brien, Merl, 26 Ind. App. 284, 59 N. E. supra.

99—In Citizens' St. R. Co. v. were upheld.

(f) The court instructs the jury that if they find from the evidence that the plaintiff was not on the step of the car when it started, but attempted to board it after it was in motion, she can not recover in this suit; but if the jury find that while the car was still waiting and receiving passengers she presented herself as an intending passenger, and gained a position on the lower step before the car was set in motion, and the conductor, in the exercise of ordinary care in the discharge of his duty, ought to have seen her in that position, then the jury should find that she was a passenger on the car at the time of the accident.¹⁰⁰

§ 2072. Same Subject—Getting Off Car While in Motion. (a) The court instructs the jury, if you should find and believe from the evidence that plaintiff's wife attempted to alight from one of defendant's cars while the same was in motion, and before it had stopped for passengers to alight therefrom, and should further find and believe that a person of ordinary care would not have so acted under similar circumstances, to return your verdict for the defendant.¹

(b) The court instructs the jury that if you believe from the evidence in the case, that, after M. A. had safely boarded defendant's car and obtained a seat therein, she did, while said car was still in motion, and before it reached the regular stopping place for leaving and taking passengers at the point of her destination, to-wit, —, in the city of —, leave her seat and walk off of said car, and step down on the running board of said car, and stepped from the running board of said car onto the street, after having been warned by the conductor not to do so, whereby she sustained the injuries complained of, then the plaintiff cannot recover in this suit, and your verdict must be for the defendant.

(c) The act of negligence stated in the plaintiff's petition is denied in the answer of defendant. The defendant further pleads in said answer that the deceased's death was caused by her own negligence in stepping off of defendant's car while the same was in motion. If, therefore, you find from the evidence that deceased's death was not caused by a start of the car, but by her act in stepping off of defendant's car while the same was in motion, after being warned by the conductor not to do so, then plaintiff is not entitled to recover, and your verdict must be for the defendant.²

(d) The fact that the plaintiff undertook to alight from the car at a time when the car was still in motion does not necessarily make

100—Gaffney v. St. P. Ry. Co., 81 Minn. 459, 84 N. W. 304.

1—Dallas C. El. St. R. Co. v. Ison, — Tex. Civ. App. —, 83 S. W. 408.

"The court gave a general charge on contributory negligence, but under the pleadings and evidence the defendant was entitled to have its defense affirmatively

submitted to the jury, and having requested a proper charge, it should have been given." Gulf C. & S. F. R. Co. v. Mangham, 95 Tex. 413, 67 S. W. 765; Pelly v. Denison, etc., R. Co., — Tex. Civ. App. —, 78 S. W. 542."

2—Behen v. St. L. T. Co., 186 Mo. 430, 85 S. W. 346 (349).

her guilty of contributory negligence. As to whether she could alight from the car at the time she undertook to do so with safety, is a question of fact for you, gentlemen, to determine from all the facts and circumstances in the case. If you find from the evidence, that, at the time she undertook, to alight from the car, she could have done so with safety, by the exercise of due diligence and care, then she would not be guilty of contributory negligence, even though you find that the car had not come to a full stop but was still moving.³

(e) The jury are instructed, as a matter of law, that if you believe from the evidence that the plaintiff got off defendant's car at an improper place, or in an improper manner, and if you further believe that such action on the part of the plaintiff was a want of ordinary care, which contributed to the injuries complained of, then your verdict must be for the defendant.

(f) Although you may believe that the plaintiff got off from the car at the north side of D. street, when the usual place for alighting was on the south side of D. street, that fact alone would not justify you in finding her guilty of negligence as would bar a recovery in the case, unless you believe and find that it was the proximate cause of the injury.⁴

(g) The court instructs the jury that, in determining the question whether the plaintiff was negligent in and about alighting from the street car in question under the circumstances under which the jury find, from the evidence, the plaintiff did so, they are to take into consideration not alone the age and condition of the plaintiff at the time, but also the relative danger and risks attending the act of alighting from a car propelled by cable, as the one in question was, and the character and condition of the locality and the plaintiff's prior knowledge of its character and condition, as shown by the evidence; and they are instructed that the plaintiff was required to exercise care for her safety in proportion to the dangers and risks attending the act of alighting from a cable car under such circumstances, and a failure on her part to exercise this care is negligence which deprives her of the right of recovery in this action; and if the jury believe, from the evidence, in this case, that the plaintiff did not exercise such care, and was guilty of such negligence, and that such failure to use such care and such negligence contributed in any way to the injury complained of in this action, then the jury should find the defendant not guilty.⁵

(h) The jury are instructed that if they find from the evidence that the plaintiff was injured while alighting from the car while it was in motion, and that such conduct on her part was a want of ordinary care for her own safety which contributed to the injury complained of, then she cannot recover in this case, and your verdict should be for the defendant.⁶

3—Wabash R. T. Co. v. Baker,
— Ind. —, 78 N. E. 196 (193).

4—N. C. St. R. Co. v. Eldridge,
151 Ill. 542, 38 N. E. 246.

5—W. C. St. R. Co. v. Manning,
170 Ill. 417 (427), 48 N. E. 958, aff'd
70 Ill. App. 239.

6—In Chi. C. R. Co. v. Canevin,

(i) That while it was the duty of defendant to stop its car to afford the plaintiff an opportunity to alight, yet the failure to do so would not give the plaintiff the right to jump from the moving car.⁷

72 Ill. App. 81, the court held the above instruction should have been given, and that the trial court erred in modifying it by adding the word "materially" before the word "contributed" was reversible error. See comment of the court in this case in *Erroneous Instructions*, Vol III, same heading.

7—The above short instruction approved in *McDonald v. City El. R. Co.*, 137 Mich. 392, 100 N. W. 592 (593).

Compare that with the following group of instructions found in *Omaha St. R. Co. v. Craig*, 39 Neb. 601, 58 N. E. 209 (214, 215).

"The jury are instructed that if the plaintiff attempted to get off a moving cable car while the speed of the train was being slackened, but before the train had been brought to a full stop, she was guilty of contributory negligence which bars her right of recovery, if this be true, although the men in charge of the train did not immediately comply with her request to stop the train.

The jury are further instructed that if the plaintiff signaled the car to stop, and the car immediately began to slacken speed, and the plaintiff, without waiting for the car to stop, did step from the car while it was in motion, and was thereby injured, she cannot recover.

The jury are further instructed that if they believe from the evidence that the plaintiff, in attempting to step off from the car while still in motion, stepped directly out from the car, at right angles from the car, and that, by reason of the momentum of the car and her own body, she was caused to fall over northwards—the direction in which the car was moving—she was guilty of contributory negligence, and cannot recover.

The jury are further instructed that if they believe from the evidence that the plaintiff thought she could step from the car with safety to herself, even while the car was in motion, the fact that she so believed she could step from the car is not of itself proof that she was guilty of contributory negligence.

If the jury should be satisfied from the evidence that, when the plaintiff signaled the car to stop by the ringing of the bell for that purpose, the car immediately began to slacken its speed, and that the plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion, and was thereby injured, she cannot recover, and the defendant is entitled to the verdict.

The jury are further instructed that if you find from the evidence that the plaintiff, without waiting for the men in charge to bring the same to a stop, attempted to get off the train while the same was in motion, and that injury resulted to her by reason of her own act in attempting to get off of the train while the same was in motion, and while the same was being brought to a stop, then the plaintiff cannot recover.

The jury are further instructed that the plaintiff assumed the responsibility of danger in attempting to step from the car while in motion, and if they find from the evidence that she did so, the fact that she misjudged her ability to get from the car with safety, does not show negligence on the part of the defendant company, and does not create any liability on the part of the defendant company.

The jury are further instructed that, if the plaintiff was injured by the accident caused by her attempting to jump off of a moving cable car, the defendant company is not liable, unless the proof satisfies them that some negligent act on the part of the company's servants in charge of the train produced the injury shown by the evidence."

A shorter Nebraska instruction is found in *Omaha St. R. Co. v. Boeson*, 68 Neb. 437, 94 N. W. Rep. 619 (622):

"The jury are instructed that if you believe from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car while it was in motion, and fell into the street, then he cannot recover damages, and your verdict should be for the defendant."

(j) If you find from the evidence that the conductor of the north-bound ~~car~~ was walking on the running board on the outside of the same for the purpose of collecting a fare from a passenger who had boarded it, and that he neither said nor did anything to the deceased, who was on the running board on the opposite side of the car, and that the deceased jumped off and was killed, there cannot be a recovery against the defendant.⁸

(k) But, if you believe that a reasonable stop was made—that is, a stop for a reasonable length of time—at or near G. street and that she had given no notice or signal that she desired to get off at this place, and shall further believe that afterwards, after it started, it occurred to her that she ought to have gotten off at this place at G. street, or where it stopped, and shall believe that she attempted to go out of the car while it was in motion, and after it had started again, and shall believe that by reason of its being in motion was the cause of her falling off, then she cannot recover in the action.⁹

§ 2073. **Same Subject—Jumping From Moving Car at Command of Conductor.** The court instructs the jury that, if you believe, from the evidence, that the defendant's east-bound car, at the time and place in question, was running at such a high rate of speed as to be dangerous for deceased, or any ordinary person so situated, to jump from said car, and that said conductor, while acting within the scope of his authority as such conductor if he was so acting, willfully and wantonly compelled deceased to jump from said car in manner and form as charged in the declaration, if he did so, and while it was running at such rate of speed, and that said conductor's conduct in this regard showed a reckless disregard of deceased's safety, and that deceased was thrown down on the adjoining track and rendered helpless, and while so lying upon said track was run over and killed by the west-bound car before it could be stopped, then you should find the defendant guilty, even though you should find, from

8—In *Memphis St. R. Co. v. Newman*, 108 Tenn. 666, 69 S. W. 269, it was held vital error to refuse the above instruction.

In *Gilmore v. Seattle R. Co.*, 29 Wash. 150, 69 Pac. 743 (745), an instruction was given as follows:

"If you believe from the fair preponderance of all the evidence that the plaintiff had a reasonable time, as I will define that to you, in which to alight from the car, and that she did, as a matter of fact, alight from the car, but that she retained her hold upon the guard rail or stanchion of the car for a longer time that would be reasonably sufficient for a person of ordinary prudence and activity, considering all her conditions and surroundings, and if you find that by reason of her so retaining hold of that guard rail she was in-

jured, it will then be your duty, gentlemen, to find your verdict in favor of the defendant in this case."

The instruction was held good by a reference to another instruction in the following words of the court:

"The instruction, standing alone, would seem to apply that the appellant was permitted to hold on to the stanchion or hand rail of the car for a reasonable time after alighting; but the court makes his meaning clear by a further instruction to the effect that a passenger could not be said to be off the car so long as he was supporting himself thereby, and being still in the act of alighting."

9—*Champagne v. La Crosse C. R. Co.*, 121 Wis. 554, 99 N. W. 334 (335).

the evidence, that there was no fault upon the part of the motorman of the west-bound car.¹⁰

§ 2074. Same Subject—Failure to Move Away After Alighting—Injury by Trailer. (a) The court instructs the jury that it was the duty of the defendant B. to use the utmost care and skill that prudent men, engaged in the same or like business, are accustomed to use under the same or similar circumstances, to enable the plaintiff, A., to alight from the car in safety, and to move far enough from said car, if such moving away was necessary after so alighting, to prevent his being struck or injured by the trailer with said car; and if you believe from the evidence that the defendant failed to use such care, and that by reason of such failure the plaintiff was prevented from getting out of the way of defendant's car after he alighted therefrom and was injured thereby, then the law is for the plaintiff, and you will so find.

(b) It was the duty of the plaintiff, A., to exercise ordinary care for his own safety in alighting from said car and moving away from the same, if such moving away was necessary; and if you believe from the evidence that the said A. negligently failed to exercise such care, or negligently remained so close to said car as that he was struck by the trailer and injured, and, but for such negligent failure on the part of the plaintiff to move away from said car when he alighted therefrom, said injury would not have been received by him, then the law is for the defendant, and you will so find.¹¹

§ 2075. Injury to Passenger While Trying to Escape From Apparently Imminent Danger. (a) The court instructs the jury that if they believe from the evidence that, while defendant was operating with electricity, street cars as a common carrier of passengers for hire, the plaintiff on November———, took passage on one of defendant's said cars, and paid her fare, and while she was being carried as such passenger, there was an explosion under the car occasioned by some part of the apparatus, and that such explosion was followed by flame and fire in said car, from which the car took fire and began to burn, and that said explosion, flame, fire, and burning of said car, were calculated to alarm and fill with fear and dread of injury or death from fire any reasonably prudent person who was a passenger upon said car; and if the jury further believe from the evidence that, thereupon, plaintiff became so alarmed and filled with fear and dread of being burned that she endeavored to

10—*Chi. C. R. Co. v. O'Donnell*, 207 Ill. 478 (483), 69 N. E. 882 (884).

11—*Louisville Ry. Co. v. Meglemery*, 25 Ky. 1587, 78 S. W. 217 (218).

"We are unable to see that there was any error in instructions 1 and 2 given by the court. They are to be read together, and, when so read, state plainly that the plaintiff cannot recover if he failed to exercise ordinary care, and but for this would not have been in-

jured. In order to find for the defendant under instruction 2, it was not necessary for the jury to believe from the evidence that the plaintiff's negligence was the sole cause of his injury. If it was due in part to the plaintiff's negligence and in part to the defendant's negligence, then he could not recover, if, but for his own negligence, the injury would not have happened."

escape from said car through the window thereof, in order to avert what she believed to be an imminent peril to her life, and that while she was thus endeavoring to escape, she exercised such care as a reasonably prudent person would exercise under the same circumstances; and that in so attempting to escape she was hurt by being violently thrown upon the paved street; and if the jury further believe from the evidence that such explosion, flame, and fire and burning of said car were occasioned by any defect in the condition of said car or the apparatus thereof, or by any improper management of said car, and if such defective condition or improper management resulted from any negligence on the part of the defendant, or its agents or servants, that is, any failure on their part to exercise the highest degree of care, skill and foresight of reasonably cautious person engaged in operating electric street cars, then the jury will find for the plaintiff, and assess her damages, as stated in another instruction; unless the jury further find that plaintiff was guilty of negligence directly contributing to her injuries.¹²

(b) The court instructs the jury that if a person without fault on her part, is confronted with sudden danger, or apparent sudden danger, the obligation resting upon her to exercise ordinary care for her own safety does not require her to act with the same deliberation and foresight which might be required under ordinary circumstances.¹³

§ 2076. **Payment of Fare in Genuine Coin.** If you find from the evidence in the case that the plaintiff boarded defendant's car, intending to become a passenger, he was entitled to all the rights and privileges of a passenger,—that is, there was due him the

12—*Brod v. St. L. T. Co.*, 115 Mo. App. 202, 91 S. W. 993 (1905).

"Defendant criticizes the instruction on several grounds, one of which is that it submits a cause of action not stated in the petition. The instruction, in no way, materially departs from the allegations of the petition. The petition is broad and so is the instruction. Plaintiff did not allege the specific cause of the explosion of the car nor did she prove the exact location or cause of the explosion and fire. She and her witnesses testified that the noise of the explosion came from beneath the bottom of the car, on the left side and near the front end, and that the fire enveloped the left side of the car. Plaintiff could not know and therefore was not required to allege the cause of the explosion and fire. She made a prima facie case by showing the unusual occurrence and it is this prima facie case the instruction submitted to the jury."

13—*Chi. U. T. Co. v. Newmiller*, 116 App. Ill. 625 (629, 630), aff'd 215 Ill. 383, 74 N. E. 410.

"The objections urged to the instruction are that it is an abstract proposition of law, and is erroneous in omitting the qualification that the danger must be such as to be apparent to a person of reasonable prudence and common sense. We do not think the instruction abstract in the sense that there is no basis for it in the evidence. If, as was testified to by some of the witnesses, the flame reached into and nearly to the center of the car, then, certainly there was sudden and apparent danger of fire, and we think it would so appear to a person of ordinary prudence. Apparently the passengers generally so thought, and it can hardly be predicated of all those who sought to escape the apparent danger that they were all lacking in ordinary prudence or common sense."

exercise of ordinary care; and if he tendered to the conductor a genuine coin of the denomination as alleged,—United States silver coin,—in payment of his fare, it was the duty of the conductor to accept the coin, and transport him to his destination. If the coin presented was not a genuine coin,—in other words, if it was a counterfeit coin,—the conductor ought not to have accepted it, and if the plaintiff failed to pay the fare demanded of him he had the right to expel him from the car. But if the coin, as I have stated, was a genuine silver coin of the United States Government, the conductor should have accepted it, and returned to him the change that was proper, and conveyed him to his destination. It is a question of fact to be determined by you under the testimony in the case. The coin is in evidence, and you have the right to inspect it, in passing upon that question.¹⁴

LIABILITY FOR INJURIES TO PERSONS OTHER THAN PASSENGERS OR EMPLOYES.

§ 2077. Degree of Care Due Pedestrian. (a) The court instructs the jury that before the plaintiff can recover against the defendant in this action it is incumbent upon her to prove to the satisfaction of the jury that the employes of defendant in charge of the car in question failed and neglected to exercise ordinary care and diligence in stopping its car in time to have avoided the injury to the deceased, A. H.; and, unless the plaintiff has shown by the evidence such want of ordinary care on the part of the defendant company's employes in charge of said car, then the jury will find their verdict for the defendant.

(b) The court instructs the jury that before the plaintiff can recover from the defendant in this action it is incumbent upon her to establish to the satisfaction of the jury that the employes of the defendant company in charge of its car, after they saw, or by the exercise of ordinary care might have seen, the danger to the deceased, A. H., were guilty of carelessness or negligence in failing and neglecting to stop said car in time to have averted the injury to said deceased, A. H.

(c) The court instructs the jury that the employes of the defendant company owed to the deceased, A. H., only that degree of care which an ordinarily careful and prudent person engaged in the same business would have exercised under like and similar circumstances; and, if the jury believes from the evidence that the employes of the defendant company exercised such care, then the jury will find their verdict in favor of the defendant.¹⁵

§ 2078. Same Subject—Not Liable for Mere Accident or Misadventure. (a) If you believe and find from the evidence that the

14—Atlanta Con. St. R. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629.
15—Holwerson v. St. L. & S. R. Co., 137 Mo. 216, 57 S. W. 770.
33 L. R. A. 824.

said K. was at the north sidewalk of A. street when defendant's car was crossing C. avenue, and then suddenly started from her position at the sidewalk to cross A. street, and without regard for her own safety, or without looking for or seeing the car, ran into the same, and that such conduct on her part was the sole cause of her injury and death, without any negligence or want of ordinary care on the part of the motorman in charge of the car causing or contributing to such injury or death, then you should find for the defendant.

(b) If you believe and find from the evidence that the injury and death of the said K. were the result of mere accident or misadventure without the fault or negligence of any one, then you should find for the defendant.¹⁶

§ 2079. Degree of Care Due Persons Riding in Wagons or Other Vehicles Along Track. The court instructs the jury that if the plaintiff was injured in the manner complained of in the petition, and that the accident and consequent injury, if any there was, was caused by the failure of the defendant or its employes to exercise reasonable and ordinary care in the operation of its car, then the law is for the plaintiff, and the jury should so find. However, the court further instructs the jury that the plaintiff was bound to exercise that degree of care and caution for his own safety that a person of ordinary prudence would exercise under the same and similar circumstances, and if the jury believes that the plaintiff did not exercise such a degree of care and caution, and the accident was occasioned thereby, then the law is for the defendant, and the jury should so find, unless the jury should further find that the defendant did or could have discovered the peril of the plaintiff in time to have avoided the injury to him by the exercise of reasonable diligence. "Ordinary care," as used in these instructions, means that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances.¹⁷

16—Koenig v. Union D. Ry. Co., 194 Mo. 564, 92 S. W. 497.

17—Greene v. Louisville Ry. Co., 27 Ky. L. 316, 84 S. W. 1154.

"It is incumbent on all travelers on the highway to exercise ordinary care for the safety of others using the highway. The operators of street cars are bound by this rule no less than other persons on the highway. The only difference between a street car and other vehicles is that it cannot turn aside as other vehicles, but must stay on the track, and it is entitled to the use of the track without obstruction from other vehicles; but it can no more run down another vehicle by negligence than any other traveler on the highway may do so, although the vehicle may be upon its track. In operating in public streets rapidly

moving cars propelled by electricity it is incumbent on those having charge of them in the crowded highway to exercise care commensurate with the circumstances for the protection of others, and to this end they must keep a lookout ahead of the car. The failure of the court to so instruct the jury was prejudicial to appellant under the facts of the case. Shearman & Redfield on Negligence, par. 435; Thompson on Negligence, par. 1333; Robinson v. Louisville Ry. Co., 112 Fed. 484, 50 C. C. A. 357; Louisville R. Co. v. Wood, 2 Ky. L. 387; Central P. R. Co. v. Chatterton, 14 Ky. L. 663; Owensboro R. Co. v. Hill, 21 Ky. L. 1638, 56 S. W. 21. If appellant was obstructing with his wagon the railway track, he might be punished for this under the city ordinance; but he was

§ 2080. **Degree of Care Due Infant Trespasser.** (a) The jury are further instructed by the court that if the plaintiff, H. R. W., at the time of the injury, was a child of tender age of 7 years, and was riding upon the defendant's car in the city of ———, whilst the same was in motion, and that the defendant's servants in charge of said car knew of his presence on the car and ordered him to get off, it was their duty to have reduced the speed of said car, before ordering the plaintiff to leave the same, to such a rate of speed as the plaintiff might depart from the car with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car. But in order to find for the plaintiff the jury must believe that the order of the conductor was given in such a manner as to frighten or intimidate the plaintiff to such an extent as to cause him to jump from the car while it was in motion; taking into consideration the age and capacity of the plaintiff.¹⁸

lawfully upon the highway, and had the right to use one part of it no less than another, although occupied by the track of the street railway. If, while on the street car track, he was struck by the car without negligence on the part of those in charge of the car when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he cannot recover. But he was not a trespasser on the track, and he had the right to anticipate that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them as in the case of other vehicles to avoid running into him. In 27 Am. & Eng. Ency. of Law, p. 70, the rule is thus stated: 'While it is the duty of vehicles moving along street railway tracks to leave the tracks on the approach of cars, so as not to obstruct their passage, still those in charge of the cars must use reasonable diligence to prevent collisions, and the company is liable for injuries resulting from their failure to do so. Thus, where a vehicle is seen moving on the tracks ahead of a car, the motorman, gripman, or driver should bring his car under control, if possible, so as to avoid a collision if the driver of the vehicle fails to leave the track; but he is not required to bring the car to a stop unless the vehicle is sufficiently near to be reasonably considered in a position of danger. It has been held that, where a street car approaching from the rear runs down a wagon driving along the

track, this is of itself sufficient evidence of negligence on the part of the street railway company, in the absence of special circumstances excusing such act, to carry the question to the jury. Where a street car is approaching from the rear a vehicle moving along the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car.'

18—Richmond T. Co. v. Wilkin-
son, 101 Va. 394, 43 S. E. 622 (623).

The above instructions "are objected to upon the ground that there is no evidence to support them; that they assume that it must be dangerous for a boy of 7 to jump off a car in motion; that they assume that the running board of a street car is a dangerous place for a boy of 7 years of age to stand; and, further, that these instructions would forbid the conductor to order a trespassing boy off his car when the car was going slowly enough for him to do so with perfect safety to the boy. These objections are not well taken. The evidence was ample to sustain the instructions, and they do not assume that the running board of a car is a dangerous place for a boy 7 years of age to stand, or that it is dangerous for a boy of that age to jump from a moving car. Those questions were submitted to the jury upon the evidence, and they are charged, in reaching their conclusion, to consider whether the plaintiff ex-

(b) If the jury further believe from the evidence that the employes of defendant knew (or could have known by the exercise of reasonable care), the plaintiff was on said car, in a dangerous situation, considering his age and experience and understanding, that then it was their duty to slow up sufficiently to permit said plaintiff to leave said car in safety, if the same was in motion, and, if the said car had not been started, not to start same until said plaintiff had gotten to a place of safety; and, if the jury believe from the evidence that the injury resulted to the plaintiff from the failure of said employe in either one of these particulars, they must find for the plaintiff; provided they believe from the evidence that the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence.

(c) If you believe from the evidence that the motorman or conductor knew (or could have known by the exercise of reasonable care), that when the car was about to start off on its return trip that the said plaintiff occupied a dangerous position for a child of tender years, that then it was the duty of the said conductor and motorman not to start the car while the plaintiff was so occupying said position; and, if you believe from the evidence that they did so, negligence may be imputed to the defendant, if the jury believe that the accident was occasioned by said negligence; provided the jury shall believe from the evidence that the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence.¹⁹

exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence. Nor does it appear that these instructions are subject to the objection that they would forbid the conductor to order a trespassing boy off his car when the car was going slowly enough for him to do so with safety to the boy. Whether the car was going slowly enough to justify the conductor in ordering a child 7 years of age to jump off was a question for the jury, and, under the instructions given in this case, the jury were charged with the duty of determining that question."

19—*Richmond T. Co. v. Wilkin-*
son, 101 Va. 394, 43 S. E. 622 (624).

Objections were also made to the above instructions upon the "ground that they tell the jury, if the employes of the defendant could have known by the exercise of reasonable care that the plaintiff was on the car in a dangerous situation, etc., thereby, it is con-

tended, making it the duty of the defendant to keep a lookout for trespassers. Ordinarily, it is not the duty of a railroad company, operating its trains, to use reasonable care to discover and avoid injuring persons trespassing upon its tracks. *C. & O. R. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732. Whether or not this rule applies to street railways in a populous city, where children of tender years are constantly coming in dangerous proximity to street cars, we need not now consider, for the instructions under consideration, when applied to the facts of the case at bar, are free from objection. The employes of the defendant company knew that the children were on the car. The motorman admits that he saw plaintiff, together with other children, on the running boards of the car just before it started, and that he moved off when the bell was rung, without looking back to see if they were off. The conductor admits that he saw as many as three boys

§ 2081. **Statutory, Municipal and Other Regulations of the Public Authority.** (a) The court instructs you that there is an ordinance of the city of Memphis, a violation of which is a misdemeanor, which provides as follows:

Article 39, paragraph 5: "Conductors and drivers of each car shall keep a rigid lookout for all teams, carriages, and persons, on foot, and especially children, either on the track, or moving towards it, and on the first appearance of danger to such team or persons, or other obstructions, the car shall be stopped in the shortest time and space possible."

Also another section, namely:

Article 39, paragraph 25: "At no point within the city limits shall they (meaning the street cars) run at a greater speed than 15 miles per hour."

(b) The court instructs you that a failure to comply with the city ordinances above quoted, within the city limits, is negligence per se, and will render the railway company liable, if its negligence was the proximate cause of the accident and injury.²⁰

on the car, and that they turned some of the seats. He says that he thought they were off, but admits that he did not see but two get off. If, therefore, it were improper for these instructions to use the expression, 'or could have known by the exercise of reasonable care,' it was harmless error, for the employes knew, at or about the time the car started, that the children were on the car, and the conductor ordered them off."

20—*Memphis St. R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (375).

"In the case of *Queen v. Dayton C. & I. Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. 935, it was held that the employment of an infant in a mine in violation of the statute forbidding such employment, and declaring it a misdemeanor, constituted per se such negligence as rendered the employer liable for all injuries sustained by the infant in the course of the employment. In *Riden v. Grimm Bros.*, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587, it was held that the sale of intoxicating liquors to an habitual drunkard, after notice from the latter's wife forbidding it, in violation of Acts 1889, c. 68, making such sale a misdemeanor, was per se such negligence as rendered the seller liable to the wife for the death of the husband, or other injury resulting to her from

such sale. In *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782, the court had under consideration the question whether the violation of a city ordinance would impose the same liability as the violation of a statute. The ordinance under examination there concerned the erection of fire escapes on buildings. In that case the court used the following language: 'It is insisted that the ordinance of 1890 imposed no duty upon the owners of this building, for a breach of which a civil action can be maintained by one sustaining injury for such breach, and that therefore the trial judge was in error in letting this go to the jury. It is conceded that for a violation of a general statute a civil action will lie at the instance of a party injured thereby. *Queen v. Dayton C. & I. Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. 635. But it is insisted that this is not true with regard to a violation of a municipal ordinance. An examination of the authorities will show much diversity of judicial opinion on this question. The cases of *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 12 Am. St. 698; *Hayes v. Mich. C. R. R.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, and *Salisbury v. Hochenroder*, 106 Mass. 458, 8 Am. Rep. 354, hold that for the violation of a municipal

(c) You are instructed, gentlemen of the jury, that it is the duty of the street railway company to exercise ordinary care to keep level with the balance of the street the space between their rails and tracks and two feet on each side of the same, and keep the tops of the rails of their tracks on a level with the surface of the street. It

ordinance an action can be maintained by a private individual injured thereby. The cases of Philadelphia R. R. v. Ervin, 89 Pa. 71, 33 Am. Rep. 726; Flynn v. Canton Co., 40 Md. 312, 17 Am. Rep. 603; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502, and Vandyke v. Cincinnati, 1 Disn. (Ohio) 532, take the contrary view. At the April term, 1903, of this court, at this place, in the case of Memphis St. R. Co. v. Williford (no opinion filed), error was assigned upon the charge of the circuit judge, substantially the same as that now complained of. Indeed, the same city ordinances which are copied supra were involved in that case, and were the subjects of the charge of the circuit judge there. The court held in an oral opinion delivered by Mr. Justice Shields, that the same rule laid down in Queen v. Dayton C. & I. Company, supra, in respect of statutes, applied to city ordinances. We have again examined the question, but deem it unnecessary to go into an extended discussion of it. To what has already been said in our cases we shall only add that we are unable to find any convincing force in the suggestion, occurring in many of the cases, that a distinction should be made between statutes and ordinances, in respect of the question referred to, on the ground that the former can create a cause of action between private individuals, or a civil cause of action in any sense, and the latter cannot. If an ordinance be passed for the protection of the individuals composing the public, as distinguished from the municipality itself, and be within the legislative power of the corporation, and any member of the public suffer an injury peculiar to himself by reason of the violation of such ordinance by some other person, it is difficult to see why, on any sound theory, he may not have an action therefor against the offender. Such ordinances are devised for the purpose of creating rules of conduct for the guidance of the people, just as statutes are, and they may be

said to emanate ultimately from the Legislature, since municipalities, in this state at least, can exercise no powers which are not expressly or by implication conferred upon them by that body.

It is true that the ordinance does use the expression 'on the first appearance of danger to such teams or persons . . . the car shall be stopped,' etc., but this language must be given a reasonable construction. Taking into consideration the purpose intended to be served by the ordinance, we are of opinion that it means, when the danger of a collision becomes imminent, the car shall be stopped. The danger to be apprehended is always that of a collision. It is always potential when street cars and other vehicles, horsemen and pedestrians are using the same thoroughfare. It does not become actual until it is perceived to be imminent. It may be then said to first appear as a real danger.

When the danger of a collision is imminent, it is certainly not unreasonable to require the railway company to stop its cars in the shortest time and space possible. This, of course, implies that the machinery and appliances shall be in proper condition, and also that the servants of the company shall do all that men of reasonable care, prudence and alertness in the same situation and with the same appliances could do to stop the car and prevent the collision. *Citizens' St. Ry. Co. v. Dan*, 102 Tenn. 320-325, 52 S. W. 177.

Nor is this rule in conflict with that laid down in *Citizens' St. Ry. v. Shepherd*, 107 Tenn. 444, 64 S. W. 710.

In that case the court held that, when the danger of a collision became imminent, then it became the duty of the motorman to use ordinary care to stop his car and prevent an accident. But ordinary care under such circumstances—that is, when the danger of a collision is imminent—is that degree of care which is described in the next, but one, preceding paragraph."

is also their duty to stop their cars at least five feet before approaching a railroad crossing. It is also the duty of the employe of the defendant company operating their cars, when they discover a person in peril on their track, to use reasonable diligence to stop the car and avoid injury to such person.²¹

§ 2082. Joint Liability With Other Individuals or Corporations.

The court instructs the jury that the plaintiff has filed her declaration containing one count which states her cause of action; that in and by said declaration she charges both the defendants with negligence causing said injury; that the jury may find one or both of the defendants guilty or not guilty, as the jury may determine from all the evidence in the case; that before the jury can find the defendant, the S. Ry. Co. guilty, they must believe, from a preponderance of the evidence, that the said S. Ry. Co. is guilty of the negligence charged against it in said declaration; that the injury, if any, sustained by the plaintiff was a natural consequence of the negligence charged against the said S. Ry. Co., flowing directly and immediately, in unbroken sequence, from said alleged negligence.²²

§ 2083. Care of Road Beds and Tracks. (a) The court instructs the jury that though they may believe from the evidence that the plaintiff, B., saw the heap of snow, alleged to have been piled or thrown by the defendant company, and knew that it was of a dangerous character, but knew that other persons had crossed there, and reasonably believed that by the exercise of reasonable care, she could cross the same in safety, her attempt is not contributory negligence.²³

(b) If the jury find from the evidence that the defendant's street car track was in an unsafe condition, and that the rails projected above the surface of the street to such an extent as to render crossing over the same dangerous at the point where the said G. attempted to cross the same, and that the said G. actually saw or discovered the dangerous condition of said track or rail, or in the exercise of ordinary care ought to have seen it, and attempted to cross the same with a loaded wagon, and was injured thereby, and that an ordinarily prudent person would not have done so, and that he was negligent in so doing, then and in this event the plaintiffs could not recover, and you will find for the defendant.²⁴

(c) The jury are instructed that if there was a hole in the top of the culvert as alleged, and that the defendant was negligent in fail-

21—Dallas Cons. El. St. R. Co. v. Ely, — Tex. Civ. App. —, 91 S. W. 887 (888).

22—Springfield Cons. R. Co. v. Putenny, 200 Ill. 9, 65 N. E. 442, aff'g 101 Ill. App. 95. In this case it was held proper for the trial court to have struck out at the end of the above instruction the following words, "without any possible intervening and probable efficient cause to which such injury might have been due, in whole or

in part." The plaintiff was riding in a cab at the time of the accident, and, on bringing suit against the cab company and the street railway company jointly, each tried to exculpate itself by inculcating the other.

23—Newport N. & O. P. R. & E. Co. v. Bradford, 99 Va. 117, 37 S. E. 807 (809).

24—Citizens' R. Co. v. Gossett, — Tex. Civ. App. —, 85 S. W. 35 (36).

ing to repair it, and that plaintiff, without negligence on his part, was injured by falling into the hole, then you will find for plaintiff, and allow him such damages as the proof may show he has sustained, if any.²⁵

(d) The jury are instructed that the defendant had no jurisdiction or control over that part of the street outside of its tracks and right of way, and could in no manner regulate and control the action of storekeepers or other persons, and could not prevent them from shoveling the snow off from the sidewalk or from making paths through the snow and throwing the snow into piles or heaps upon the street outside of its tracks and right of way. And if the jury believe from the evidence that certain storekeepers or other persons did at the time and at the place where the accident to the plaintiff happened, shovel snow and ice from the sidewalk out into the street, and did shovel paths in the snow and ice, throwing it to either side, making piles of snow and ice in the street outside of defendant's tracks and right of way at the place in question, and at the time in question, and that such accumulations or piles of snow and ice were the cause of the accident complained of, then the jury should find the defendant not guilty.²⁶

(e) The jury are instructed that it was the duty of the city of _____ and not of the defendant to remove the accumulations of snow and ice, if any, which had become lodged between the defendant's tracks and right of way and the sidewalk at the time and at the place when and where the accident complained of occurred. So if the jury believe from the evidence that the plaintiff was injured by reason of an accumulation of ice and snow in the street outside of defendant's tracks and right of way, and that such accumulation of snow and ice at the time and place in question was the cause of the accident, then the jury should find the defendant not guilty (unless you further find from the evidence that such accumulation of snow and ice was caused by the defendant.)²⁷

§ 2084. **Cars and Appliances.** (a) The court instructs the jury that the cars of said railway shall be of modern type, propelled by electricity or any other motive power, except steam, which is or may become suitable for railway purposes, and must be properly lighted in the nighttime, whether standing or running.²⁸

(b) A street railway company is required to use cars that will not unduly endanger the lives and limbs of persons using the streets and crossing its tracks. It may not use old and obsolete cars that are difficult to control or without good equipment to stop; and if by such use an injury is inflicted, when the use of a more modern or

25—Laredo El. & R. Co. v. Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998 (1000).

26—Kornazsewka v. W. C. St. R. Co., 76 Ill. App. 366 (369).

27—Ibid.

28—Ensley v. Detroit U. R. Co.,

134 Mich. 195, 96 N. W. 34 (35).

"We think this instruction fairly presented the question to the jury. See Rascher v. St. R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447; McGee v. St. R. Co., 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. 507."

complete car with good equipment to stop, such as is generally in use, would not have caused the injury, then such company in the use of such old and obsolete car without good equipage to stop it, is guilty of neglect. This rule, however, does not require the company to use the most recent pattern or kind of car or brake manufactured, but it does require it to use such a pattern or kind of car and brake as is in general use in cities or towns of the size where it is used.²⁹

§ 2085. Sounding Bells and Gongs. The court instructs the jury that it was the duty of the defendant's gripman to sound his gong or bell when approaching L. avenue, so as to give notice to persons desiring to cross said street of the approach of the train of cars; and if you find from the evidence that said gripman failed to sound his gong or bell, or give any other warning, when approaching said avenue, and that, but for his failure to so sound his gong or bell or give such warning, the accident complained of would not have happened, your verdict should be for the plaintiffs, unless you also find from the evidence that B., at the time she was killed by defendant's cars, was not using that degree of care in going upon defendant's tracks which, in the ordinary experience of mankind, was to be expected of a girl of her age and capacity under the circumstances shown in the evidence.³⁰

§ 2086. Use of Proper Brakes. (a) The court instructs the jury that the law requires that the defendant's servants should be watchful to see that the way is clear in the direction in which the train is going, and that, where they have reason to anticipate the sudden and unexpected appearance of children upon or approaching the track, they should so manage the grip and brakes of the cars as to be able to stop the cars quickly and readily, should occasion require. If, therefore, under all the circumstances detailed in the evidence, you

29—Indianapolis St. R. Co. v. Schomberg, — Ind. App. —, 71 N. E. 237 (239), aff'd 164 Ind. 111, 72 N. E. 1041.

"The use of an old car without good equipment to stop it ought to be an act of negligence, but the instruction does not require the use of cars and brakes of the most recent patterns, but only such as are in general use in cities and towns of the size where it is used. It characterizes the act as one of negligence. It certainly could not be considered one of due care. It does make the liability of defendant depend absolutely upon circumstances."

30—Schmidt v. St. L. R. Co., 163 Mo. 645, 63 S. W. 834 (836).

"There is no statute making it the duty of the gripman to sound the gong or bell at the approach of a street crossing, and there is no law making a failure to do so

negligence per se. Such failure becomes negligence only when the circumstances render the ringing of the bell necessary, and, if the circumstances are in dispute, whether the occasion is such as calls for the sounding of the bell is a question of fact for the jury. But is it the duty of the court to require the jury to find facts that are undisputed and established by the evidence of both sides? We think, under the unquestioned circumstances of this case, it was the duty of the gripman to have sounded his gong on the approach of Lemp avenue; and the inference is strong that if he had done so the child, who according to the gripman's own evidence, probably could not see the car on account of the buggy, would have heard the gong, and would not have run into danger. We see no error in that instruction."

find that there was reason to anticipate the sudden and unexpected appearance of children upon or approaching the track at the intersection of L. avenue with B., and you further find that defendant's servants in charge of its train of cars were not so managing its grip and brakes so as to be able to stop said train quickly, should occasion require, and you further find that the death of the plaintiffs' daughter was caused by the failure of defendant's servants to so manage said grips and brakes, then your verdict must be for the plaintiffs, unless you should also find from the evidence that ———, at the time she was killed by defendant's cars, was not using that degree of care in going upon defendant's tracks, which, in the ordinary experience of mankind, was to be expected of a girl of her age and capacity under the circumstances shown in the evidence.³¹

(b) You are instructed that defendant was under no obligation to supply the safest or most effective brakes that could be obtained, or to use the utmost care in keeping the brakes on its cars in repair, but was bound to use only ordinary care in the selection of its brakes and in maintaining and keeping the same in repair; but ordinary care in such a case requires the care usually exercised in the operation of electric street car lines, and it is the duty of a party, in operating an electric car, to use the best appliances in common use, and to exercise great care in keeping its appliances for stopping cars in good condition.³²

§ 2087. Allowing Running Board to Extend Over Sidewalks. It was the duty of defendant, in running its cars on the highway, to use reasonable care to avoid injury to persons using the highway; and what is reasonable care depends upon the circumstances of the case; and, as the danger of accident increases, the degree of care should also increase. It was the duty of the defendant to the plaintiff to exercise such care as would be exercised by a reasonably prudent man under all the circumstances. At places where there is more danger the speed must be greatly reduced, and the gong should be sounded to give warning; and if the defendant company was operating a car, the running board of which, at curves, extended over a part of the sidewalk, it was its duty to use reasonable care and diligence to prevent injury thereby to any person standing on the sidewalk at such place; and it is the duty of the motorman operating such car to use reasonable care to avoid injury to persons on the sidewalk at places where there is such overlapping of the running board; and reasonable care may mean great care, depending upon the circumstances, and the greater the overlapping, the greater degree of care must be exer-

31—Schmidt v. St. L. R. Co., 163 Mo. 645, 63 S. W. 834 (837).

32—Mock v. Los A. T. Co., 139 Cal. 616, 73 Pac. 454 (455).

"We think the law should be, and is, as stated in this instruction. Of course, a street car cannot be operated upon the public

streets of a great city, with any degree of safety to pedestrians and others, except by 'keeping its appliances for stopping cars in good condition.' Therefore ordinary prudence requires that 'great care' should be exercised in this direction."

cised. It is his duty to avoid injury to persons lawfully using the public street, whether crossing it or whether on the sidewalk.³³

§ 2088. **Rate of Speed.** (a) The court instructs you that while the defendant company was permitted by ordinance to run its cars at the point where the accident happened at a speed not exceeding — miles per hour, yet such permission fixed the highest rate of speed at which the defendant company was permitted under any circumstances to run, and did not authorize the defendant company to run at such rate, regardless of any and all circumstances and conditions that might exist. If, therefore, you find from the evidence that the plaintiff was run over and injured, as alleged, by defendant's car, at a point on the defendant's tracks where the defendant's servants and agents had reason to anticipate the appearance of children and other persons upon the track, and if you further find that the defendant at the time of the injury was running its said car at a rate of speed which, under the facts and circumstances shown by the evidence, was careless, negligent and dangerous, and in consequence thereof ran over and injured said plaintiff, and provided you further find from the evidence that said B. at the time exercised such care for her own safety as could be reasonably expected of a child of her age and capacity, then your verdict should be for plaintiff, although you should also find that such rate of speed did not exceed the rate of — miles per hour.³⁴

(b) You are further instructed, that, if the car of the defendant was being propelled at a greater rate of speed than — miles an hour, such speed was, in law, negligence, and if such speed was the direct and immediate cause of the death of T., that but for such negligent speed, if you so find it was, the accident would not have occurred, the plaintiff is entitled to recover. If, however, the speed of the car was less than fifteen miles an hour, the same was not negligence, and the plaintiff cannot recover, if you believe the deceased was lying on the car track, unless she has proved that the motorman in charge of the car could by use of the means reasonably within his power have stopped the car, after he saw T., in time and distance sufficient to avoid striking T.³⁵

(c) With respect to the alleged negligence of defendant operating

33—Hayden v. F. H. & W. R. Co., 76 Conn. 355, 56 Atl. 613 (616).

"We think this was a fair statement of the law relative to the duty of the defendant and its servants towards the plaintiff in this case, and that it was well adapted for the guidance of the jury."

34—Heinzle v. Met. St. R. Co., 182 Mo. 528, 81 S. W. 848 (853).

35—Taylor v. Houston El. Co., — Tex. Civ. App. —, 85 S. W. 1019 (1020), where an intoxicated person lying on the track was killed.

See also the following series of

instructions in Birmingham R. & E. Co. v. City S. Co., 119 Ala. 547, 24 So. 558 (559), 43 L. R. A. 385.

"(a) The duty of a motorman on an electric car varies, to some extent, according to the locality in which he is running. He may be permitted to run at a speed in open country, where there are no crossings, which would not be permitted where he would be likely to encounter people and vehicles upon the track.

(b) It would be proper for him to run the car at one speed in one part of the town, and not to run

its cars at a high and excessive rate of speed, you are instructed that, under the ordinance of the City of St. L., defendant had the right to operate its car at the place mentioned in the testimony at a rate of speed not exceeding 10 miles per hour. Before, therefore, you can find against the defendant on account of the excessive speed, you must find either that the defendant operated its car in excess of the speed of 10 miles an hour, or at such a speed which, under the evidence and under the circumstances given in the testimony, amounted to negligence, and unless you so find, and also further find that such excessive or negligent speed was the cause of the death of plaintiffs' son, then plaintiffs are not entitled to recover on account of such speed.³⁶

at such rate of speed at another part of the town, where it was more densely populated.

(c) In determining whether he was guilty of negligence in this case, gentlemen of the jury, you will consider the locality where he was running; whether or not there was danger of his striking a vehicle or person upon the track at any crossing, and how fast he was running; how far his light would enable him to observe dangers in front of him; within what distance he could stop the car, and from all the circumstances which the evidence discloses to you, surrounding this matter, you will determine whether or not he was guilty of negligence in running the car.

(d) It is the duty of the motorman, when he is running where he may come into collision with some person or vehicle at a crossing, at some place where the person or vehicle has a right to be, to keep his car under such control as that he may stop it in time to avoid the injury, if he had, with proper diligence, discovered the danger. While he may run with greater or less speed according to the locality in which he is running, it is his duty to at least retain control over his car; and that control must be such that he may, in case he encounters danger and discovers it, by doing those things which will control his car, so regulate his speed that he will come to a full stop before he does the injury to the person or vehicle that may be in front of him, or give that person or vehicle an opportunity to get out of the way. He is not bound to anticipate that anybody will do anything in getting upon the track, which he ought not to do, but he is bound to

know that other people have a right upon the track, besides himself, and in running the trains he must so run them that he may discover danger, if he can discover it by the exercise of proper diligence, so as to stop the car, and avert the injury which might happen to a person in his way upon the track. If the night is dark and he cannot see further ahead than his light, of course it is his duty to take that fact into consideration in determining the speed of his car. If he cannot see but a little way ahead, he must run more slowly than if he could see a long way ahead.

(e) If he fails in any such duty, he is guilty of negligence; and if the injury results to any persons upon the track, or to property which is where it has a right to be, then the company for whom the motorman is acting is liable for the result."

36—*Masterson v. Transit Co.*, 204 Mo. 507 (517), 98 S. W. 505.

"Plaintiffs interpret this to mean that the jury were instructed that defendant had the absolute right to run its car then and there at the rate of 10 miles an hour regardless of the circumstances. That is a misunderstanding of the instruction. Plaintiffs, in their petition, had counted on the ordinance and at the trial, to obviate the necessity of introducing the ordinance in evidence, it was admitted by counsel on both sides in open court that the speed limit fixed by the ordinance was 10 miles an hour. The plaintiffs having invoked the ordinance as one of the measures of speed to be observed by the defendant, the latter had the right, in view of the admission, to have the jury instructed that so far as the ordinance was con-

(d) The court instructs the jury that plaintiff's petition charges that its servant was, on ———, about ——— p. m., driving his stake wagon drawn by three horses, one of them being in the lead, south on E. avenue, and that at the intersection of E. and H., while said wagon was being driven from the north side towards the south side thereof, an east-bound car of the defendant company struck said lead horse. The negligence charged against said defendant is: First, that said car, while approaching said crossing, was being operated at an excessive and dangerous rate of speed to persons and animals crossing H. avenue at its intersection with E.; second, that the motorman thereof failed to give any warning of the approach of said car on E. avenue. The court instructs you that in regard to those allegations of negligence the burden of proof is upon the plaintiff to show by the preponderance or greater weight of the evidence that said accident was caused by either one or both said alleged acts of negligence. By "burden of proof" is meant that the evidence to sustain a proposition thus to be proved is greater in weight and credibility in your judgment than the evidence to the contrary.³⁷

§ 2089. **Same Subject—As to Infant Trespassers.** The jury are further instructed by the court that, if the plaintiff at the time of the injury, was a child of tender age of thirteen years, and was riding upon the defendant's car in the city of A., whilst the same was traveling at a fast rate of speed, that it was the duty of the defendant's motorman in charge of said train to have reduced the speed of said train, before ordering the plaintiff to leave the same, to such a rate of speed as the plaintiff might depart from the train with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car.³⁸

§ 2090. **Frightening Animals—Car Operated in Ordinary Manner.** If the defendant was operating an interurban railroad on and along a public highway, and if while running its cars along and upon its said railroad, plaintiff's horse became frightened at the running of said car, or at the appearance of said car, aside from said sign or banner, and said car was being run and operated in the ordinary way of operating said car, then the court instructs you that said fright of said horse under such condition could not be chargeable to the defendant.³⁹

cerned, defendant had the right to run its car at the rate of 10 miles an hour. But the instruction did not say that the car could be lawfully run 10 miles an hour regardless of the circumstances; its natural meaning was that if the car was not run in excess of 10 miles an hour there was no violation of the ordinance, and it said if the car was not run in excess of 10 miles an hour or at such a speed which under the circumstances shown in the evidence amounted

to negligence, the plaintiffs could not recover on the issue as to speed. We find no fault with that instruction."

37—Sanitary D. Co. v. St. L. T. Co., 98 Mo. App. 20, 71 S. W. 726.

38—Washington A. & Mt. V. E. R. Co. v. Quayle, 95 Va. 741, 30 S. E. 391 (394).

39—Indianapolis & G. R. T. Co. v. Haines, 33 Ind. App. 63, 69 N. E. 187 (188).

"It would be a strained construction of the language used in this

§ 2091. Same Subject—Car Not Operated in Ordinary Manner.

If the jury believe from the evidence that the horse of plaintiff was frightened by the noise and smoke arising from the machinery of the car of defendant, and that said noise and smoke was not incident to the ordinary operation of their cars they are instructed that this raises the presumption that such noise and smoke would not have been caused if those who had the providing, maintaining and care of defendant's machinery had used proper care thereto, and in the absence of an explanation on the part of the defendant showing due care on its part, they may infer that the defendant was guilty of negligence; and if they further believe that such negligence caused the accident as set forth in the declaration, and that the plaintiff was free from fault, they must find for the plaintiff.⁴⁰

§ 2092. Right of Way of Street Cars Over Other Vehicles Driven Along Track—Collision With Same. (a) The jury are instructed that, by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is invested with the right of way over other vehicles over the portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same, and if the jury believe, from the evidence, that the plaintiff, while neglecting such duty and failing thereby to use ordinary care for his own safety, was injured, then he cannot recover in this case.⁴¹

instruction to say that the jury would understand it to mean that appellee might recover if his horse became frightened at the running of the car unless it was shown that the car was being run and operated in the ordinary way of operating the car. A careful consideration of the instruction discloses nothing prejudicial to appellant."

40—*Richmond R. & E. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736 (738).

"As a rule negligence is not presumed. But there are cases where the maxim *res ipsa loquitur* is directly applicable, and from the thing done or omitted negligence or care is presumed." 16 Am. & Eng. Inc. Law 448. "When the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms 'evidence of negligence' in conformity with the maxim *res ipsa loquitur*. *Seybolt v. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; 2 Jag. Torts 938; *Whart. Neg.*, § 421; *Cooley, Torts* 799; *Bigelow, Torts* 596; *Shear & R.*, § 59. A pre-

sumption of negligence from the simple occurrence of an accident arises where the accident proceeds from an act of such a character that when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, or for the management and construction of which he is responsible. *Transportation Co. v. Downer*, 11 Wall 129, 20 L. Ed. 160; *Phil. W. & B. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. 493, 20 Atl. 2 (note), 8 L. R. A. 673; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410."

41—*North C. E. Ry. Co. v. Peuser*, 190 Ill. 67 (70), 60 N. E. 78.

"Street railway companies are public carriers of passengers and are given corporate existence to enable them to provide the means of rapid transportation for the convenience of the people and the promotion of the public welfare. The cars of such corporations can-

(b) You are instructed that, although you believe from the evidence that the wagon which the street car collided with was driven in front of the car for some distance near the railroad track, but in a place of safety, these facts would not, under the law, make it the duty of the motorman to stop his car; and if you believe said motorman rang his gong on seeing said wagon near said track, as aforesaid, so as to warn said persons on said track on said wagon that the car was approaching, he (the motorman) had a right to anticipate that the wagon would be kept out of danger and give him the right of way, and under the circumstances he would not be called upon to stop the car or to check the same until he saw the driver was ignorant of the approach of the car, and that a collision would likely occur.⁴²

(c) The jury are instructed that by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is vested with the right of way over other vehicles over the portion of the street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same. And if the jury believe from the evidence that the plaintiff, while neglecting such duty, if he did neglect such duty, and failing thereby to use ordinary care for his own safety, was injured, then the plaintiff cannot recover in this case.⁴³

(d) A street car has the right of way upon that portion of the street upon which it alone can travel. If, therefore, a private vehicle

not give and take the road—turn to right or left—as can ordinary vehicles, but must move on and along the rails laid down in the street for that purpose. The grant to such corporation of the right to use the streets of a city must by necessary implication be held to confer the right of passage along its tracks superior to the right of a horseman or one driving a vehicle on that portion of the street occupied by the tracks of the railway company. Such companies do not, however, have an exclusive right to the use of that part of the streets occupied by their tracks. The public are not deprived of the right to use all parts of the street in the ordinary manner, but retain such right, subject to the superior right of passage. A citizen passing along the street in a carriage, buggy or like vehicle, subject to the rule must exercise ordinary care for his own safety and not obstruct the passage of the car, may drive on the track rails laid in the street by the street car company, and drive along and upon such track or rails without becoming a trespasser, but it is his duty to leave the track whenever

his presence there serves to impede the passage of the cars. A street railway company is charged with the knowledge that the public may lawfully use the entire street, and it must, in operating its cars on the streets, employ all reasonable means to avoid injuring those whom it knows may rightfully use that part of the streets occupied by its tracks. The principles we have pronounced are supported by adjudicated cases in this court and the consensus of modern authority. *Chicago W. D. R. Co. v. Bert*, 69 Ill. 338; *North C. St. R. Co. v. Smadraff*, 189 id. 155, 59 N. E. 507; *Elliott on Roads & Streets*, 2d ed., secs. 761-2. It was an error to refuse to grant the instruction."

See also the instructions approved in *C. C. Ry. Co. v. Rohe*, 118 Ill. App. 322 (326); *C. C. Ry. Co. v. Manger*, 105 Ill. App. 579 (584), and *Purinton Brick Co. v. Eckman*, 102 Ill. App. 183 (186).

⁴²—*Hot Spr. St. R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245 (248).

⁴³—*Chi. C. R. Co. v. Meinheit*, 114 Ill. App. 497 (498).

"In *North C. E. R. Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78, the same

in traveling upon the public highway, meets with a street car, the private vehicle must yield the right of way to the street car.⁴⁴

(e) The court instructs the jury that while, if you believe from the evidence, that the occupants of the sleigh in question were driving along the street in such a position that they were likely to be injured by the defendant's car, the motorman in charge of the defendant's car was bound to use ordinary care to prevent such threatened injury, if he knew, or by the exercise of ordinary care might have known, of the danger, and if by the use of ordinary care he might have avoided it, yet if the jury believe from the evidence that the said sleigh was driven in front of the car so suddenly that the said motorman had no such notice of any danger to the occupants of said sleigh as to give such motorman an opportunity to avoid the danger by the exercise of such presence of mind and of such ordinary care as is to be expected from men of ordinary coolness and prudence under such circumstances as were then surrounding him, and if the jury further believe from the evidence that at the time of the accident and prior thereto the car of the defendant was being operated with ordinary care, then the plaintiff has no right to a verdict in her favor.⁴⁵

(f) You are instructed that while the plaintiff had the right to use the street, and any and all parts of it, as might be necessary in traveling thereon, yet the defendant in operating its cars on a fixed track, is not expected nor required to turn out for persons occupying its tracks, but so far as passage along its tracks is concerned, it has the superior right of passage, and men driving horses must turn out and allow the cars to pass.⁴⁶

(g) If you further find from the evidence that there was no obstruction in the way to prevent the motorman from seeing S. as he drove out of B. avenue and drove along V. street, and S. drove upon the track at a distance far enough ahead of the car, which was being operated by A., the motorman, to have enabled any ordinarily careful person to have stopped his car, if need be, to avoid a collision, where the motorman had been on the lookout and had his car under control, then the court charges you that it was negligence on the part of A., the motorman, to have collided with S., the wagoner, and whatever injuries S. received in consequence of such injuries he has the right to recover for; the jury are instructed in this connection that a motorman has a right to assume that a person who is upon the track and apparently capable of taking care of himself will leave it before

instruction was asked by the defendant and refused and because of such refusal the judgment was reversed. In that case the wagon in which the plaintiff was, and the street car, were upon the same track, going the same way, the car behind the wagon. The driver attempted to turn his horse and wagon from the track and while the hind wheels of the wagon were still on or near the track, the car

struck the wagon and the plaintiff was thrown out and injured."

44—*Doolin v. Omnibus C. Co.*, 140 Cal. 369, 73 Pac. 1060 (1061).

45—*West C. St. R. Co. v. Peters*, 95 Ill. App. 479 (482), *aff'd* 196 Ill. 298, 63 N. E. 662. See also *W. C. St. R. Co. v. Kautz*, 89 Ill. App. 309.

46—*Met. St. R. Co. v. Rouch*, 66 Kans. 195, 71 Pac. 257.

the car reaches him, and that the motorman can indulge in this presumption until the danger of a collision becomes imminent.⁴⁷

§ 2093. **Street Crossings—Pedestrians.** (a) The court instructs the jury that a traveler upon a street crossing, desiring to cross the street car track there situate, has not the same right to require the speed of a car to be slackened, to enable him to pass over the track, as the person in charge of the car has to require him to give way to allow the car to pass.

(b) It is as much his duty, as a matter of law, to see an approaching car which is in plain sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car. Testimony of a person or any number of persons that he or they, when approaching a street car track with a view of crossing it, looked along the track for a coming car, and did not see one, although a car was in plain sight, and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities.⁴⁸

(c) The court instructs the jury that if they believe from the evidence that the employes of defendant in charge of the car in question used ordinary care in the management of said car at and near the place where the deceased, A., was injured, and that as soon as they saw the deceased, A., in a position of danger, or by the exercise of ordinary care might have seen that he was in danger, they used such care and caution in stopping said car to avoid injury to said deceased, A., as a person of ordinary care and prudence would have exercised

47—*Citizens' R. Co. v. Shepherd*, 107 Tenn. 444, 64 S. W. 710.

48—*Lightfoot v. Winnebago T. Co.*, 123 Wis. 479, 102 N. W. 30 (32).

The court further instructs the jury that, if they believe, from the evidence, that the said C., deceased, attempted to cross over the defendant's tracks at or near M. avenue, in the city of —, on or about the — of —, as alleged in the plaintiff's declaration or some count thereof, and that while crossing over the same he was struck by one of the defendant's cars, and was injured thereby, and that at the time he attempted to cross the same he saw defendant's car coming along said tracks, and that a reasonably prudent man would have reason to believe, from the distance said car was away, there was sufficient time to cross over said tracks safely before said car would reach the place where the deceased was attempting to cross; and if they further believe, from the evidence, that the said C., deceased, acted upon the belief and was using due

diligence and care to cross over the defendant's said tracks and get off the same so as to avoid a collision; and if they further believe, from the evidence, that the defendant's servants and agents who were managing said car saw the said C., or by the exercise of ordinary care could have seen him, in time, after he started to cross said tracks, to have slowed up its said car and have prevented said collision, then it was their duty to have done so, and a failure to perform such duty would be negligence upon the part of defendant's agents as would render the defendant liable, provided they further believe, from the evidence, that a failure to check the speed of said car was the proximate cause of said injury, and that the plaintiff's intestate was in the exercise of due care for his own safety at and before the time of the collision. In *W. C. St. R. Co. v. Foster*, 175 Ill. 396 (398), 51 N. E. 690, aff'g 74 Ill. App. 414, the court in comment on above said: "This instruction is objectionable in some respects, in-

under like and similar circumstances, then the verdict of the jury must be for the defendant.⁴⁹

§ 2094. **Street Crossings—Vehicles Crossing Track.** (a) The court instructs the jury that neither the defendant for the operation of its cars, nor the plaintiff for crossing the street had the exclusive right to the use of T. avenue at its intersection with S. street west. Neither had a superior right over the other, and each would be obliged, in so far as the undertaking in which each was engaged and the car or vehicle each was using would reasonably permit, to take reasonable precaution to avoid collision each with the other.⁵⁰

(b) It is the duty of the defendant, by its agents or servants, to use reasonable care to see vehicles which may be passing across its tracks; and if you believe from the evidence that the motorneer of the defendant did not use ordinary care to observe — while he was passing across the track of the defendant upon a public street, and that if said motorneer had used such ordinary care, he could have seen the carriage in time to have stopped his car or slackened its speed, so as to have avoided injury to said carriage and — and —, and that the plaintiff, while using ordinary care, was injured as charged in the declaration on account of such neglect, the jury must find a verdict for the plaintiff.⁵¹

(c) The court instructs the jury that if they believe from all the evidence that the agents or servants of the defendant corporation at the time of the injuries to plaintiff, carelessly and negligently ran said car or cars upon plaintiff's team, and that by the exercise of ordinary care they could have avoided doing so, and that such negligence, and not negligence on the part of the plaintiff, was the cause of the injuries to plaintiff, they should find for the plaintiff.⁵²

(d) If the jury shall find from the evidence that both the motorman and the plaintiff supposed that the plaintiff would be able to get across the track without being struck by the car, and that in so doing they both erred in their judgment in respect to the matter, and that the accident was due to such error in judgment on their part, then the plaintiff can not recover, and their verdict must be for the defendant.⁵³

form, but not seriously so. In substance it tells the jury that if they believe the plaintiff's intestate was injured in a certain manner, while he himself was in the exercise of due care and caution, and if they believe the defendant's servants did or omitted to do certain things, the plaintiff is entitled to recover. Either party is entitled to have the jury instructed as to his theory of the case."

See the exhaustive comment on a like instruction in *Snyder v. People's Ry. Co.*, — Del. —, 53 Atl. 433.

49—*Holverson v. St. L. St. R. Co.*, 137 Mo. 216, 57 S. W. 770.

50—*Stanley v. Cedar R. & M. C. R. Co.*, 119 Iowa 526, 93 N. W. 489 (492).

51—*Springfield C. R. Co. v. Clark*, 51 Ill. App. 626 (632).

52—*Twelkemeyer v. St. L. T. Co.*, 102 Mo. App. 190, 76 S. W. 682 (684), 11 L. R. A. 323.

53—*Holmstrom v. Oldham Bank*, 69 Ill. App. 110 (112).

The court instructs the jury that the rights of plaintiff and defendant to travel in the street in question were equal. It was also the

§ 2095. **Street Crossings—Fire Engines Crossing Track.** (a) If the jury find and believe, from the evidence, that G. and S. streets were, on the — day of —, open public streets within the city of St. L.; and if the jury further find and believe, from the evidence, that at said time the defendant was using the tracks, railway and car mentioned in the evidence for the purpose of transporting persons for hire from one point to another in said city, as a street railroad operated by electricity, and that on said day — was plaintiff's husband, and an employe of the fire department of the city of St. L., and was discharging his duty therein as the driver of a fuel wagon, said fuel wagon being at the time a part of the fire apparatus of said department and then being used in the business of said department, and that plaintiff's said husband was at said date driving the horses attached to said fuel wagon along G. street, going in a westwardly direction; and if the jury further find and believe, from the evidence, that while plaintiff's said husband was so driving the horses attached to said fuel wagon along G. street, and across S. street at its intersection with G. street, defendant's car ran into and collided with said wagon, causing the said — to be thrown from said wagon and injured to such an extent as to cause his death; and if the jury further find and believe, from the evidence, that defendant's agents, servants or employes in charge of and operating said car either saw, or by keeping a vigilant watch for vehicles moving toward the track upon which said car was being propelled could have seen, said horses and fuel wagons moving toward and across said track and in danger of injury, and that after seeing said horses and fuel wagons moving toward said track, or, after they could have seen by keeping a vigilant watch as aforementioned, defendant's agents, servants and employes, or either of them, could by stopping said car within the shortest time and space possible under the circumstances, have averted said collision and injury, and neglected to do so; and if the jury find and believe, from the evidence, that said — exercised ordinary care and prudence in driving toward and across said track,—then your verdict should be for the plaintiff.

(b) The court instructs the jury that by the terms of the ordinance (No. —) read in evidence, the defendant's motorman, conductor or other persons in charge of its car mentioned in evidence, were bound to keep a vigilant watch for vehicles moving toward defendant's track, and upon the first appearance of danger to such vehicle the person or persons in charge of said car were bound to

duty of the servants of the defendant to take notice of the ordinary use to which said street was put by the traveling public, and it was also their duty to expect that vehicles would be driven across the tracks in front of approaching cars, and to keep a vigilant lookout for such travelers, and so to operate the cars that persons who

were exercising reasonable care for their own safety, and who were about to cross the tracks would be warned of the approach of the car by the ringing of bells or other necessary warning.

Above instruction approved in *Burns v. Met. St. R. Co.*, 66 Kan. 188, 71 Pac. 244 (246).

stop said car within the shortest time and space possible, and a failure to keep such vigilant watch, and to stop said car (if you find from the evidence that defendant's servants, agents or employes did so fail) was negligence upon the part of defendant.

(c) The court instructs the jury that by the terms of ordinance No. —, read in evidence, the person or persons in charge of defendant's car mentioned in the evidence were required to give to the fuel wagon driven by — (if you find from the evidence that said fuel wagon was a part of the fire apparatus of the city of —), the right of way upon the street over which it was passing (if you find from the evidence said fuel wagon was going upon said street in response to an alarm of fire); and if, from the evidence, you find that the person or persons in charge of said car either carelessly or wantonly obstructed or interfered with said fuel wagon while going to a fire, such conduct on the part of said person or persons is negligence on the part of defendant.

(d) The court also instructs the jury that it was the duty of the deceased, —, to exercise ordinary care upon his part to make use of his faculties on approaching the crossing of defendant's track; that, whether the servants operating defendant's car by electricity gave signals or not, it was the duty of — to look and listen before driving on defendant's track, and if, from the evidence, the jury believe that — failed to exercise ordinary care, and failed to look and listen, and thereby directly contributed to the wagon and defendant's car coming into contact and causing the injuries which produced said —'s death, then their verdict should be for the defendant company.

(e) The court also instructs the jury that if, from the evidence, they believe that the motorman of the car had no warning, nor could have known thereof by keeping a vigilant watch, as indicated in other instructions given, regard being had to the circumstances and surroundings, until both the car and the wagon had reached the intersection of S. and G. streets, and the jury also believe that the wagon and car were then both going at such speed that it was impossible for defendant's motorman to avoid a collision between them, then the jury should find a verdict for the defendant.⁵⁴

(f) The court instructs the jury that it was the duty of the defendant to give audible signals of the approach of its cars, and that nonperformance of this duty was evidence of negligence on the part of the defendant, and that, if the evidence satisfied the jury that a failure to give signals was the proximate cause of the injury complained of, that was actionable negligence.⁵⁵

§ 2096. **Collision with Other Street Cars.** (a) The court instructs the jury that it was the duty of the defendant company in the

⁵⁴—Guinney v. Southern E. Co., 167 Mo. 595, 67 S. W. 296.

⁵⁵—Cons. T. Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067 (1068).

operation of its cars to use ordinary care to prevent collision, and to observe that provision of the city ordinance which give to the east and west bound cars the right of way at intersecting points over north and south bound cars. It was at the time the duty of the plaintiff in the operation of the east bound car to exercise for his own protection ordinary care to avoid collision, and notwithstanding his right of way, because of his being on an east bound car, it was his duty to avoid collision if he saw danger ahead, or in the exercise of ordinary care would have seen danger, in time to have stopped his car or otherwise have averted the accident; and if you believe from the evidence plaintiff failed to exercise such care or perform such duty, and that such failure in any way contributed to his injury, then he is not entitled to recover.

(b) By "ordinary care" is meant such care as a person of ordinary prudence would, under the same or similar circumstances, exercise. The absence of such care is negligence. If, therefore, from the evidence, you believe that the defendant company operated upon a public open street of ——— the car which collided with the car of the ——— Company, and that in its operation at the time of the accident the defendant company, by its servants or employes in charge of said car, failed to give the east-bound car the right of way, and negligently ran its car so as to collide with the east-bound car, and that by reason of such collision the plaintiff was injured, and that he was himself at the time of the accident exercising ordinary care for his own protection as herein defined, then your verdict should be for the plaintiff. The burden of proving any negligence of defendant or failure to observe the city ordinance regarding the right of way is upon the plaintiff throughout the entire case to establish it by a preponderance or greater weight of the testimony. The burden of so proving any contributory negligence on the part of the plaintiff is upon the defendant.⁵⁶

§ 2097. **Collision with Persons on or Near Tracks.** (a) The court instructs the jury, as a matter of law, that if they believe from the evidence that everything was done that could be done by the defendant's servants to stop the car as soon as they saw, or by the exercise of ordinary care could have seen, the danger of the plaintiff, then the jury should find the defendant not guilty.⁵⁷

(b) The law of this case is, and the court so instructs you, that it was the duty of the motorman in charge of the defendant's car on S. street, near L. Place, to run his car at a reasonable rate of speed, and to keep a lookout, and to keep his car under reasonable control at such place as he might reasonably expect persons to be

56—*McLain v. St. L. & S. R. Co.*, 100 Mo. 374, 73 S. W. 909 (912).

57—*West C. St. R. Co. v. Camp*, 48 Ill. App. 503 (504).

The court says that the above

instruction was rightfully asked by appellant, and that the refusal of the trial court to give it was such error as to demand a reversal of the judgment.

on the track of said car, and to exercise ordinary care for the safety of persons using the track or street; and if you further believe from the evidence in this case that the motorman in charge of this car, which collided with the deceased and killed her, negligently failed in any of these particulars that I have just announced to you, and that by reason of such failure the deceased, E., was killed, then the law is for the plaintiff, and you should so find.

(c) But unless you believe from the evidence that the motorman in charge of defendant's car negligently failed in some of the particulars which I have announced to you, and that E. was killed as a result of such negligent failure on the part of the motorman, then the law is for the defendant, and you should so find.⁵⁸

§ 2098. **Same Subject—Child Run Over by Car—Series.** (a) The jury are instructed that if they believe and find from the evidence that plaintiffs are the parents of B., deceased; that said deceased at the time of his death was a minor, unmarried and of the age of seven years; and that defendant on and prior to about the ——— day of ———, was engaged in the business of transporting passengers, for hire, from one point to another within the city of St. L., by a street railway, and for that purpose used and operated its railway, and a certain gripcar and trailer composing the train; and if the jurors further believe and find from the evidence that Morgan street at said time was an open public street of the city of St. L. at the place hereinafter mentioned; and if the jurors further believe and find from the evidence that on the ——— of ——— that said child was in said M. street, at a point at or near the crossing on the east side of T. street, and whilst on said street at said place he was run over by defendant's said gripcar, and thereby injured, and died from the effect thereof; and if the jurors further believe and find from the evidence that defendant's gripman in charge of said gripcar just before and at the time of so running over and injuring said child was not keeping a vigilant watch for all persons on foot, especially children, either on its said track, or moving towards it, or that said gripman did not stop said gripcar in the shortest time and space possible, under the circumstances, upon the first appearance of danger to said child; and if the jurors further believe and find from the evidence that said gripman, by the keeping of such vigilant watch, would have seen said child moving towards the track, or upon the track and in danger, and could, in the exercise of ordinary care, by so stopping said gripcar in the shortest time and space possible under the circumstances, have averted the injury from said child; and if the jurors further believe and find from the evidence that plaintiffs exercised ordinary care in the custody of said child, in keeping it from being exposed to said injury, according to their condition in life, and that said child exercised the degree of care which is reasonably to be expected from a child of his years and experience under the

circumstances,—then your verdict should be for the plaintiff, and, if you find for the plaintiffs, you will assess their damages in the sum of not exceeding five thousand dollars.

(b) The jurors are instructed that if the defendant was engaged in the business of transporting passengers, for hire, from one point to another within the city of St. L., on or about the ——— day of ———, then, by Ordinance No. 17188, read in evidence, it became the duty of the gripman in charge of the gripcar to keep a vigilant watch for persons on foot, especially for children, either on its track or moving towards it, and, on the first appearance of danger to such person or child, it was the duty of the gripman to stop the car in his charge in the shortest time and space possible under the circumstances. The court instructs the jury that the degree or measure of care or caution which said infant child, B., was required to exercise, was that which is ordinarily exercised, and which is reasonably to be expected from a child of his years and experience, under the circumstances he was in, as shown by the evidence, and, before the jury can find him guilty of contributory negligence, they must find that he failed to exercise such care or caution as might reasonably be expected of a child of his years and experience under the circumstances; and the burden of proving contributory negligence is on the defendant to establish by a preponderance of the evidence.⁵⁹

59—Hogan v. Citizens' Ry. Co., 150 Mo. 473, 51 S. W. 473 (474).

The following instructions were approved in the same case, and, together with the instructions in the text, constitute a series.

The court instructs the jury that in considering this case they should not indulge in any mere suppositions or imaginings as to what may or may not have been done or occurred at the time of the occurrence, but must decide the case upon the evidence of the witnesses and the instruction of the court. And the court further instructs the jury that they are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and in weighing the testimony the jury should take into consideration, not only what they have testified to, but also their manner of testifying, and their bias, if any is shown, towards or against plaintiffs or defendant, their ability at the time to clearly see what occurred, and now to clearly recall and relate the facts; and, if the jury believe from the evidence that any witness has knowingly sworn falsely to any material fact, then the jury may disbelieve the whole or any part of such witness' testimony.

The court instructs the jury that, though there was a crowd of people at the northeast corner of M. and T. street, the gripman was not required, under the allegations of the petition and the law, to slow down his train to one, two or three, or four, or five, or six miles an hour, or to stop it, or try to stop it, before the rush of the people towards the track; and the jury must not impute any negligence to the gripman because he did not stop, or try to stop, or was not running very slowly, before the rush of the crowd occurred, or the first appearance of danger.

The court instructs the jury that there is no evidence in this case tending to prove the cars were being run at a greater rate of speed than eight and one-half miles an hour, and therefore the jury should not consider the allegations of negligence that the train was being run at a greater rate of speed than eight and one-half miles an hour. And the court further instructs you that if you believe from the evidence that as the train was approaching Twelfth street the gripman rang the bell, and it could be heard at the northeast corner of T. and M. streets, then the court instructs you that

§ 2099. **Failure to Check Speed of Car When Danger Imminent to Person on Track.** (a) It is the duty of a motorman in charge of a street car to exercise reasonable care and diligence to discover any person or vehicle upon or near to the track in front of the car which he is operating, and if he discovers a vehicle in charge of a person upon said track, or so near as to be likely to be struck by said car, and he has reason to believe that said person is unconscious of his danger, or unable to avoid it, it is his duty to use every reasonable effort to stop the car, and if in such case he causes or permits said car to run with unabated speed, and without effort to check or stop the same, until it runs into and strikes said vehicle, destroying it, injuring the horses attached to it, and the person in charge of it, the company would be guilty of negligence, and a recovery could be had for any injury sustained.⁶⁰

(b) If you find from the evidence that upon the day and at the time of the accident, it was clear, and the view at the point where

he performed his whole duty under the allegations of negligence in that regard, and under the law, and he was not required to be ringing it as he was crossing T. street and approaching the east crossing, and you must find that allegation of negligence concerning the not ringing of the bell in favor of the defendant. And the court further instructs you that all the evidence in this case shows that the child, B., was on the pavement, in the crowd, and if the jury believe from the evidence that the gripman and conductor were keeping a vigilant watch for all persons on foot, especially children, as mentioned in these instructions, as the train was crossing T. street and approaching the east crossing, and that as soon as the crowd surged or rushed towards the track the gripman stopped the train in the shortest time and space possible under the circumstances, then your verdict must be for the defendant, notwithstanding the gripman did not notice the boy as he ran from the pavement and onto the track, or thereafter.

The court further instructs the jury that an accident may happen, and a person be injured or killed therein, that is not caused by the negligence of any person connected therewith; and if the jury believe from the evidence that the death of the child, B., was the result of such mere accident or misadventure, then your verdict must be for the defendant.

The court instructs the jury that

while the child, B., was required to use only such care and caution as could be reasonably expected of a child of his years and experience, nevertheless he was required to use such care and caution; and if the jury believe from the evidence that he did not do so, and was himself negligent in running right in front of and close to the car, and his being run upon by the car was the result of his negligence, in not exercising such care, then the jury will find their verdict for the defendant.

The court instructs the jury that, under the pleadings and evidence, no want of care or negligence can be imputed to the defendant because it did not have other or different appliances about its gripcar than it had, and therefore the jury must not consider that matter at all.

60—Indianapolis T. & T. Co. v. Smith, — Ind. App. —, 77 N. E. 1140 (1143).

"The above instruction as an entirety correctly states the law. We are unable to see anything in it that assumes that the car could have been stopped. It is the theory and contention of appellee that the motorman could, by the exercise of reasonable care, have seen the wagon by reason of the light from the electric light and the headlight of the car.

"Upon the point of omitting from the instruction the question of appellee's contributory negligence does not render the instruction erroneous when construed in connection with the other instructions."

it occurred was unobstructed, so that the motorman could have seen plaintiff's wagon, on or near the track, if he had exercised ordinary diligence, and further find that the motorman had knowledge of the conditions existing at the place of the collision, and that he could have seen the plaintiff's peril in time to have stopped the car and prevented the accident, by the exercise of reasonable care, then I instruct that his failure to do so, thus causing the injury, would constitute negligence upon the part of the company defendant, and you should find for the plaintiff, unless you further find that plaintiff, by his own negligence, caused or contributed to the injury complained of.⁶¹

(c) It is the duty of a motorman, running and operating a street car along and upon the street of a city to have it under such control that it may be stopped within a short distance, if occasion requires. From his failure to exercise reasonable care in that regard, negligence may be inferred. It is also the duty of a motorman to exercise the highest degree of care to avoid injury to a person after discovering his peril. If you find from a preponderance of the evidence that on ———, 190—, the defendant company was running and operating a line of railway along and upon I. avenue, in the city of C., having double tracks thereon; that at a point near where said line of railway intersects B. street said I. avenue is narrow, said street being 60 feet wide, and no more; that at said time, and at said place on said street, and on the southwest side of said street, there was a ditch 1½ feet deep and 5 feet wide which was filled with water, snow, and ice, and was in a dangerous and unsafe condition to drive upon or over with a vehicle, and there was not sufficient space between said ditch and the tracks of defendant's railway for a person to drive with a vehicle, without obstructing said street cars; that said company and its employees had full knowledge of the condition of said street, and of the dangerous condition of said ditch for the passage of vehicles; that on ———, 19—, plaintiff, in the transaction of his business, was driving a horse and loaded wagon along I. Ave.; that before he reached or entered upon said narrow place he stopped, and looked to see if any car was in sight or approaching; that there was none; that thereupon he drove carefully along a narrow space, the wheel of his wagon being upon said track or very near to it, that as he was so driving, he saw one of the defendant's cars approaching from the northwest running at a high and dangerous speed; that he was in plain view of said car and there was nothing to prevent the conductor and motorman in charge of said car from seeing him or his wagon in the perilous

61—Indianapolis T. & T. Co. v. Smith, — Ind. App. —, 77 N. E. 1140 (1144).

"This instruction, of which appellant complains and against which counsel urge some objections, seems to us to so clearly and

fairly state the law applicable to the facts that we do not deem it either necessary or important to take up the objections and discuss them separately. The instruction is a correct statement of the law."

situation in which he was; that no warning was given; that the speed of said car was not lessened, nor was said car stopped nor attempted to be stopped; that plaintiff endeavored to drive out of the way and avoid said car, but could not do so; that said car was negligently run against his said wagon, overturning it and throwing it in the ditch; plaintiff was thrown to the ground; his leg was broken and he was otherwise injured, as in complaint set out, then I instruct you that you should find for the plaintiff, unless you should further find that plaintiff, by his own negligence, contributed to the injury.⁶²

§ 2100. Contributory Negligence of Persons Other Than Passengers or Employees—In General. (a) The court instructs the jury, if you believe from the evidence that plaintiff was guilty of negligence, and that this negligence combined with the negligence of defendant to produce the accident, so that both acts together constituted the proximate cause of the injury, then the negligence of the plaintiff, however slight, would bar a recovery, and you should find for the defendant.⁶³

(b) If the jury believe, from the evidence, that the sole efficient cause of the injury to the plaintiff was the negligent manner in which plaintiff's horse was driven at the time and place in question, if you believe from the evidence said horse was negligently driven, then you should find the defendant not guilty.⁶⁴

(c) If you find from the evidence that the plaintiff's injuries, if any, were directly and proximately caused by the negligence, if any, of the defendant, as explained to you in the second and third instructions, then it is your duty to ascertain and determine whether the plaintiff was himself, at and previous to the time of receiving

62—Indianapolis T. & T. Co. v. Smith, — Ind. App. —, 77 N. E. 1140 (1143).

"Assuming that there was evidence tending to support all of the facts to which the court referred in this instruction, we do not think there was any error in directing the jury that under such facts the motorman was charged with the exercise of the highest degree of care. In *Lake Erie, etc., Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, the question under consideration was embraced in the quotation from that case which appears in a former part of this opinion. In the case of *Gagg v. Vetter*, 41 Ind. 242, 13 Am. Rep. 322, the court quoted from *Kelsey v. Barney*, 12 N. Y. 425, and approved the following: Under the same circumstances a very high degree of vigilance is demanded, even under the requirements of ordinary care. Where the conse-

quences of negligence will probably be serious injury to others, and where the means of avoiding infliction of injury to others is completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."

63—*Memphis St. R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (380).

"The instruction stated a correct rule of law, and should have been given to the jury. *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618, 69 S. W. 265; *Nashville St. R. Co. v. Norman*, 108 Tenn. 331, 67 S. W. 479; *Saunders v. R. R.*, 99 Tenn. 135, 41 S. W. 1031; *Barr v. R. R.*, 105 Tenn. 547, 58 S. W. 849."

64—*N. C. St. R. Co. v. Smadraff*, 89 Ill. App. 411 (416), aff'd 189 Ill. 155, 59 N. E. 527. See also *Chl. U. T. Co. v. Leach*, 117 Ill. App. 169 (173), aff'd 215 Ill. 184, 74 N. E. 119.

his injuries, if any, exercising such ordinary care as a man of reasonable caution and prudence would have exercised under like circumstances; and if you find that his failure so to do directly contributed to his injuries, if any, then your verdict should be for the defendant; and upon the issue of the exercise of ordinary care by the plaintiff the burden of proof is upon him to establish the same to your satisfaction by a fair preponderance of the evidence.⁶⁵

(d) But if you find that the plaintiff by any act or omission on his part was guilty of negligence as hereinbefore defined and that such negligence directly contributed in causing the collision and injuries, if any, then you will find for the defendant, regardless of whether or not it or its servants were also negligent.⁶⁶

(e) It was the duty of the deceased, E., to exercise that degree of care which persons of her age, experience, and intelligence usually exercise for her own safety in using the street, and although you may believe from the evidence that the motorman in charge of the car was negligent, as submitted to you by another instruction, yet, if you further believe from the evidence that E. failed to exercise that degree of care, to wit, such care as persons of her age, experience, and intelligence usually exercise under like or similar circumstances, and that such failure on her part so contributed to bring about her injury that but for such failure she would not have been injured, then the law is for the defendant, and you should so find.⁶⁷

(f) The court instructs the jury that if, from the evidence, they believe that both the plaintiff and the servant of defendant operating said defendant's car were guilty of negligence, and that plaintiff's negligence directly contributed to the accident, then the verdict should be for the defendant.⁶⁸

65—Stanley v. Cedar R. & M. C. R. Co., 119 Iowa 526, 93 N. W. 489 (491).

The court instructs the jury that while it is true that if the plaintiff was guilty of contributory negligence, that fact alone would relieve the defendant company from all liability, yet in order to find the plaintiff guilty of contributory negligence you must believe from the evidence that the plaintiff failed to exercise that care merely which the law requires, and he is only required by law, to exercise such care and foresight as an ordinarily prudent man possessing ordinary intelligence would exercise under circumstances similar to those surrounding the plaintiff at the time of the alleged injury. And if you believe from the evidence that the plaintiff in endeavoring to cross over the tracks of said company and while on said tracks, or either of them, exercised that care and foresight to avoid

the danger that a person of ordinary prudence, caution and intelligence would usually exercise under the same or similar circumstances, then you should find that the plaintiff was not guilty of contributory negligence.

Approved in *Chi. U. T. Co. v. Chugren*, 110 Ill. App. 545 (546-7), Justice Ball holding that the use of the word "usually" was equivalent to "ordinary." But see *C. C. Ry. Co. v. Schonler*, 111 Ill. App. 470 (472), where Justice Stein holds in a similar instruction that the use of the word "usually" was reversible error.

66—*Met St. R. Co. v. Rouch*, 66 Kans. 195, 71 Pac. 257 (258).

67—*Eirk's Adm'r v. Ry. Co.*, — Ky. —, 98 S. W. 293.

68—*Septowsky v. St. L. T. Co.*, 102 Mo. App. 110, 76 S. W. 693 (697).

The jury are instructed that by the term "ordinary care and prudence," as used in these instructions, is meant that degree of care

§ 2101. **Rule That Burden of Proof is on Defendant to Prove Contributory Negligence.** The jurors are instructed that negligence cannot be presumed, and the burden of proof is upon the plaintiff to establish by the preponderance or greater weight of the evidence the facts necessary to a verdict in his favor under these instructions. And the jurors are further instructed that, while the burden of proof is upon the defendant to prove the contributory negligence of the plaintiff alleged, yet this does not relieve the plaintiff from proving by a preponderance or greater weight of the evidence that the injuries alleged and complained of were caused solely by the negligence of the defendant's servants in charge of said car. The burden remains upon the plaintiff throughout the entire case, and if the jurors believe and find from the evidence that the alleged injuries were caused by plaintiff driving in front of said car so close that the motorman in charge thereof was unable by the use of ordinary care to stop the same in time to avoid the collision, or if you believe that the alleged injuries were caused by the combined or concurring negligence of the plaintiff and defendant's servants in the particulars set out in these instructions, or if you believe that the alleged injuries were due to an accident or misadventure for which neither party is responsible, then the plaintiff is not entitled to recover and your verdict must be for the defendant.⁶⁹

§ 2102. **Same Subject—Rule as to Children.** (a) The court instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule in regard to an adult or grown person that, to entitle him or her to recover damages for an injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury, and the law presumes that a child between the ages of 7 and 14 cannot be guilty of contributory negligence, and, in order to establish that a child of such age is capable of contributory negligence, such pre-

that would be used by a person of ordinary prudence under the same or similar circumstances; and a failure to exercise ordinary care as so defined is negligence. The burden of proving that G. did not exercise ordinary care to avoid the collision and injury which resulted in his death is upon the defendant.

The charge of negligence made by plaintiff against defendant by this action must be proved to the satisfaction of the jury by the preponderance of the evidence. The jury have no right to presume negligence, and, if the evidence does

not preponderate in favor of plaintiff, then the verdict should be for defendant.

If, from the evidence, the jury believe that both the deceased, G., and the servant of defendant operating its car, were equally guilty of negligence which directly contributed to the injury and death of said G., then the verdict should be for the defendant.

Above instructions approved in *Guinney v. So. El. Co.*, 167 Mo. 595, 67 S. W. 296.

69—*Freyremark v. St. L. T. Co.*, 111 Mo. App. 208, 85 S. W. 607 (608).

sumption must be rebutted by evidence and circumstances establishing his maturity and capacity.⁷⁰

(b) Upon the issue as to whether the deceased was guilty of negligence contributing to her death, such as will prevent the plaintiffs from recovering in this case, the court instructs you that the law requires all persons situated as deceased, ———, was, when and before the accident happened, to exercise ordinary care and caution to avoid injury to themselves, and that the absence of such care and caution constitutes negligence. In determining, however, whether the deceased, ———, was exercising such care and caution, the jury should take into consideration her age and capacity, since the law requires of a child nine years old only such care and caution as might reasonably be expected of one of her age and capacity under similar circumstances. If, therefore, you find that the deceased, ———, in going upon defendant's track, was using that degree of care which, in the ordinary experience of mankind, was to be expected of one of her age and capacity under similar circumstances, then she was not guilty of negligence, within the meaning of the law and these instructions. The court further instructs you

70—Richmond T. Co. v. Wilkinson, 101 Va. 394, 43 S. E. 622 (623).

See also the three following instructions in the same use:

The court further instructs the jury that if they believe from the evidence that the plaintiff was injured by jumping from a moving electric car of the defendant, whilst being propelled through the streets of the city of R., and that the plaintiff's act of jumping from the car was caused by the orders of the defendant's motorman or conductor in charge of the car, given while the car was in motion, then they must find for the plaintiff, provided the jury shall believe that the plaintiff, by reason of his age and want of judgment and discretion, was unable to exercise care and caution to resist the orders of the defendant's motorman or conductor. The jury must believe from the evidence that the conductor ordered the plaintiff to get off, while the car was moving, in such a threatening manner as to intimidate the plaintiff, considering his age and capacity and thereby caused him to jump from said car.

The court instructs the jury that if they believe from the evidence that the plaintiff, W., at the time of the injury was a child of tender years, and had boarded a car of the defendant company whilst the same was standing at the eastern

terminus of the defendant's road, and that the agents and employes of the defendant company knew, or could have known by the exercise of ordinary care, of his presence on said car, and that said child was standing on the step of said car, and that step, was a place of danger for a child, that it was the duty of the agents or employes of said company to take notice of the danger of the plaintiff; and if they believe from the evidence that the conductor or motorman allowed the car to start while the plaintiff occupied such position, which action in permitting the said plaintiff to remain on the car resulted in the injury to said plaintiff, then they shall find for the plaintiff provided the jury shall believe from the evidence that the plaintiff, by reason of his age and want of judgment, and discretion, was not guilty of contributory negligence as heretofore defined in these instructions.

"The court instructs the jury that, even if they may believe from the evidence that the plaintiff was guilty of contributory negligence, that they are instructed that still the plaintiff would be entitled to recover against the defendant, if they believe from the evidence that the servants and agents of the defendant company in charge of said car did not do all they could to avoid the injury

that the burden of proving that the deceased, ———, was guilty of negligence contributing to her death, is upon the defendant.⁷¹

(c) The jury are instructed that although they may find from the evidence that, at the time of the accident to the plaintiff, defendant's train was running at a greater rate of speed than five miles an hour, that would not justify a recovery in this case in favor of the plaintiff, unless the jury further find that the plaintiff taking into consideration his age and experience and understanding, by reason of the threatening language of the motorman had reasonable ground for believing that the motorman intended to inflict physical violence upon the plaintiff, or to eject him from the car, or so terrorized the plaintiff as to compel him against his will to jump from the car.⁷²

after his danger was known, or might have been known by the exercise of ordinary care.

71—Schmidt v. St. L. R. Co., 163 Mo. 645, 63 S. W. 834 (836).

The court, in its opinion, said:

"The objection offered to this is that it assumes that the child was 9 years old. A fact which is really in dispute should never be assumed in an instruction, but a minor point, about which there is no dispute, which, though technically in issue, is virtually conceded, may sometimes be assumed without rendering the instruction reversible error. In this case, the only evidence as to the child's age was given by her father, who said she was 9 years old. There was no question or contradiction of that. She was spoken of by the witnesses for defendant, as well as for plaintiff, as a young child, and "the little girl," all through the trial. The defendant refers to her as such in the instructions it asked. The exact age of the child was not made a point of dispute, and a year or two younger or older would have made no difference in the case."

72—Washington, etc., Ry. Co. v. Quayle, 95 Va. 741, 30 S. E. 391 (393).

The four following instructions are taken from the same case:

The jury are instructed that although they may believe from the evidence that the motorman called to the plaintiff and his companions to get off the car, yet to entitle the plaintiff to recover in this action, the jury must believe that said call of the motorman was of such a threatening character as to justify the belief in the mind of the plaintiff, taking into consideration his age, that the motorman intended to do him bodily harm, or

to eject him from the said car while it was in motion and the plaintiff through fear of such threat jumped from the car and was injured, and that the jury must further believe that it was within the scope and duty of said motorman to order the plaintiff to get off of said car.

The court further instructs the jury that if they shall believe from the evidence that the plaintiff was injured by jumping from a moving train of the defendant whilst being propelled through the streets of the city of A., at the unlawful rate of speed of from ten to twelve miles per hour, and that the plaintiff's act of jumping from the train was caused by the orders of the defendant's motorman or conductor in charge of the train, then they may find for the plaintiff, provided the jury shall believe that the plaintiff by reason of his age and want of judgment and discretion was unable to exercise sufficient care and caution to resist the orders of the defendant's said motorman.

The court doth further instruct the jury that the conduct of an infant is not of necessity to be judged by the same rule which governs that of an adult; that while it is the general rule in regard to an adult or grown person, that to entitle him to recover damages for any injury resulting from the fault or negligence of another, he must have been free from fault, such is not the rule in regard to an infant of tender years; the care and caution required of a child is according to his maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury.

(d) A child that is not over three years of age cannot be guilty in law of negligence contributing to its injury; and it is the duty of all persons and corporations to take this rule of law into consideration in the transaction of business, and in the operation of machinery or other mechanical devices, and in the use of streets, highways and public places. The defendant in the operation of cars in the streets of ——— was chargeable with notice of this rule, and cannot avoid its liability by merely showing that the action or conduct of the child ———, if he were not over three years of age, contributed to the injury.⁷³

§ 2103. Same Subject—Rule as to Intoxicated Persons. (a) If the jury believe from the evidence that the plaintiff's decedent, on the evening when he met with the accident that resulted in his death, was intoxicated from drink, and that, being so intoxicated, he attempted to cross defendant's railway track in front of a moving car that was approaching him, so close to said car that he could not move beyond the point on the track that he first reached before the car struck him, then you are instructed that the plaintiff cannot recover in this action.⁷⁴

The court further instructs the jury that the ordinances of the city of A. require that no engine or car shall be drawn or propelled by the defendant company over its railway tracks on F. street, within the corporation limits of the city at a rate of speed exceeding five miles per hour; and if the jury shall believe from the evidence that the plaintiff was riding upon the defendant's car on the day of the injury, which was being propelled or drawn at a greater rate of speed than five miles per hour within the limits of said city, to wit, from ten to twelve miles per hour and whilst said car was being so drawn and propelled by the defendant, the plaintiff was ordered by the defendant's motorman or conductor in charge of the train to get off said car, and thereby frightened or intimidated the plaintiff to such an extent as to cause him to jump from the car while running at the unlawful rate of speed aforesaid, and that the plaintiff's injury was caused by the order of the defendant's agent and the speed of the car, they shall find for the plaintiff providing they believe from the evidence that the plaintiff exercised such a degree of care and caution as under circumstances might reasonably be expected from one of his age and intelligence.

73—In Indianapolis St. R. Co. v.

Schomberg, — Ind. App. —, 71 N. E. 237, 238, aff'd 164 Ind. 111, 72 N. E. 1041, the above instruction was said to state correctly the rule applicable to young children.

74—Richmond T. Co. v. Martin's Adm'x., 102 Va. 209, 45 S. E. 886 (887).

"The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'"

If the jury believe that the plaintiff was intoxicated, and that by the exercise of ordinary prudence could have avoided the accident if sober, he is guilty of contributory negligence, and cannot recover; or if the accident was partly due to the intoxication of the

(b) If you find and believe from the evidence that the plaintiff herein, as he approached the scene of the accident complained of herein, failed to look and listen for the approach of defendant's car, and that such failure on his part contributed to the accident complained of herein, and that a person of ordinary prudence would not have so acted under the same or similar circumstances, then you are instructed that this would constitute contributory negligence on the part of the plaintiff.

(c) If you find and believe from the evidence that, when the plaintiff discovered the approach of the defendant's car, he failed to check the speed of his horse in sufficient time to avoid an accident, and that a person of ordinary prudence would and could have checked the speed of his horse in time to have avoided an accident, then you are instructed that this would constitute contributory negligence on the part of the plaintiff.

(d) If you find and believe from the evidence that at the time of the accident complained of herein, the plaintiff was in a state of intoxication or semi-intoxication, and that such state of intoxication or semi-intoxication placed him in such condition that he was unable to and failed to exercise that caution and care required of him under instructions heretofore given, and that such condition contributed to the accident complained of herein, then you are instructed that this constituted contributory negligence on the part of the plaintiff.⁷⁵

§ 2104. Rule to Stop, Look and Listen. (a) The court instructs the jury that it was the duty of the plaintiff to take notice of the fact that cars were liable to pass along the tracks of the defendant at any time, and that they could not turn out of the track, and it was his duty to make a vigilant use of his senses of sight and hearing when about to cross the track of the defendant, to ascertain if there was a present danger in crossing, and if he failed so to do, and if by looking and listening for approaching cars, he would have discovered

plaintiff he cannot recover. But you must find before you can take up the consideration of these requests that he was intoxicated. It must not be conjecture on your part or guess work. It does not follow that because the man sang in his wagon, or asked, perhaps, foolish questions of passers-by, or that his breath smelled of liquor, that he was intoxicated. That is some evidence of the fact, but you must find, in order to invoke the law of these requests, that he was intoxicated, and that that intoxication contributed to the accident—that is, that a sober man would not have been hurt.

Above instruction upheld in *Shelly v. Brunswick T. Co.*, 65 N. J. L. 639, 48 Atl. 562 (564).

75—Dallas Cons. E. St. R. Co. v.

English, — Tex. Civ. App. —, 93 S. W. 1096 (1098).

"It is settled law that the defendant in a case like the present has the right to prepare and demand the giving of a charge requiring the jury to find whether the evidence establishes the existence of any fact or specified group of facts which if true would in law establish its plea of contributory negligence; and this is true if proper charges are asked as to each of the several special pleas of contributory negligence presented by the record. *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; *M. K. & T. R. Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *M. K. & T. R. Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956."

the car in question approaching in time to have avoided colliding with it, then he cannot recover.⁷⁶

(b) If you find from the evidence that plaintiff looked to the north for an approaching car before going upon the track, and you further find that at the time she so looked the said car was there approaching and within view of her, then you are instructed that plaintiff is chargeable with knowledge of its approach, although plaintiff claims that she did not see said car approaching.⁷⁷

(c) Although you may believe from the evidence that the car was being operated at a speed exceeding 15 miles per hour, and that the defendant's agents in charge of said car failed to observe that the plaintiff was in danger of being struck by the car, still, if you further believe from the evidence that the plaintiff, by looking or listening, could have seen or heard the approaching car in time to have stopped before going on the track over which it was running, and thereby have avoided the injury, and that plaintiff did not stop and look and listen before going on the track, then your verdict must be for defendant.

(d) Even if you do find from the evidence that the motorman in charge of the car saw the plaintiff was going upon the track in front of the car, and could, by the exercise of care on his part, have stopped the car before reaching plaintiff, yet if you further find from the evidence that, after said motorman knew plaintiff was going on the track, the plaintiff knew, or by looking or listening for the approaching car could have known, of its approach, and that it was not likely to stop before reaching him, and that he could have then desisted from stepping on the track in front of said car and thereby have avoided the injury, and that the plaintiff did not stop and look and listen before going on the track, then your verdict must be for defendant.⁷⁸

(e) If the jury believe from the facts and circumstances given in evidence that the plaintiff situated as he was in the wagon, would in the exercise of ordinary care have seen the approaching car on 13th street in time to have warned the driver of its approach, and in time to have prevented the collision, then it was his duty to have done so, and if he failed to do so then he cannot recover, and your verdict must be for the defendant, notwithstanding the defendant may too have been negligent.

(f) The court instructs the jury that it is the duty of persons on

76—Burns v. Met. St. Ry. Co., 66 Kans. 188, 71 Pac. 244 (245).

"This direction was amplified by another in which the jury were told that if the plaintiff could by looking or listening 'or by other careful and prudent acts' have discovered the approach of the car in time to have avoided the collision, he could not recover. We are well satisfied that the trial court stated

correctly the law in these instructions."

77—Met. St. R. Co. v. Agnew, 65 Kas. 478, 70 Pac. 345.

78—Deitring v. St. L. T. Co., 109 Mo. App. 524, 85 S. W. 140 (147). See also the instructions in Holverson v. St. L. & S. R. Co., 137 Mo. 216, 57 S. W. 770, and in Sanitary D. Co. v. St. L. T. Co., 98 Mo. App. 20, 71 S. W. 726.

public streets, whether on foot or in vehicles, to be ordinarily prudent and careful in crossing street car tracks and to both look and listen for approaching cars, and even though the jury should find in this case that the gong of the car was not sounded still if the plaintiff could, by exercising ordinary care with respect to the speed with which he approached the track, and in looking for the approach of cars have caused the said wagon to be stopped in time to avert the collision then your verdict will be for the defendant.⁷⁹

(g) If you find from the evidence that the deceased was walking along and upon B. street for the purpose of crossing defendant's track in said street, then it was the duty of the deceased, while approaching defendant's street car track, to look in the direction from which the car was approaching, and also to listen for the purpose of ascertaining whether a car was approaching or not; and if he found from such means that a car was approaching so near as that there was danger of a collision, then it was deceased's duty to stop before going upon the track, and to let the car pass without interference or delay. If the jury find from the evidence that the deceased failed to look or to listen, or that if he did look and listen that he failed to heed what he saw or heard, and that the situation was such that by looking or listening he might have seen or heard the approach of the car in time to have avoided the accident, and that he failed to do so, and that such failure directly contributed to causing deceased's injury and death, then the plaintiff cannot recover, and your verdict must be for the defendant.

(h) While the burden of proof is upon the defendant to establish its plea of contributory negligence upon the part of the deceased, yet this does not relieve the plaintiff from establishing by a preponderance or the greater weight of the evidence that the sole cause of deceased's injury was the negligence of the defendant's agent, as defined in the other instructions, and, notwithstanding defendant's plea of contributory negligence, that the burden of proof rests upon the plaintiff throughout the trial of the case; and if the jury find from the evidence that the death of the deceased was caused by an accident for which neither party is responsible, or from the combined and concurring negligence of the deceased and the motorman, in the manner set out in these instructions, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.

(i) Even if the jury do find from the evidence, that the motorman in charge of said car saw the plaintiff's husband approaching the track in front of the car, the motorman had the right to assume and act upon the presumption that the plaintiff's husband would stop before going upon the track, and was under no duty to attempt to stop the car until he became aware that the plaintiff's husband was going to get on the track in front of the car, or until his conduct and actions would have led a person of ordinary prudence to conclude that he was going to do so.⁸⁰

⁷⁹—Holden v. Missouri R. Co., 177 Mo. 456, 76 S. W. 973 (1975).

⁸⁰—Eckhard v. St. L. T. Co., 190 Mo. 593, 89 S. W. 602.

(j) Although the jury may find from the evidence that defendant's the St. L. T. Co.'s agents in charge of the car did fail to sound any bell or gong on said car, and did not stop or slow up said car and avert the collision, and did not keep a watch for persons on or approaching the track, and did not stop the car in the shortest time and space possible after the first appearance of danger, still, if you find from the evidence that plaintiff saw the approaching car, or, by looking, could have seen said car in time to have kept the horse and wagon off the track and avoid the collision, and failed to see or heed what he saw, then the plaintiff cannot recover and your verdict must be for the said defendant. If the jury find from the evidence that the plaintiff's alleged injuries were caused by the mutual and concurring negligence of plaintiff and the defendant's, the St. L. T. Co.'s motorman in charge of said car, and that the negligence of either, without the concurrence of the negligence of the other, would not have caused the injury, then your verdict must be for the said defendant.

(k) If the jury believe from the evidence that plaintiff was driving a wagon south on Nineteenth street, and that Nineteenth street was crossed by the railroad tracks of the defendant, St. L. T. Co., laid in O. street, then it was the duty of plaintiff, in approaching said street railway tracks to look in the direction from which the car was approaching and also to listen for the purpose of ascertaining whether a car was approaching or not, and if he found by such means that a car was approaching so near that there was danger of a collision, then it was the plaintiff's duty to stop before going upon the track and let the car pass without delay or hinderance; and if the jury find from the evidence that the plaintiff failed to look or listen, or if he looked or listened, that he failed to heed what he saw or heard, and to stop his horse and keep off the track, and that said failure directly contributed to plaintiff's alleged injuries, then the plaintiff cannot recover and your verdict must be for the defendant.⁸¹

(l) The jurors are instructed that it was the duty of the plaintiff before driving on or across the track of the defendant, to look and listen for approaching cars; and if you find and believe from the evidence that plaintiff failed so to do, and that by looking and listening he could have seen or heard the approaching car of defendant in time to have kept off the track, and averted the injury to himself, then you must find a verdict for the defendant, unless you further believe and find from the evidence that defendant's servants in charge of said car, after they saw, or by the exercise of ordinary care might have seen that plaintiff was in, or intended to place himself or wagon in a position of peril, failed to use such care and caution in stopping said car to avoid injury to plaintiff as a person of ordinary care and prudence would have exercised under the same or similar circumstances.⁸²

81—Rodgers v. St. L. T. Co., 117 Mo. App. 678, 92 S. W. 1157.

82—Freymark v. St. L. T. Co., 111 Mo. App. 208, 85 S. W. 606 (608).

(m) It was the duty of plaintiff to look and listen for the approach of the car, before attempting to pass over the track, and if you believe from the evidence that he failed to look and listen, and that such failure was the direct and proximate cause of the accident, or directly contributed to it as its proximate cause, your verdict should be for the defendant.⁸³

§ 2105. **Bicyclist—Collision With Car.** If the jury shall find from the evidence that plaintiff ran his bicycle into the side of defendant's car, and thereby caused the accident, then they are instructed that, under the declaration in this case, their verdict must be for the defendant.⁸⁴

§ 2106. **Failure of Driver of Vehicle Passing Along or Near Track to Use Reasonable Care.** (a) If you find from the evidence that plaintiff was driving eastwardly beside the track at the time of the accident, and so near the rails as to prevent the car from passing the rear without collision, and that while so driving he failed to look back from time to time along the track, or to listen for signals from

83—Nashville Ry. Co. v. Norman, 108 Tenn. 324, 67 S. W. 479 (481). See also the instruction on this subject in *Citizens' Ry. Co. v. Ford*, 25 Tex. Civ. App. 328, 60 S. W. 680 (681).

In *Georgia*, in *Macon Ry. & L. Co. v. Barnes*, 121 Ga. 443, 49 S. E. 282, it has been held not erroneous to refuse to charge the jury that one who drives on and along a street railway track laid in a public highway "should be careful to look and listen with ordinary care to avoid a collision."

The court said:

"Whatever may be the rulings on the subject in other jurisdictions, it is well settled in this state that it is not incumbent upon the court to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his senses of hearing and seeing before stepping on the track. 'The precise thing which any man should do before stepping upon a railroad track is that which any prudent man would do under similar circumstances. If prudent men would look and listen, so must every one else, or take consequences, so far as the consequences might have been avoided by that means. The court cannot instruct the jury what a prudent man would do, for, in legal contemplation, the jury know it better than the court.' *Richmond & D. R. Co. v. Howard*, 79 Ga. 44, 53, 3 S. E. 426; *Richmond & D. R. Co. v. Johnston*, 89 Ga. 560, 15 S. E. 908; *Met.*

St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. 'What particular means or measures of diligence would be appropriate under the circumstances should be left to the jury.' *Ins. Co. of N. Am. v. Leader*, 121 Ga. 260, 48 S. E. 972. If the court should charge in a case of this character that it was the duty of a party to do a specific thing, would it not be equivalent to saying that the omission to do that thing would be negligence? It is true that in the opinion rendered in *Savannah Ry. Co. v. Beasley*, 94 Ga. 142, 146, 21 S. E. 285, 286, it was said that 'people who intend to cross its (the street railroad's) track should be careful to look and listen to avoid a collision.'"

84—*So. C. C. R. Co. v. Kinnare*, 96 Ill. App. 210 (215).

In *Harrington v. Los A. Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 20, 98 Am. St. Rep. 285, an instruction directing a verdict in defendant's favor, if certain facts were found, was modified by the court adding:

"Unless you shall also find that the motorman in charge of defendant's car, after perceiving the dangerous situation then and there existing, did recklessly or wantonly send his car forward. Whether or not such reckless or wanton conduct of the defendant did occur and cause the collision is a question of fact for you to determine from the evidence, the same as you must determine from other facts submitted."

an approaching car, or if you find that, thus driving along the track, he failed to turn out and leave the track unobstructed on the approach of the car from the rear, or if you find that plaintiff drove upon the track in front of an approaching car without looking or listening for same, or so short a time before the wagon was struck as to prevent any possibility of stopping the car in time to prevent an accident, then it is your duty to determine whether, in doing or omitting to do any one of these acts, plaintiff was guilty of contributory negligence.

(b) And in doing this you may consider all the facts and circumstances proven at the trial, as surrounding the accident, including, so far as proven, the topography of the locality at the place of the accident; the character of the vehicle in which plaintiff was riding; the position of the vehicle at the time of the accident; the speed of the approaching car; the distance at which it could have been seen or heard by the driver of the wagon if he had looked and listened—in fine, to every minute detail of the accident; and if you find, after considering all the facts and circumstances proven to you, that plaintiff was guilty of contributory negligence in any of these respects, and that such contributory negligence was the proximate cause of (that is to say, the cause which led to or directly contributed to produce) the accident and injury, then there can be no recovery, and your verdict should be for the defendant.

(c) It is the duty of a driver of a private vehicle, while on the track, or so near to it as to prevent a car passing without a collision, not only to turn off when called upon by the servant of the railroad company, but to listen to whatever signal there may be of an approaching car; and he should also look behind him from time to time, so that he may, if the car be so near, turn off and allow it to pass without hindrance or any slacking of ordinary speed, and, if he fail to observe this precaution, he does so at his own risk.⁸⁵

(d) The court instructs the jury that if they believe from the evidence that, after the plaintiff's horse became frightened by the car, plaintiff pulled him so suddenly to the left as to cause plaintiff to fall from the wagon, and that in so doing the plaintiff did not exercise reasonable care, and received the injury complained of in this case in consequence thereof, they must find for the defendant.

(e) In considering the question as to whether or not plaintiff acted with reasonable care in pulling the reins, they must consider all the circumstances by which he was surrounded at the time, and particularly whether by the negligence of the defendant he had been so flurried or excited as to make it reasonable for him to act as he did.⁸⁶

(f) If you find from the evidence that plaintiff saw the car approaching, and afterwards had time to avert the alleged collision by

⁸⁵—*Memphis St. R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (378).

"We do not think that the plaintiff in error has anything to complain of in the instructions given

as above set out when they are all taken together."

⁸⁶—*Richmond Ry. & E. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736 (740).

using ordinary care in turning out and getting off the track and out of the way of the car; and if you further find that plaintiff, after he saw the car approaching, did not use ordinary care in turning out and getting off the track and out of the way of the car—then plaintiff was guilty of negligence; and if you so find, and find that such negligence was a proximate cause of the injuries, if any, sustained by the plaintiff, without which they would not have been sustained, then your verdict must be for the defendant.⁸⁷

(g) If you believe from the evidence in this case that when the wagon with which the street car collided occupied a position which enabled the car to pass in safety and without striking said wagon, and that while said wagon occupied said position, and while the car was approaching it from the rear, the motorman on said car rang the gong of said car as a warning, and that said driver and plaintiff could have heard the warning by the exercise of ordinary care and attention to it, and after said warning said wagon was driven suddenly in front of said car, and sufficiently close to it to make it impossible to stop said car by exercise of ordinary care and reasonable effort, and said plaintiff was injured by the collision which ensued, he cannot recover in this action.⁸⁸

§ 2107. Care Due by Driver of Vehicle Crossing Track—Ordinary Care Defined. (a) The court instructs the jury that ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent person, situated as the deceased was before and at the time of the accident, would exercise for his own safety.

(b) If you believe, from the evidence, that the plaintiff became frightened or alarmed or confused just before coming into collision with defendant's car on account of getting suddenly into a position of peril, then such sudden peril will not excuse him for a failure, if there was any, to exercise ordinary care, if you believe, from the evidence, that he brought himself into such position of peril by reason of his own negligence, if he was negligent, or by reason of running

87—*Kimbal v. St. L. & S. R. Co.*, 108 Mo. App. 78, 82 S. W. 1096 (1099).

88—*Hot Spr. St. R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245 (248).

In *W. C. St. R. Co. v. Kautz*, 89 Ill. App. 309, the following instruction was asked for and refused:

"If you believe, from the evidence, that the plaintiff jumped from the wagon, you should find a verdict in favor of the defendant."

The appellate court, on appeal, said:

"This instruction should have been given. Two of the witnesses testified that appellee jumped from the wagon. The declaration as we have seen alleges that plaintiff was thrown out by the force of the collision. The plaintiff must prove

her case as she alleges it, and defendant was entitled to have the jury instructed in accordance with the evidence of those two witnesses that, if they believe their evidence that appellee jumped out of the wagon, then that the verdict should be for the defendant. *I. C. R. Co. v. C. T. & Trust Co.*, 79 Ill. App. 623; *Wabash & W. R. Co. v. Friedman*, 146 Ill. 583-8, 30 N. E. 353. It is not a simple matter of variance of proof from the declaration which was not called to the attention of the court as contended by counsel for appellee. The matter was presented to the court by the instruction asked, and it was error to refuse it. *McCormick, etc., Co. v. Sendzikowski*, 72 Ill. App. 402-7, and cases there cited."

the risk of an obvious and serious danger merely to avoid inconvenience.

(c) When the court instructs the jury that the plaintiff can not recover unless C. was in the exercise of ordinary care at the time of the injury, the court means that C. was required to exercise such care for his own safety not only at the precise time of the injury, but during the time and circumstances preceding the injury as well; and if you believe, from the evidence, that he failed to exercise ordinary care for his own safety in getting into the position he was in when injured it will be your duty to find for the defendant, the same as if he failed to exercise ordinary care at the precise instant of the injury.⁸⁹

(d) What constitutes "ordinary care," as mentioned in these instructions, depends on the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case with reference to whom the term "ordinary care" is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instructions.⁹⁰

(e) By ordinary care is meant such care as a man of ordinary care and prudence would have exercised under circumstances like to those disclosed by the testimony in this case.⁹¹

§ 2108. Pedestrian Suddenly Going Upon Track Without Warning to Motorman. I further instruct you that if you believe from the evidence that without such an act on her part that would indicate to the motorman, in the exercise of ordinary care, that she was about to go upon the track, the plaintiff's intestate, E., suddenly and without the knowledge of the motorman, and without warning of her intention, went upon the track so near in front that the motorman, in the exercise of ordinary care, could not stop the car to warn her in time to avoid injuring her, then the law is for the defendant, and you should so find.⁹²

89—So. Chi. C. Ry. Co. v. Kinare, 216 Ill. 451 (456), 75 N. E. 179.

"As a criticism upon this instruction it is urged that 'it assumes that an ordinarily prudent and cautious person might find himself in the situation that the plaintiff was in at the time of the accident, and assumes that he was not guilty of contributory negligence in being in the position in which he found himself at the injury.' We see nothing in the instruction from which any such assumption is indicated. The instruction fairly directed the minds of the jury to the acts of the deceased connected with his going to the left of the buggy and bringing himself into the situation or position in which he found himself

at the time he was injured, as well as his conduct while in such position or situation. There is nothing in the instruction which would lead the jury to infer that if deceased exercised due care in his endeavors to avoid injury or extricate himself from a position of danger plaintiff might recover, regardless of whether deceased had by his own negligence brought himself into such position of peril."

90—Sanitary D. Co. of Mo. v. St. L. T. Co., 98 Mo. App. 20, 71 S. W. 726 (727).

91—Hanlon v. Milwaukee E. Ry. & L. Co., 118 Wis. 210, 95 N. W. 100 (104).

92—Eirk's Adm'r v. Ry. Co., — Ky. —, 98 S. W. 293.

§ 2109. Injury Avoidable Notwithstanding Contributory Negligence of Plaintiff. (a) The court charges the jury all that is meant by wanton or willful or intentional negligence is the conscious failure on the part of the motorman to use reasonable care to avoid the injury after discovering the danger to the wagon, if the jury believe from the evidence that there was such failure and the injury resulted therefrom; and in such case any negligence on the part of the plaintiff, whether it contributed to the injury or not, is not a defense or excuse to the defendant for injuring the plaintiff.

(b) Although the plaintiff may have been guilty of negligence in allowing the wheel of the wagon to be on the track or near the track, yet this negligence will not defeat the plaintiff's right to recover, if the motorman actually saw, or by keeping a constant and vigilant lookout could have seen, the exposed condition of danger of the wagon or of the plaintiff in time to have avoided the injury by the exercise of reasonable care, and negligently failed to exercise such reasonable care; and if the jury are reasonably satisfied from the evidence that such negligent failure of the motorman was the proximate cause of the injury to the plaintiff, then the defendant is liable, and the verdict of the jury should be for the plaintiff.

(c) It was the duty of the motorman to keep a constant and vigilant lookout for persons and things on the track; and if the jury are reasonably satisfied from the evidence that the motorman, by keeping such constant and vigilant lookout, could have seen the exposed condition of danger of the wagon on or near the track, or of the plaintiff in time to have avoided injuring the plaintiff by the exercise of reasonable care, then the law charges the motorman with seeing the exposed condition of the wagon or of the plaintiff within the time stated above in this charge, whether he saw them or not.

(d) Although the plaintiff may have been guilty of negligence in exposing herself to injury by allowing the wagon wheel or any part of the wagon to remain on or near the track, yet such negligence will not defeat her right to recover, if the motorman saw the exposed condition of danger of the wagon or of the plaintiff in time to have avoided the injury by the exercise of reasonable care, and by the use of all means at his command, and negligently failed to exercise such reasonable care; and if the jury are reasonably satisfied from the evidence that such negligent failure of the motorman was the proximate cause of the injury to the plaintiff, then the defendant is liable, and the verdict should be for the plaintiff.

(e) If the jury should be reasonably satisfied from the evidence the plaintiff was guilty of negligence in allowing the wagon wheel or wagon to be on or so near to the track as to expose it to danger by the running of the car, yet such negligence would not be considered as contributory negligence to the injury, if the jury believe from the evidence to their reasonable satisfaction that the motorman saw the exposed condition of the wagon to danger on or near the track in time to avoid the injury by reducing the rate of speed in time so as

to so control it and avoid the injury, and the motorman negligently failed to give such warning and reduce the speed or stop said car, and failed to use all means at his command to avoid the injury, this negligence of the motorman was the proximate cause of the injury to the plaintiff.⁹³

(f) If the jury find and believe from the evidence that F. street and B. street were, on ———, 19—, open, public streets within the city of S.; and if the jury further find and believe from the evidence that, at said time, the defendant operated an electric railway along and upon B. street, was using the tracks, and owned and operated the railway car mentioned in the evidence, for the purpose of transporting persons for hire from one point to another in said city, and that on said day E. was the husband of plaintiff, that plaintiff's said husband was at said date crossing from the west to the east side of B. street at its intersection with F. street, and that while he was so crossing, defendant's south bound car run upon said crossing and street at a violent, excessive, and negligent speed, knocking down, running upon, and dragging the said E. and injuring him to such an extent as to cause his death; and if the jury further find and believe from the evidence that defendant's agents, servants, and employes in charge of and operating said car either saw, or by keeping a vigilant watch for persons moving toward the track upon which said car was being propelled could have seen, said E. moving toward and across said track, and in danger of injury, and that after seeing said E. moving towards and upon said track, or, after they could have seen, by keeping a vigilant watch as aforementioned, defendant's agents, servants, and employes, or either of them, could, by stopping said car within the shortest time and space possible under the circumstances, have averted said injury, and neglected so to do; and if the jury further find and believe, from the evidence, that said E. exercised ordinary care and prudence in walking towards and across said track—then your verdict should be for the plaintiff.⁹⁴

(g) Even if the jury believe from the evidence that plaintiff negligently placed himself in a dangerous situation, yet if the defendant's motorman operating its car saw, or by the exercise of reasonable care might have seen, plaintiff upon the street and in the act of passing over defendant's track, and in a dangerous situation, in time to have avoided injuring him by the exercise of ordinary care, but that he negligently failed to do so, then its verdict should be for the plaintiff.⁹⁵

(h) If you believe from the evidence that E. got upon the track of the street car, or was in the act of approaching the track in such a way as to indicate to the motorman, or apprise the motorman in charge of the car, that she was in the act of going upon the track,

93—Above instructions approved in Birmingham Ry. L. & P. Co. v. Brantley, 141 Ala. 614, 37 So. 698 (699).

94—Eckhard v. St. L. T. Co., 190 Mo. 593, 89 S. W. 602.

95—Deitring v. St. L. T. Co., 109 Mo. App. 524, 85 S. W. 140 (147).

or about to go upon the track, far enough ahead of the car that the motorman, in the exercise of ordinary care, could have seen that fact in time, either by stopping the car, or arresting its motion, or giving a signal of its approach so as to notify her, and you believe from the evidence that the motorman failed so to do, then the law is for the plaintiff, although you may believe that she herself was negligent; that is, failed to use such care as I have said persons of her age, experience, and intelligence usually exercise under such circumstances.⁹⁶

(i) Though the act of a person in crossing or driving alongside the track in front of a street railway car which is moving towards him, near enough to be struck, may be negligence, yet, if the motorman in charge of the car observes the negligence, or could have observed the negligence, by the use of ordinary care, when the peril of a collision became imminent, and might have avoided its effect, by due care, in time to prevent an accident, and failed to do so, the company would in that event be liable.⁹⁷

§ 2110. Negligence of Driver of Vehicle. (a) It is the duty of the defendant's motorman, when running the defendant's cars through the streets of the city of ———, to keep a lookout ahead, to keep the cars under reasonable control, and to exercise ordinary care to prevent injury to other people who may be using the street, and, if there is a person or vehicle likely to be imperiled from the car, to give timely notice of the approach of the car by the usual and ordinary signal; and if you shall believe from the evidence that at the time mentioned in the petition the motorman, in charge of the car which collided with the wagon on which Mr. H. was, failed to exercise any of those duties, and by reason of such failure the car collided with the wagon, and Mr. H. was thrown from it, and his death resulted therefrom, then the law is for the plaintiff, and you should so find, unless you shall believe from the evidence that Mr. H. or the driver in charge of the wagon was negligent, and thereby helped to cause or bring about the collision and consequent injury, and but for which negligence upon the part of Mr. H. or the driver in charge of the wagon, if any there was, the injury would not have occurred.

(b) But if you shall believe from the evidence that the motorman in charge of the car observed those duties of which I have spoken to you, then the law is for the defendant, and you should so find, notwithstanding the injury which occurred to Mr. H.; or if you shall believe from the evidence that the driver of the wagon or Mr. H. was negligent, and thereby helped to cause or bring about the injury which resulted to Mr. H., and that he would not have been injured but for such contributory negligence, if any there was, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that, when the wagon became imperiled from the car,

⁹⁶—Eirk's Adm'r v. Ry. Co., — Ky. —, 98 S. W. 293.

⁹⁷—Memphis St. R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374 (375).

the motorman could by the exercise of ordinary care have stopped the car, if necessary, and have prevented the collision. If such was the fact the law is for the plaintiff.

(c) It was the duty of Mr. H. and the driver of the wagon, when he turned to cross the street, to exercise ordinary care for the protection of themselves, and if either of them failed to exercise that degree of care, and thereby helped to cause or bring about the injury complained of in this action to Mr. H., and the injury would not have occurred but for the failure to exercise ordinary care, either by Mr. H. or by the driver, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that, when the wagon became imperiled from the car, the motorman could by the exercise of ordinary care have stopped the car, if necessary, and have prevented the collision, as mentioned in instruction No. 2.

(d) If you find for the plaintiff, you should find in such sum as will reasonably and fairly compensate the estate of Mr. H. for the destruction of his power to earn money, not exceeding the sum of \$———, the amount claimed in the petition; and in that connection you may consider the amount that Mr. H. was earning, if any, as shown by the evidence, immediately prior to his death, and all the other circumstances shown by the evidence touching his capacity to earn money. If you find for the defendant, you will simply say so, and no more.⁹⁸

(e) In determining whether or not the plaintiff in this case was guilty of contributory negligence, you shall consider her own acts and conduct, and all the other circumstances shown in evidence surrounding the accident and injury, if any, to the plaintiff. And if you shall find from the preponderance of all the evidence that the plaintiff acted as a person of ordinary prudence under all the circumstances, you should find her free from contributory negligence although you may find that her husband was guilty of negligence in the driving and management of his horse and vehicle. In other words, no negligence of the husband in the driving and management of said horse can be imputed to the plaintiff, if you find that she herself was free from any fault or negligence, and was merely the passive guest of her husband, without any authority to direct or control the conduct or movements of her said husband in the driving and management of said horse.⁹⁹

98—*Louisville Ry. Co. v. Hoskins*, Adm'r, 28 Ky. L. 124, 88 S. W. 1087 (1088).

99—*Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 574.

"It is insisted that this charge is bad for the reason that it invades the province of the jury in stating to them that they shall consider the conduct of the plaintiff and other circumstances, etc.; the further contention being that by this statement of the court, the

question of the plaintiff's contributory negligence was to be considered alone, to the exclusion of the negligence on the part of her husband. It is insisted that the jury must have understood by the charge that the fact that the plaintiff was merely a passive guest of her husband was equivalent to establishing her freedom from fault or negligence. It is further contended that it was not proper for the court to use the words 'shall

§ 2111. **Imputable Negligence—Rule in Illinois.** If the jury find, from the preponderance of the evidence, that the plaintiff was injured as charged in her declaration, by reason of the alleged negligence of the defendant, and that at and before the time of receiving such injury, the plaintiff was in the exercise of ordinary care for her own safety, and that when injured she was riding in the cutter in question as the invited guest of X., then, even though it should appear that said X. was guilty of some want of care that contributed in some measure toward the bringing about of the accident in question, such want of care, if any, on the part of said X., will not be imputable to the plaintiff.¹⁰⁰

§ 2112. **Imputable Negligence—Rule in Wisconsin.** The court instructs the jury that if the driver of the vehicle in question was guilty of any want of ordinary care and prudence at the time in question, then the law imputes such negligence to the plaintiff, who was riding with her.¹

§ 2113. **Imputable Negligence—Parent and Child.** (a) If the jury shall believe from the evidence that the mother accompanied and was in charge of the child, and negligently permitted it to go upon the track when the car was approaching, or when, by the exercise of ordinary care and watchfulness, she could have known that the car was approaching, and but for the negligence of the mother in permitting the child to go upon the track the injury would not have happened, the jury should find for the defendant.

(b) Although the jury may find from the evidence that the mother was guilty of negligence in permitting the child to go upon the track, yet if the injury of the child could have been avoided by the motor-man after he knew, or could, by the exercise of ordinary care have known, that there was reasonable ground to believe that the child would go upon the track, then the jury must find for the plaintiff.²

and 'should' as they are employed in the instruction. That the charge is not rendered bad for the latter reason is fully settled by the decision of this court in *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494, and cases there cited."

100—*West C. St. R. Co. v. Peters*, 196 Ill. 298 (303), aff'g 95 Ill. App. 479, 63 N. E. 662.

"We think that the contention by appellant that under this instruction, if the jury concluded from the evidence that the plaintiff had been injured by an act of the defendant, and that such act was alleged to be negligent, they then might reconcile it with their consciences to find a verdict for the plaintiff in reliance upon this instruction is frivolous."

1—*Lightfoot v. Winnebago T. Co.*, 123 Wis. 479, 102 N. W. 30 (33).

"This court held 27 years ago, in

an opinion by Chief Justice Ryan, that 'the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence contributing to the injury complained of by such person, . . . will defeat the action.' *Prideaux v. Mineral Point*, 43 Wis. 513 (526-531), 28 Am. Rep. 558. Such ruling has been steadily adhered to during these many intervening years. *Otis v. Janesville*, 47 Wis. 422, 2 N. W. 783, 40 L. R. A. 831; *Ritger v. Milwaukee*, 99 Wis. 190, 197, 74 N. W. 815; *Olson v. Town of Luck*, 103 Wis. 33, 35, 79 N. W. 29. If the rule contended for is to prevail, it is for the Legislature to say so."

2—*Toner's Adm'r v. South C. & C. St. R. Co.*, 109 Ky. 41, 58 S. W. 439 (440).

"In *Canal Co. v. Murphy*, 9 Bush (Ky) 522, where the death

(c) The fact that the wife of the plaintiff may have been guilty of negligence, if such was the case, in permitting H. to go on or into the street where and when the defendant was operating cars over its tracks, will not prevent the plaintiff recovering in this case, if the motorman, after he became aware of the danger of the child, could have avoided injuring him by the use of such care as the dangerous position of the child and its age required him under the circumstances to exercise.³

of a little girl 5 years old was sued for, this court said: 'The child, by reason of its tender years, cannot be said to have been guilty of any negligence. She was non sui juris, and her conduct, if negligent, must be regarded as the negligence of the parents, and not that of the infant. Parents are the legal and natural custodians of their children, and, when the children are so young as not to be capable of exercising any discretion, their parents must exercise it for them. This control and care over children must be such as parents of ordinary prudence exercise.' In the subsequent case of *Schlenk's Adm'r v. Cent. P. Ry. Co.*, 15 Ky. L. 409, 23 S. W. 589, where a child three and one-half years old was killed by a street car, by reason of the negligence of his nurse having him in charge, this court, affirming the judgment in favor of the defendant, said: 'If there was any negligence it was on the part of the inexperienced nurse, by reason of nonage, having the boy in charge, and as she was the agent of the plaintiff, in the temporary control and custody of the boy, her negligence must be imputed to the father.' Under the statute, a recovery in this case, if had, would go to the father and mother, one moiety to each. Every reason that would charge the father with the negligence of the nurse would apply with equal force in a suit of this

character, where the wife has the custody of the child at the time of the injury, and the court did not err in so instructing the jury. Besides, the pivotal question in the case was whether the child ran suddenly out on the track, and was struck before he could be saved by ordinary care on the part of the motorman, or whether he was loitering near the track as the car approached slowly, and ran in front of the car some 25 or 30 feet, while the mother was calling on the motorman not to run over her child, and he might by ordinary care have avoided doing so, as the evidence for appellant tended to show. This issue was fairly submitted to the jury by the instructions given by the court; for the jury was expressly told that notwithstanding the negligence of the mother, and without regard to it, 'yet if the injury of the child could have been avoided by the motorman after he knew, or could, by the exercise of ordinary care, have known, that there was reasonable ground to believe that the child would go upon the track, then they must find for the plaintiff.' The real issue in the case having been clearly submitted to the jury, and fairly tried by them, their verdict should not be disturbed."

3—Indianapolis St. R. Co. v. Schomberg, — Ind. App. —, 71 N. E. 237 (239), *aff'd* 164 Ind. 111, 72 N. E. 1041.

CHAPTER LXXI.

NEGLIGENCE—TELEGRAPH COMPANIES.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2114. "Negligence" in delivery of telegram defined.</p> <p>§ 2115. Duty of telegraph company to make prompt delivery of telegram.</p> <p>§ 2116. Telegraph company not insurer of absolute safety and accuracy of telegrams.</p> <p>§ 2117. Incorrect or insufficient address given by plaintiff to defendant a good defense in actions for non-delivery.</p> <p>§ 2118. Nature of knowledge of agents of telephone company as to purpose of call.</p> | <p>§ 2119. Failure to consummate business trade through non-delivery of telegram.</p> <p>§ 2120. No duty on part of plaintiff's agent to inform telegraph company of his agency.</p> <p>§ 2121. Care due while working with cable above public street.</p> <p>§ 2122. Lineman—Degree of care required while working near electric wires.</p> <p>§ 2123. Electric wires—Presumption of danger.</p> |
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§ 2114. "Negligence" in Delivery of Telegram Defined. "Negligence," as used in this charge, is defined to mean the failure to exercise ordinary care, and "ordinary care" is defined to mean such care as a person of ordinary prudence would have exercised under the same or similar circumstances.¹

§ 2115. Duty of Telegraph Company to Make Prompt Delivery of Telegram. (a) This is an action by plaintiffs for damages they claim they suffered by the nondelivery of a telegram by the defendant. Coming right to the points in issue, it is the duty of the telegraph company to promptly deliver any message which is given to them for transmission and delivery, and a failure to deliver promptly makes them liable in damages, and it is a question for you to find, from the facts in this case, whether there was prompt delivery of the

1—Hargrave v. Western U. T. Co., — Tex. Civ. App. —, 60 S. W. 687 (689).

"Appellants object to this definition because, they say, 'when the telegraph company, for hire, assumes to deliver a telegram such as a death message, the highest degree of care and diligence is required of them in the speedy and prompt delivery thereof.' Such is not the law. The jury were instructed that, if the company 'failed to exercise ordinary care and diligence to deliver said message to H, then they will find for

the plaintiffs, and assess their damages.' The charge gave the correct measure of diligence. Appellee would have been liable for the failure of any of its employees charged with the duty of delivering the message to exercise ordinary care and to have defined its care as including skill, fitness, and diligence on the part of its servants would have added nothing to the definition. The definition given was not erroneous, and, if appellants thought it was not sufficiently full, they should have requested a fuller one."

message in question. People send messages by telegram instead of by mail because they are in need of haste, and when a message is so sent and received it must be delivered with reasonable dispatch in all cases, and if not, the company must pay damages for failure to so deliver. And it is for you to say whether, under all the circumstances of this case, there was such prompt delivery of the message as will relieve the defendant company from liability. The telegram in question demonstrated upon its face that it was an urgent message, and must be delivered with haste, and in such cases a greater degree of diligence must be exercised than if no such urgency was expressed, and you will take this into consideration in considering the facts and making up your verdict. The telegram is resorted to by the public to secure the speediest mode of communication, and the prompt delivery is the very essence of the undertaking by the company. Hence a failure to make such prompt delivery, if shown in this case, requires a verdict at your hands for the plaintiffs as hereinafter indicated.

(b) If you find from the evidence that the defendant sent the message in question with reasonable promptness, and delivered the same to Mr. D. with reasonable diligence, your verdict must be for the defendant. On the question of prompt delivery you are to take into account the distance of the place of delivery from defendants' office, the distance of the office from the schoolhouse, and the necessary time it would take to get there. The burden is on the plaintiffs to show by the preponderance of the evidence that the allegations in the declaration are true, and if the evidence on behalf of the plaintiffs fails to do this, or such evidence is fully met by evidence on behalf of the defendant, then I instruct you that the plaintiffs cannot recover. The plaintiffs cannot recover unless by the neglect of some duty the company owed them; and if the message was delivered to Mr. D. with reasonable diligence your verdict must be for the defendant.

(c) If you find that the company did not deliver this telegram, as I have indicated, with such promptness as was required under the circumstances, and are liable for a failure to so deliver, then you will find for the plaintiffs such an amount as will be reasonable under all the facts in the case. In other words if you find for plaintiffs your verdict will be for what the services of Mr. K. would reasonably be worth before the commissioners, on trying the client's case at the rate per day as shown by the evidence in this case.²

§ 2116. Telegraph Company Not Insurer of Absolute Safety and Accuracy of Telegrams. You are charged that if the mistake made in the transmission or delivery of the message was caused or brought about on account of or by reason of negligence on the part of the defendant, or its agents or servants, then, in that event, the conditions and stipulations pleaded by defendant cannot avail it anything in this action. The telegraph company is not an insurer of absolute safety and accuracy in the transmission of messages.³

2—Sweet v. W. U. Tel. Co., 139 Mich. 322, 102 N. W. 850 (852).

3—W. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632 (634).

§ 2117. **Incorrect or Insufficient Address Given by Plaintiff to Defendant a Good Defense in Actions for Non-Delivery.** The jury are instructed that if from the evidence they believe that M., who delivered the message in question to the defendant company for transmission, gave to the defendant an incorrect or insufficient address, and that in so doing he was guilty of negligence, as that term has been hereinbefore defined, and if the jury further believe from the evidence that such negligence on his part, if any, contributed to the failure to deliver the message to H., then the plaintiff cannot recover, even though the defendant may have also been negligent.⁴

§ 2118. **Nature of Knowledge of Agents of Telephone Company as to Purpose of Call.** I further instruct you that any testimony as to the knowledge of the fact (if it was a fact) that the employes of defendant knew of the death of Mrs. M., and that the purpose of the call to get G. M. at C. in communication with A. B., in order to notify plaintiff of his mother's death, must have come to the knowledge of the said employes through some transaction or act while they were transacting the business of the defendant in connection with the call put in.⁵

§ 2119. **Failure to Consummate Business Trade Through Non-Delivery of Telegram.** Where, in an action against a telegraph company for failure to deliver a message, it is sought to recover damages for losses which would have been prevented by a sale which the message was designed to complete, it must appear that the delivery of the message to the party to whom it was directed would have effected a valid and binding contract. It does not mean, though, that the contract would not have been binding. It does not mean that there might have been a defense between A. and B., the persons to whom the goods were to be sold, if one complained by reason of the fact that he did not make a contract, as the result of the non-delivery of the telegram. Matters of defense they might set up you cannot consider here, but if the persons fairly intended to complete and perfect the sale contract, that is enough. It is for you to say in any given case whether or not that was the purpose, and, if it had gone, how far; and I so charge you. Where one partner, who has received an offer in the usual course of trade, telegraphs his co-partner for advice as to accepting it, and, not hearing from him, on account of the negligent failure of the telegraph company to deliver the message, voluntarily

4—Hargrave v. W. U. Tel. Co., — Tex. Civ. App. —, 60 S. W. 687 (689).

5—Merrill v. S. W. Tel. & Telephone Co., 31 Tex. Civ. App. 614, 73 S. W. 422 (423).

"The rule is laid down by our Supreme Court in *Tex. Loan Agency v. Taylor*, 88 Tex. 49, 29 S. W. 1057, and *Kauffmann v. Robey*, 60 Tex. 308, 48 Am. Rep. 264. In the first case cited, Mr. Gaines, C. J., in speaking of the doctrine of

knowledge of the agent being imputed to the principal, says: "This principle only applies where the agent acquires his knowledge in the transaction of his principal's business, and we therefore think that the doctrine of imputed notice should be limited to cases of that character." The charge was in strict accord with these authorities, and was applicable to the facts; hence not erroneous."

acts upon his own judgment and declines the offer, such negligence of the telegraph company is not the proximate cause of the loss sustained by failure to consummate the trade, and the defendant is not liable in damages upon proof that if the message had been reasonably delivered the co-partner would have advised acceptance, and the trade would have been made.⁶

§ 2120. **No Duty on Part of Plaintiff's Agent to Inform Telegraph Company of His Agency.** The court charges the jury that it was not the duty of F. L. to inform the defendant company of the fact that in sending the message described in the complaint, if from the evidence you believe that he was acting as the agent of plaintiff, that he was the agent of plaintiff, in order to make the defendant liable to plaintiff in this cause.⁷

§ 2121. **Care Due While Working With Cable Above Public Street.** The public had a right to use the public streets of P. City in the exercise of due care, and if defendant undertook to handle or work with a cable above the public street, it was the duty of defendant to use care to prevent the cable from falling on any person who may have been on such street.⁸

§ 2122. **Lineman—Degree of Care Required While Working Near Electric Wires.** (a) If the jury believe from the evidence that it was dangerous for R. to stand upon the strand or messenger cable, which made a perfect circuit between any charged electrical agency in the hand of R. and the ground, and that R. knew or by the exercise of ordinary care would have known, that standing upon said messenger cable was dangerous, and if the jury further believe from the evidence that a man of ordinary prudence under such circumstances as surrounded R., would not have stood upon said messenger strand or messenger cable while holding a telephone wire suspended over electric wires, then the jury must find the defendant not guilty.

(b) If the jury believe from the evidence that a man of ordinary prudence, exercising ordinary care for his own safety under such circumstances as surrounded R. at the time of this accident, would have worn and used a safety belt, and that R. did not at the time of this accident wear a safety belt, and if the jury further believe from the evidence that the death of R. would have been prevented if the deceased had worn a safety belt, then the jury must find the defendant not guilty.

(c) The court instructs the jury that ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent person, with deceased's knowledge or means of knowledge of electrical affairs, and situated as deceased was, before and at the time of the accident, would exercise for his own safety.⁹

6—Wallingford v. W. U. Tel. Co., 60 S. C. 201, 38 S. E. 443 (448).

7—Manker v. W. U. Tel. Co., 137 Ala. 292, 34 So. 839.

8—Southern Bell T. & T. Co. v.

Mayo, 134 Ala. 641, 33 So. 16.

9—Commonwealth El. Co. v. Rose, 114 Ill. App. 181 (184), aff'd 214 Ill. 545, 73 N. E. 780.

"Complaint is made of the above

§ 2123. **Electric Wires—Presumption of Danger.** The defendant, H., in breaking, coiling and hanging the dead or uncharged wire on June 20, 1901, is presumed to have known that it was an electric wire, and to have known and realized the dangerous properties of electricity, and that a higher degree of care was necessary, when a thing on account of which an injury may be caused was a highly dangerous one, and that dead electric wires may be enlivened or become charged with a current of electricity by coming in contact with a charged wire, and that in case any person touched or grasped such a wire, it would or might reasonably be expected to, endanger the life or limbs of the person touching it.¹⁰

instruction because of the words 'with deceased's knowledge or means of knowledge of electrical affairs.' The instruction obviously refers to the question whether the deceased exercised ordinary care for his own safety. In our opinion the defendant was not prejudiced by the words complained of. The deceased was an experienced line-man and had been a foreman. Acts or conduct on his part might amount to or constitute negligence when the same acts or conduct on the part of one wholly ignorant of electrical affairs would not amount to negligence. It was for the jury to find from all the evidence what the deceased did or failed to do and then to say whether such acts and conduct showed ordinary care on his part for his own safety, or amounted to contributory negligence. This included as well the acts and conduct of the deceased

in placing himself in the position in which he was, as his acts and conduct in that position, but we cannot see that the instruction is subject to the criticism that it assumes that the deceased exercised ordinary care in placing himself in the position in which he was at the time he fell."

10—Nagle v. Hake, 123 Wis. 256, 101 N. W. 409 (413).

"The sentence now under consideration is elliptical in that it does not in terms state with what the care required in handling electric wires is to be compared; but we think none could mistake the idea intended, namely the idea that greater care is required in handling such agencies which may be charged with mysterious and sudden death, than in handling ordinary substances, and this as we have seen is a correct statement of the law."

CHAPTER LXXII.

NEGLIGENCE—MISCELLANEOUS.

See Erroneous Instructions, same chapter head, Vol. III.

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| § 2124. Liability of gas company for break in gas pipe. | § 2130. Liability for damage from ditch built on one's own land. |
| § 2125. Artificial light—Liability for furnishing unsafe. | § 2131. Logs—Degree of care required in driving. |
| § 2126. Coal mine—Duty of owner of to fence shaft. | § 2132. Defective scaffold—Elements that must be proven—Burden of proof—Preponderance. |
| § 2127. Boiler maintained in negligent manner—Damage caused by overflow of boiler. | § 2133. Hogs—Infection of from following other hogs. |
| § 2128. Danger from fire. | |
| § 2129. Fire—Negligently setting—Injury to trees. | |

§ 2124. **Liability of Gas Company for Break in Gas Pipe.** The jury are instructed that there is evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner, and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant.¹

§ 2125. **Artificial Light—Liability For Furnishing Unsafe.** (a) In furnishing an artificial light, if one was necessary, the plaintiff did not assume all risk of loss that might arise from its use, for it will appear to you that it was possible for any person purposely to throw a perfectly safe light, furnished him under those circumstances, into the oil, and thus cause a conflagration. In that case it would clearly be the negligent act of the person using the candle. But, if a light was necessary, it was the plaintiff's duty, if he furnished any light at all, to furnish a reasonably safe light; and it was the defendant's duty to use the light in an ordinarily careful and prudent man-

1—*Carmody v. Boston Gaslight Co.* (four cases), 162 Mass. 539, 39 N. E. 184 (185).

"This request was copied from a ruling given in *Smith v. Gaslight Co.*, 129 Mass. 318, where this court said of it that, as applied to the facts of that case, it could not be said to be wrong. The presiding justice in the present case declined to give the instruction, but instructed the jury in other terms, which fully and correctly dealt with the phases of the cause to which the request was addressed.

While the ruling requested is sufficiently correct, if it be construed as declaring that there was enough evidence of want of proper care to be submitted to the jury, it would invade the proper province of the jury, if it was understood by them to mean that there was evidence enough to require them to find the defendant negligent, and the presiding justice was not bound to give a ruling which, as applied to the case upon trial, might have been so understood."

ner. If the light was reasonably safe, and the defendant's negligence alone caused the injury, the plaintiff should be compensated for his loss. But if the light was not reasonably safe, and because the light was dangerous which was furnished to defendant's servant, and defendant's servant used it with ordinary care and prudence and the loss and injury were caused by the unsafe and dangerous light furnished by the plaintiff or his servants, then the plaintiff should not recover. Or if the plaintiff's loss and injury was the result of the unsafe light furnished by the defendant's servants, combined with the careless use and handling of it by the defendant's servants, then the plaintiff cannot recover, and your verdict should be for the defendant. Whether it was the plaintiff's duty or not to supply a light, in my opinion it was his duty to provide a reasonably safe one under all the circumstances; and if he failed so to provide a safe light, and that, combined with the negligent act of the defendant's servant, caused the loss or injury, then the plaintiff should not recover.

(b) The giving of a candle to H. may not be contributory negligence in itself, because I have already called your attention to the fact that you are to determine as a question of fact whether a candle was a reasonably safe light to provide under the circumstances. Of course, whether the light was safe—whether the candle was safe—or not, under all the circumstances, is a question of fact.²

§ 2126. **Coal Mine—Duty of Owner of to Fence Shaft.** The law makes it the duty of every operator and owner of a coal mine to securely fence the top of the shaft by gates properly protecting the shaft and entry thereto, and if such operator fails willfully to so fence the shaft, and by reason of such failure a person employed about the mine is killed, the owner or operator is liable to the widow of the person so killed for damages not to exceed the sum of \$——.³

2—Dore v. Babcock, 72 Conn. 408, 44 Atl. 736 (737).

3—Catlett v. Young, 143 Ill. 74 (78), 32 N. E. 447.

"In the case of Litchfield C. Co. v. Taylor, 81 Ill. 590, it was held that, where the party is killed in attempting to ascend from a coal mine by the fall of a lump of coal, and it appears that the defendant willfully used uncovered cages for the ascent and descent of persons working in the mine in violation of the statute, which caused the death, a recovery may be had by his widow, notwithstanding the deceased may not have been free from fault or negligence on his part. Objection was there taken to the instruction of the court that it excluded consideration of the jury the negligence of the deceased, which may have contributed to the injury. It was held that the instruction was in sub-

stance correct, and it was said: 'In the case under consideration, it was the willful conduct of the coal company, of which the plaintiff complained, and, while the deceased may not have been entirely free from fault, yet if the jury find from the evidence that the willful conduct of appellant resulted in the injury, the verdict would be justified.' The decision in this cited case sustained the instruction given by the court, on the ground that, under the statute of 1872, contributory negligence was not a defence. The present statute, so far as the question now under consideration is affected, is substantially the same as that of 1872. When the legislature in 1879 re-enacted in substance the statute of 1872, and re-enacted in the same language section 14, which gives the right of action, it must be regarded that it acted in view of the interpretation

§ 2127. Boiler Maintained in Negligent Manner—Damage Caused by Overflow of Boiler. (a) The defendant in this case has a perfect right to use such a combination or boiler as it sees fit, provided that it exercises reasonable care in its selection, maintenance and use.

(b) The burden to prove lack of care, and to prove negligence, which is the same thing, is on the plaintiffs throughout this case. Unless they (the plaintiffs) have shown that the boiler and apparatus which was used by the defendants were improper appliances to be used, or that they were maintained or used by the defendants in a careless or negligent manner, and unless they have so shown to your satisfaction, and by a preponderance of the evidence, you are instructed that you must find for the defendants.

(c) The jury are instructed that they must not consider this fact, that, after the overflow occurred, the defendant had shut off the stopcock at night so as to prevent water from flowing into the boiler, in determining whether or not the defendant exercised due care prior to the accident.⁴

§ 2128. Danger from Fire. The jury are instructed, that the question of negligence or diligence depends upon and partakes of the surrounding circumstances peculiar to each case, and in this case, if the jury believe, from the evidence, that defendant's mill, as it was

that more than three years before had been placed by this court upon such statute of 1872 and upon said section 14, and intended that in case of injuries occasioned by any willful violation of the act of 1879, or by willful failure to comply with any of its provisions, the right of recovery should not depend upon the exercise of ordinary care by the person injured, or the deceased, or be precluded by contributory negligence. This view of the law as a matter of course is based on the ground that there has been a willful failure to comply with the requirements of the statute. If the statute has been complied with, or if the injury is not occasioned by the willful violation or willful failure denounced by the statute but by some other alleged negligence of the mine owner, and the person injured or killed fails to exercise ordinary care, then there will be no right of action."

4—Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164 (1907).

"The defendant was entitled to the instruction as asked. The care due from the defendant is not to be measured by its conduct after the overflow had demonstrated the necessity of further precautions, but by the conditions existing at and before the time of the occur-

rence. If both instructions had been before them, the jury might have been misled to suppose that, although not to be considered as a confession of negligence, it was evidence of some weight, to be considered by them for some purpose. But they knew nothing of the instruction refused, and were not required to attempt to distinguish between the two. They were correctly instructed that the subsequent precaution was not to be considered as a confession of previous neglect. If the fact could be considered as of any weight, it would be because of the inference arising therefrom that the decision to turn off the stopcock in the future was made from the consciousness that the failure to do so in the past was neglect, and in that respect it would be a tacit confession, evidenced by conduct. A jury is not expected to indulge in metaphysical distinctions so minute as this. The instruction given would be understood by the ordinary mind as substantially a direction to disregard the fact in question. This is all that the court was required to do, and it is not material that it was not done in language as accurate and precise in the instruction given as in that asked."

accustomed to be used, endangered the buildings of the plaintiff by reason of throwing out fire and sparks from the chimney, then it became the duty of the defendant to avail himself of some such well known apparatus, or other means, to prevent the escape of sparks and fire from the chimney as experience had shown to be reasonably adequate for that purpose; whether such apparatus or means was generally used on such chimneys or not, provided the jury believe, from the evidence, that apparatus had been discovered and was generally known to persons engaged in the same or similar business which would have lessened the danger, and were in their nature and operation reasonably susceptible of being applied to chimneys of the kind used by the defendant.⁵

§ 2129. **Fire—Negligently Setting—Injury to Trees.** If you find from the evidence that the defendant, either by himself or his servant, acting within the scope of his employment, negligently set out, or negligently suffered to escape, the fire which ran upon, burned over, and injured plaintiff's premises, and that such injury was the proximate consequence of such negligent act or omission, then you should find for the plaintiff, and award him just compensation for the loss which he has sustained.⁶

§ 2130. **Liability for Damage from Ditch Built on One's Own Land.** If the ditch was on defendant's land, and he used reasonable and ordinary care to guard against injury to plaintiff, he is not liable. If the embankment washed out from natural causes, the defendant could not reasonably have foreseen and guarded against, he is not liable, if the dike was on his own land.⁷

§ 2131. **Logs—Degree of Care Required in Driving.** There is no absolute test fixed by law by which the measure of care required in a particular case can be determined. The only standard is to be found in the carefully considered, dispassionate judgment of the jury in view of all the circumstances of the case. The question always is, what would a person of average prudence do under like circumstances? If such a person, placed in exactly the same situation as the party whose conduct is in question, possessed of the same knowledge as he had of all the surrounding facts and circumstances, including the danger of resultant injury and the means of avoiding it, would or might have done as such person did, he is free from fault and not responsible for any accident or injury that may happen. . . . Did the lumber company, their officers, agents and servants (because, being a corporation, they could act only by or through their officers, agents and servants), exercise ordinary care in running their logs,

5—Hoyt v. Jeffers, 30 Mich. 181.

6—Wickham v. Wolcott, 1 Neb. (unof.) 160, 95 N. W. 366.

7—Neumeister v. Goddard, 125 Wis. 82, 103 N. W. 241 (244).

"We are constrained to hold that this instruction should have been given. It was applicable to a point

material to the issue and the evidence, and not covered by the general charge, and hence should have been given. Campbell v. Campbell, 54 Wis. 90 (98), 11 N. W. 456; Curtis v. C. & N. W. R. Co., 95 Wis. 470, 70 N. W. 665."

and permitting them to accumulate in the jam and elsewhere in the yard, or in failing to remove them prior to the washout? On this question you will consider the question of the logs, the number of them, the extent of the jam, what effect, if any, the logs had, the means of preventing their accumulation, the stage of the water, the currents of the river; in short, all the considerations urged upon you by counsel upon both sides, and all the evidence in the case. And on this question, as upon the like question in the case of V. and M., you will be likely to, and properly may, consider what you would or would not have done had you been placed in their situation. If you find that they did exercise ordinary care; that persons of average prudence placed in their situation, possessed of their knowledge and means of knowledge of the proper management and driving of logs, their effect upon the dam, and of all the other circumstances, would or might have done as they did, both in permitting the logs to accumulate, and in failing to remove them,—you will return a verdict for the lumber company. If you find that they did not exercise ordinary care in thus allowing the logs to accumulate or in failing to remove them, and that they contributed to the washout, your verdict will be for the plaintiffs.⁸

§ 2132. Defective Scaffold—Elements That Must Be Proven—Burden of Proof—Preponderance. The jury are further instructed that the burden of proof in this case is upon the plaintiff, and before he can recover on account of the alleged negligence on the part of the defendants in providing or having for use a weak, defective or insufficient plank as a scaffold, it is necessary for the plaintiff to prove, by a preponderance of the evidence, (1) that the plank was insufficient, weak or defective, and that the accident happened as the result of such weakness, insufficiency or defect; (2) that the defendants had notice or knowledge of such insufficiency, weakness or defect, or that they might have had notice thereof by the exercise of ordinary care; (3) that the plaintiff did not know of such insufficiency, weakness or defect, and that he had no means of knowledge thereof equal to those of the defendants; and (4) that he was in his relation to the accident in the exercise of ordinary care. If the plaintiff fails to prove by a preponderance of the evidence any one of these four propositions, the jury should find for the defendants, even though they find that G. was foreman, and gave directions to use plank in question.⁹

8—*Town of Monroe v. Connecticut R. L. Co.*, 68 N. H. 89, 39 Atl. 1019 (1021).

9—*Armour v. Brazau*, 191 Ill. 117 (126), 60 N. E. 904, reversing 93 Ill. App. 235.

"The main principles stated in this instruction were declared to be the law in *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95, where they were quoted from § 414 of Wood on the Law of Masters and Servants and they have been adhered to and

repeated in substantially the same language in *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225; *Howe v. Mendaris*, 183 Ill. 288, 55 N. E. 724, and *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573. As applied to the facts in this case, there has been no departure from the rule stated in the instruction, and it should have been given."

See Negligence—Master and Servant, Chapter LXIII.

§ 2133. **Hogs—Infection of from Following Other Hogs.** The court instructs the jury that if plaintiff, in taking the hogs in controversy among his own hogs, failed to use ordinary care in so doing, or negligently and carelessly permitted them to come in contact with and run with his well hogs, plaintiff cannot recover for loss by reason of the infection of his hogs from the hogs in controversy, if so infected.¹⁰

10—Brush v. Smith. 111 Iowa 217. 82 N. W. 467 (468).

CHAPTER LXXIII.

NEGOTIABLE INSTRUMENTS.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2134. Presumptions in favor of the holder.</p> <p>§ 2135. Evidence required for recovery.</p> <p>§ 2136. Usury.</p> <p>§ 2137. Joint liability.</p> <p>§ 2138. Gift.</p> <p>§ 2139. Action on bond—Damages—Recoupment.</p> <p>§ 2140. Balance on account—Credits.</p> <p>§ 2141. Liability of principal and surety.</p> <p>§ 2142. Accepting of draft without bill of lading.</p> <p>§ 2143. Execution and delivery—Burden of proof.</p> <p>§ 2144. Genuineness of signature—Credibility of witnesses—What must be proved—Bona fide holder.</p> <p>§ 2145. Receipt of payment—Genuineness of signature.</p> <p>§ 2146. Fraud—Mistake—Unable to read—Relying on another.</p> <p>§ 2147. Signature obtained through artifice or fraudulent representations.</p> <p>§ 2148. Must use reasonable care to avoid imposition.</p> <p>§ 2149. Fraud may be waived.</p> <p>§ 2150. Defendant inducing plaintiff to buy note—Estoppel.</p> <p>§ 2151. Duress—Threats of imprisonment.</p> <p>§ 2152. Duress—Abuse of criminal process—Lawful imprisonment not duress.</p> <p>§ 2153. Duress—Ratification of voidable note.</p> <p>§ 2154. Want of consideration.</p> <p>§ 2155. "Worthless" and "doubtful" notes.</p> <p>§ 2156. Settlement of old debt—Consideration.</p> <p>§ 2157. Illegal consideration.</p> <p>§ 2158. Void consideration—Sale of liquor on Sunday—Note executed on Sunday.</p> <p>§ 2159. Consideration—Forbearing suit on note.</p> <p>§ 2160. Consideration—Settlement of criminal charge.</p> <p>§ 2161. Accommodation paper.</p> | <p>§ 2162. Payment—Burden of proof.</p> <p>§ 2163. Payment—Deception as to ownership of note.</p> <p>§ 2164. Protest—Demand of payment.</p> <p>§ 2165. Notes given in payment for property.</p> <p>§ 2166. Assignee after maturity.</p> <p>§ 2167. Assignee with notice of suspicious facts.</p> <p>§ 2168. What constitutes innocent holder.</p> <p>§ 2169. Bona fide holder—What vitiates note in his hands.</p> <p>§ 2170. Assignee with notice from an assignee without notice.</p> <p>§ 2171. Innocent purchaser—Taken as security for pre-existing debt.</p> <p>§ 2172. Note taken in payment or part payment.</p> <p>§ 2173. Evidence necessary to overcome presumption.</p> <p>§ 2174. Note stolen or wrongfully obtained.</p> <p>§ 2175. Endorsement in blank.</p> <p>§ 2176. Endorsement before maturity—Innocent holder.</p> <p>§ 2177. Endorsement—Intention—Liability.</p> <p>§ 2178. Liability of endorser—Due diligence—Bringing suit.</p> <p>§ 2179. Return of the officer not conclusive.</p> <p>§ 2180. Extension of time.</p> <p>§ 2181. Endorsement constitutes prima facie liability.</p> <p>§ 2182. New party—New consideration.</p> |
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- GUARANTORS AND SURETIES.**
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| <p>§ 2183. Guarantor—Liability generally.</p> <p>§ 2184. When an endorser becomes a guarantor—Illinois.</p> <p>§ 2185. Guarantor liable until note is paid—Delay will not release.</p> <p>§ 2186. Release of guarantor—Extending time—Surety.</p> <p>§ 2187. Consideration for guaranty.</p> <p>§ 2188. Insolvency may be proved by other evidence—Return of officer not conclusive.</p> | |
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§ 2189. Guaranty — Acceptance — Knowledge thereof.	§ 2192. Lien of surety—Bills of lading held by title to goods.
§ 2190. Co-sureties—Partners.	§ 2193. Possession of personal property evidence of ownership.
§ 2191. Lien of surety—Title to goods.	

2134. Presumptions in Favor of the Holder. (a) The court instructs the jury that the possession of a note, indorsed in blank, unaccompanied by any declaration or other evidence in regard to it, is *prima facie* evidence that the holder is the owner of it; that he took it for value before it became due, and in the regular course of business.¹

(b) The jury are instructed that the indorsee of a promissory note, in the absence of proof to the contrary, is presumed in law to have taken it in due course of trade before maturity, for value and in good faith.

(c) When a note is indorsed without date, the presumption of law is, in the absence of proof to the contrary, that it was indorsed before it became due.

(d) When the assignment of a promissory note is without date, the law raises a presumption that the transfer was made before the maturity of the note, and to rebut this presumption the burden of proof is upon the person alleging that the note was assigned after maturity.²

§ 2135. Evidence Required for Recovery. (a) The court instructs the jury that if you believe from the evidence in this case that the defendants executed and delivered to A. in his lifetime, the notes mentioned and described in the declaration, and further believe from the evidence that said notes have not been paid by the defendants or either of them to the said A. during his lifetime, or to the plaintiff since his decease, then you should find for the plaintiff.³

(b) If you find from the evidence that the defendant signed the note sued upon in this action, and that the plaintiff purchased it before maturity, you will find for the plaintiff.⁴

§ 2136. Usury. The court instructs the jury that if you find from the evidence that on ———, Y. executed twelve notes in the sum of twenty-one dollars each, payable in one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve months, respectively from date, to the order of H., in consideration of money borrowed by Y. at that time, and that nine of said notes were secured by and described in the mortgage in evidence, and that said Y. delivered said

1—Pettee v. Prout, 3 Gray (Mass.) 502; Warren v. Gilman, 15 Me. 70; Dugan v. U. S., 3 Wheat. 172; Kelly v. Ford, 4 Ia. 140; Goodman v. Simonds, 20 How. 343; Cook v. Helms, 5 Wis. 107; Farwell v. Myers, 36 Ill. 510; Stoddard v. Burton, 41 Ia. 582.

2—Richards v. Betzer, 53 Ill. 466.

3—Robison v. Bailey, 113 Ill. App. 123 (126).

4—First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276 (278).

"That this request stated the law correctly cannot be questioned."

twelve notes to J. K. on said day, then such transaction is usurious, and the mortgage in evidence is void, and in that case plaintiff cannot recover and your verdict must be for the defendants.⁵

§ 2137. Joint Liability. The jury are instructed that where two or more persons are sued and they answer the complaint separately, and one makes a defense which, if sustained, will defeat the entire right of recovery, the rule of law is that if the separate answer by one of several defendants goes to the merits of the case, and is such that proof of it will defeat a recovery by the plaintiff, it will inure to the benefit of the other defendants.⁶

5—*Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. 260 (263).

"The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law. Webb. Usury § 29. 'The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious.' Id. § 28. 'The true construction of statutes regulating interest upon the loan or forbearance of money, goods or things in action is that no greater rate of compensation than that prescribed shall be taken upon a loan of forbearance of money directly or indirectly by way of a loan of property or in any other manner, no matter how disguised.' 27 Am. & Eng. Enc. Law p. 935.

As was well said by Treat J. in *Ferguson v. Sutphen*, 8 Ill. 547, 566 and 567 "The law against usury is founded in principles of public policy,—principles that have been for ages recognized and almost universally adopted. Without inquiring into the policy or justice of the statutes for the prevention of usury, it is the imperative duty of the judicial tribunals faithfully to execute them. If there is any injustice or impolicy in these enactments, the fault rests with the legislature, and it must provide the proper corrective and not the courts. Whenever the injured party invokes the aid of the courts, and presents a case clearly within the statute, there should not be the least hesitation in applying the appropriate remedy. The only effectual mode of discouraging and preventing the practice of usury is by a rigid enforcement of the provisions of the statute. If a case comes within the mischief of the statute, it should be held to be within the remedy. And this seems to be the

principle on which these statutes have everywhere been construed and administered. The real injury in every case is whether there has been a borrowing and lending at a greater rate of interest than the law allows, and this becomes purely a question of fact to be determined from all the circumstances of the particular case. The law looks at the nature and substance of the transaction and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their shifts and devices and ascertain the true character and design of the transaction. And if, upon such investigation it appears that there was in substance, a loan at an illegal rate of interest, no matter what form or shape the contract has been made to assume, it will be declared to be usurious and the proper remedy applied."

6—*Brant v. Barnett*, 10 Ind. App. 653, 38 N. E. 421 (422).

"We think counsel are mistaken in the construction placed by them on the instruction. The court did not tell the jury that if the appellee, ———, at the time she signed the note, was a married woman, and executed it as surety for the maker, that would release the appellee X from liability; but the court simply told them that, if one of the persons who executed the note established a defense which would defeat appellant's right to recover at all, such defense inured to the benefit of all the other defendants, whether they individually made such defense or not. The instruction states the law correctly.

§ 2138. **Gift.** The court instructs the jury that possession of the note by the payee at the time of his death was evidence tending to prove that there had been no gift of the note.⁷

§ 2139. **Action on Bond—Damages—Recoupment.** (a) You are charged that under the terms of this contract a bond has been given, and that bond, in substance, guarantees the character of this work for the term of five years, and that, if there is anything that has occurred after the acceptance that shows the work didn't hold out under this guaranty, that suit should be brought upon this bond.

(b) I charge you that whatever damages, if there are any, under the evidence, this defendant can recoup here.

(c) I charge you that the defendant in this case is at liberty to plead that recoupment here, and waive his remedy upon the bond, if he sees fit.

(d) So, under this issue, if you shall find that there has been a breach of this contract on the part of the plaintiff, and the defendant has suffered damage from it, you may award that damage to the defendant, as against the claim of the plaintiff, even if it overcomes the amount of the plaintiff's claim, and render judgment for the balance to the defendant, if you shall find anything of that kind.⁸

§ 2140. **Balance on Account—Credits.** This is a question of accounting and bookkeeping. You have heard the evidence in this case, and you will have to ascertain from it, as best you can, the amount of money that is due to the plaintiff here. That the defendant owes the plaintiff is admitted by the defendant; but the question is, how much? The defendant claims that the amount claimed by the plaintiff is excessive, and that it is entitled to certain credits thereon, in consequence of demands which they had as against C., who was the payee of the note transferred to the plaintiff. If you should find from the evidence that any of these items which counsel have called to your attention were designed and intended at the time to have been payments on account, or to the credit of the note, and that such items were agreed upon and determined before the date of the indorsement of the note to the plaintiff, which was —, they would be entitled to have them credited upon the amount due upon the note—principal and interest. If you should conclude that they are not entitled to any of these credits, then it would be your simple duty to ascertain the amount of principal and interest due, after deducting the amount of the cash payments which are contained on the back of the note.⁹

Stapp v. Davis, 78 Ind. 128; Moyer v. Brand, 102 Ind. 301, 26 N. E. 125; for, if the appellant had no cause of action, he was not entitled to recover."

7—Oelke v. Theis, 70 Neb. 465, 97 N. W. 588.

8—"This instruction is sound law." Nelson Mfg. Co. v. Shreve, 94 Mo. App. 518, 68 S. W. 376 (377).

9—Love v. Anchor Raisin Vineyard Co., — Cal. —, 45 Pac. 1044 (1045).

§ 2141. **Liability of Principal and Surety.** The court instructs the jury that it makes no difference whether the defendant, I., signed the note in question as principal or as surety; his liability to pay the note would be the same in either case, if you find from the weight of the evidence he did sign the note.¹⁰

§ 2142. **Accepting of Draft Without Bill of Lading.** If you believe, from the evidence, that the defendants agreed to honor the drafts of G. & W. for the cost of cattle consigned to the defendants, and that the draft herein sued on was drawn for the cost of cattle in pursuance of said agreement, and that said cattle were consigned to the defendants, then you will find the issues in this case for the plaintiff.¹¹

§ 2143. **Execution and Delivery—Burden of Proof.** (a) The court instructs the jury that the answer of the said defendant in this action is a general denial, and that the pleadings put in issue the execution and delivery of the note sued on herein; that is, the burden of the proof is on the plaintiff to prove that said B. made, signed and delivered the note sued on to the plaintiff; and that, unless you believe from the evidence before you that said B. did make and sign and deliver said note to the said plaintiff, your verdict should be for the said defendant and against the plaintiff.

(b) The court instructs the jury that in an action on a promissory note in this court an answer on the part of the defendant in such an action consisting of a general denial, is a denial of the execution and delivery of the said note, and throws back upon the plaintiff the duty and burden of proving by a preponderance of the evidence that the note is genuine and was executed and delivered by said B. to the said plaintiff, and unless you believe from the evidence before you that the said B. did make and deliver the said note to the said plaintiff your verdict should be in favor of said defendant and against the plaintiff.

10—Ingram v. Reiman, 81 Ill. App. 123 (125).

11—Hall v. First Nat'l B'k of Emporia, 133 Ill. 234 (241), 24 N. E. 546.

"It cannot be fairly said that the instruction assumes any fact. If the defendants agreed to accept the draft before it was drawn for the cost of the cattle, and it was drawn, and the cattle were consigned to the defendants, they would be liable therefor as fully as though they had formally accepted the draft upon its presentation. Nor can the contention that the cattle for which the draft was drawn never reached defendants, but that an inferior lot was shipped to them, avail as against the plaintiff in this case. If it be true, as it probably is, that the cattle against which the draft was drawn ultimately were sold at Kansas

City, the bank knew nothing of the diversion of the consignment and the substitution of other cattle in their place or stead, and cannot be affected thereby, whether the diversion was accidental or by design. As said by the Appellate Court: 'Where a party agrees to accept and pay a draft for cattle bought and consigned to him, without requiring a bill of lading to be attached, he, and not the party who in good faith advances money on the draft relying on such promise to accept and pay, takes the risk of the stock being diverted while in transit either by accident or design.' It is apparent also that appellants suffered no injury in respect of this particular shipment as the cattle realized a sum in excess of the draft."

(c) The court instructs the jury that if you believe from the evidence before you that the promissory note in controversy was never delivered by B. in his lifetime, nor by the duly appointed executor of his estate after his death, then you are instructed that it is your duty to find your verdict in favor of the said B. estate and against the plaintiff.

(d) The court instructs this jury that the burden of proof is on the plaintiff to prove by a preponderance of the evidence that this note in controversy is the true genuine note of said B. deceased; that it was delivered to the plaintiff G. by said B., deceased, in his lifetime; and if the plaintiff has failed to so prove, then it is your duty to find your verdict in favor of the said defendant estate and against the said plaintiff.¹²

§ 2144. **Genuineness of Signature—Credibility of Witnesses—What Must Be Proved—Bona Fide Holder.** (a) Witnesses have testified as to their opinion respecting the genuineness of the signature to the note in suit, based upon their acquaintance with and knowledge of defendant's genuine signature. You will carefully consider the same, and give it the weight and value it is justly entitled to, taking into account the experience and knowledge of the witnesses about the matter concerning which the opinion is given. Such evidence, however, is regarded as unsatisfactory. It is, in fact, the result of a comparison of the signature in question with the genuine signature of the defendant as the same is remembered and impressed upon the mind of the witness whose opinion is so given. Such evidence ought not to overthrow positive and direct testimony of a credible witness who testifies from personal knowledge. It should not be disregarded in any case without good and sufficient reasons, such as would entitle you to disregard other evidence. In case of a conflict between the evidence of witnesses about the matter on which the opinion is given, it is important as corroborative evidence.¹³

(b) The jury are instructed that in determining the issue whether or not the signature "J." appearing upon the notes in evidence is the genuine signature of the president of the ——— Association at the date of the said notes, you are not bound, by the fact that the witness J. is the person whose signature is under consideration, to consider the testimony of said J. himself on this issue as conclusive or controlling; but you must consider the testimony of said J., and that of each and every other witness, bearing upon this issue, and give to such testimony and all the evidence such weight and credibility only as, in your judgment, and under your oath as jurors, you think the same entitled to. And in determining upon your verdict

12—Gandy v. Bissell's Estate, 5 Neb. (unof.) 184, 97 N. W. 632 (634).

13—Bruner v. Wade, 84 Ia. 698, 51 N. W. 251 (252).

No error is apparent on the face

of the instruction in the particulars of which complaint is made, and, if a more specific statement was desired, it should have been asked.

you must consider all the evidence, and every fact and circumstance in evidence before you; and if, after fully considering the testimony of all the witnesses, and all the facts and circumstances developed by the evidence, you are reasonably satisfied that said J., as president of said association, did sign the name "J." to said notes, then your verdict must be for plaintiffs.¹⁴

(c) Under the issues as joined, it is incumbent upon the plaintiff to prove, by a preponderance of the evidence, that the note in suit was executed by the defendant as alleged, that the plaintiff is the owner of the same and that said note is now due and unpaid.

(d) If you believe from the evidence that the note in controversy was not executed by the defendant—that is, that he never signed the same, or authorized his name to be placed thereto by any one, but that his signature was placed to said note without his knowledge or consent—then you should find for the defendant, although such note may have passed into the hands of a bona fide holder before maturity.¹⁵

§ 2145. **Receipt of Payment—Genuineness of Signature.** (a) The jury are instructed as a matter of law that the possession by the plaintiff of uncanceled promissory notes, is *prima facie* proof that such notes remain unpaid, and the burden of proving the payment of such notes is upon the person alleging they have been paid; and unless the jury believe defendant has proven by a preponderance of the evidence, the payment of the notes offered in evidence therein, verdict must be for the plaintiff.

(b) It is for the jury to determine from the evidence what the parties intended in making said receipts, and if they believe from the evidence that the parties did not intend to adjust, and did not adjust said notes, by said receipt, they will disregard said receipt.

The jury are instructed that the receipt introduced in evidence, if genuine, is *prima facie* evidence of payment in full of all moneys owing by S. to C. at the time of the making of said receipt, and in the absence of any rebutting proof, establishes the fact of payment in full of all money indebtedness of said S. to said C. existing at said time.

(c) If you believe from the evidence that the signature on the receipt introduced in evidence is the genuine signature of C., then you are instructed that said receipt is evidence of the highest and most

14—*Sanders v. North End B. & L. Assn.*, 178 Mo. 674, 77 S. W. 833 (836).

"This instruction practically told the jury that, under the issue as to whether the notes were signed by J. or not, his testimony was not conclusive, but that the jury must decide that issue according to all the evidence and facts and circumstances of the case. It would have

been error for the court to refuse to so declare. The testimony of no witness is conclusive upon a jury. Under the issues, it was impossible that J. should be anything else than prominent in the case, but it cannot be said that this instruction made him or his testimony 'unfavorably' prominent."

15—*First Nat. Bank v. Carson*, 30 Neb. 104, 46 N. W. 276 (277).

satisfactory character of the payment in full by S. to C. of all money due him from S. at the time of the making of said receipt.¹⁶

§ 2146. Fraud—Mistake—Unable to Read—Relying on Another.

(a) Although the jury may believe, from the evidence, that a person representing himself as the agent of B., the payee named in the note in suit, applied to the defendant to become an agent of the said B. for the sale of (seed drills), to be manufactured by the said B., and that it was agreed between said agent and the defendant (that defendant should only be required to pay an agreed share of the money collected by him from such sales, etc.), and that the defendant signed the note offered in evidence, supposing, at the time, that he was only signing certain papers constituting himself such agent, in pursuance of such agreement, and that he was deceived as to the character of such paper by the false and fraudulent representations of said agent in reference thereto, still the defendant will be liable upon said note, provided you further believe, from the evidence, that the defendant was able to read writing, and did not read the paper, or without unreasonable efforts in that behalf might have learned the true character of the paper, by procuring the same to be read to him by some person having no interest in deceiving him; and also that the plaintiff took the note in the ordinary course of business, for value and before due, and without any notice of the fraud practiced upon the defendant.¹⁷

(b) If defendant was induced to execute the note in question by false and fraudulent representations made to him, regarding the character of the instrument which he was desired to sign, so that he was led to believe the paper presented was a wholly different instrument, then the note is void as to him, and the plaintiff cannot recover thereon; provided, the jury further believe, from the evidence, that the defendant was not chargeable with any negligence which contributed to the deception.¹⁸

(c) If the jury believe, from the evidence, that the said B. was the agent for the plaintiff, and that he obtained said note from the defendant as such agent, and further, that when defendant signed the note he was unable to read writing readily, and requested the said B. to read the same to him (or the said B. offered to read the same to him), and did read it to the defendant, and if the jury further believe, from the evidence, that the said B., when reading said note, misread the same in any material part, and thus misled the defendant, and induced him to sign said note, when he would not otherwise have done so, then these facts would constitute fraud

16—Connelly v. Sullivan, 119 Ill. App. 469.

17—Ross v. Dolan, 29 Ohio St. 473.

18—DeCamp v. Hamma, 29 Ohio St. 467; Hubbard v. Rankin, 71 Ill. 129; Gibbs v. Linaburg, 22 Mich. 479.

and circumvention, within the meaning of the law, and the note is not binding upon the defendant, but is wholly void as to him.¹⁹

(d) That if a person is induced, through a fraud practiced upon him, to sign a promissory note, under the belief that it is an instrument of an entirely different character, and he is guilty of no negligence on his part, the note will be void in whosoever hands it may be, as having been obtained through fraud and circumvention.²⁰

(e) In this state, if the signature of a person is obtained to a note by the fraud or circumvention of the payee thereof, or of any person acting for him, then such a note will be wholly void, even in the hands of a bona fide assignee without notice; provided, it appears, from the evidence, that the maker of the note was not chargeable with any want of reasonable care and caution to avoid being imposed upon.²¹

(f) If the jury believe, from the evidence, that the defendant was induced to execute the note in question by false and fraudulent representations made to him, regarding the character of the instrument which he was desired to sign, so that he was led to believe the paper presented was a wholly different instrument, then the note is void as to him, and the plaintiff cannot recover thereon; provided, the jury further believe, from the evidence, that the defendant was not chargeable with any negligence which contributed to the deception.²²

§ 2147. Signature Obtained through Artifice or Fraudulent Representations. (a) Where one voluntarily signs a negotiable promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises and neglects to avail himself thereof, relying upon the representations of another, he cannot set up such ignorance and mistake against an innocent holder for value, who takes it before maturity. If, however, his signature was procured through artifice or fraudulent representations, without negligence on his part (under such circumstances that reasonable and ordinary care would not enable him to discover the fraud or imposition), then the maker is not liable on the note.²³

(b) Although the jury may find, from the evidence, that there was an agreement between the agent of the said B. and the defendant, to the purport and effect of the agreement set out in the last instruction, and that the defendant, by the false and fraudulent representations of the said agent, was induced to affix his signature to a printed blank which would be in the form of a promissory note when the

19—*Smentek v. Cornhauser*, 17 Ill. App. 266; *Smith on Fraud*, Sec. 209.

20—*Hubbard v. Rankin*, 71 Ill. 129. See *Van Brunt v. Langley*, 85 Ill. 281.

21—*Griffiths v. Kellogg*, 39 Wis. 290, 20 Am. Rep. 48.

22—*DeCamp v. Hamma*, 29 Ohio

St. 467; *Hubbard v. Rankin*, 71 Ill. 129; *Gibbs v. Linaburg*, 22 Mich. 479, 7 Am. Rep. 675.

23—*DeCamp v. Hamma*, 29 Ohio St. 467; *Mead v. Munson*, 60 Ill. 49; *State Bank v. McCoy*, 69 Penn. St. 204, 8 Am. Rep. 246; *Douglas v. Matting*, 29 Ia. 498, 4 Am. Rep. 238.

blanks were filled, but without any intention of executing a promissory note, and then delivered the said paper so signed by him to said agent, and gave him no authority to fill said blanks or to write anything over his signature, still the defendant would be liable in this case, if you further believe, from the evidence, that the agent, or the said B., afterwards filled the blanks in the form in which it is now written, and that the plaintiff took the note in the ordinary course of business for value and before due, without any notice of the fraud practiced upon defendant.²⁴

(c) The court instructs the jury, that fraud and circumvention, in obtaining the execution of a note, within the meaning of the statute, is not a fraud which relates to the quality, quantity, value or character of the consideration of the note. It means some trick, artifice or device, by means of which a person is induced to give the note in question, under the belief that he is giving an instrument of a different character; as when a person is induced to give a note under the belief that it is a receipt (or is induced to give a note for one amount, under the belief that it is for a different amount).²⁵

§ 2148. Must Use Reasonable Care to Avoid Imposition. That a person, before executing a promissory note, should use all reasonable and ordinary precautions to avoid impositions, and if able to read writing readily, he should examine it himself, and if not able to read, he should have it read to him, by some one in whom he has confidence, unless some trick or artifice is used, or false statement made, reasonably calculated to induce him to neglect such ordinary prudence.²⁶

§ 2149. Fraud May be Waived. If the jury believe, from the evidence, that after the giving of the note in question the defendant learned all the facts regarding, etc., and that after discovering such facts, and at or about the time the note came due, he requested the plaintiff to give him time to pay it, stating that he would pay it, and that the plaintiff, in pursuance of such request, did give him additional time after the note came due in which to pay it, then the defendant thereby waived the alleged fraud, and he will now be liable on the note, although at the time he asked for time to pay it he did not know that the facts, now set up as a defense, would make a defense in law.²⁷

§ 2150. Defendant Inducing Plaintiff to Buy Note—Estoppel. (a) If you believe from the evidence that the defendant, T., induced the plaintiff to buy or purchase the note or bond described by the defendant in his testimony, then your verdict must be for the plaintiff, notwithstanding the note may have been without consideration, not-

24—Ross v. Doland, 29 Ohio St. 473; Nebecker v. Cutsinger, 48 Ind. 473.

25—Latham v. Smith, 45 Ill. 25; 27—Rindskopf v. Doman, 28 Ohio St. 516.

26—Ross v. Doland, 29 Ohio St.

withstanding the note may have been procured by fraud and misrepresentations, and notwithstanding the fact that there may have been irregularities in the transfer of the note from R. to S.

(b) If you believe from the evidence that the defendant induced the plaintiff to buy or purchase the note or bond described in the evidence of defendant, T., then you must find your verdict for the plaintiff, even though the evidence should show that the article sold by R. to T. was not in fact patented.

(c) If the jury believe from the evidence that the defendant, T., requested or induced the plaintiff, G., to buy or purchase the note or bond described by the defendant in his testimony, your verdict must be for the plaintiff, provided you further find that plaintiff did buy the note or bond for value.

(d) Gentlemen of the jury, if you find from the evidence that the defendant, T., induced S. to buy the note or bond described in the testimony of the defendant, T., and he (plaintiff) parted with value for the note or bond, then your verdict must be for the plaintiff.

(e) If the jury believe from the evidence that the defendant procured or induced the plaintiff to buy the note or bond described by defendant, T., in his testimony, and you further find that the plaintiff parted with value for the said note or bond, then the defendant is estopped from setting up any kind or character of defense to this action which may have existed at the time the plaintiff purchased the note, and your verdict must be for the plaintiff.²⁸

§ 2151. Duress—Threats of Imprisonment. (a) Under the admissions and allegations made in these pleadings the only issue which you are called upon to try is this: Were the notes set out in plaintiff's petition given by the defendant by reason of the threats of imprisonment of the said C. W. N. made by the plaintiff or its agents to the defendant at the time said notes were given.

(b) The burden of proof in this case is upon the defendant, and after admitting the signing and execution of the notes before he can avoid the payment thereof, he must prove by a preponderance of the evidence that said notes were not given voluntarily by him but were obtained from him by such threats and duress as to overcome his will and understanding.

(c) You are instructed that duress, in order to avoid the payment of these notes, must be such an influence exerted by the plaintiff upon the defendant as to overcome his will and compel a formal assent to an undertaking when he really does not agree to it, and make that appear to be his free act, which is not his but is another's, imposed upon him through fear which deprives him of self control. And in this case, if you find that the defendant has proved by a preponderance of the evidence that he signed these notes wholly and

²⁸—*Tapscott v. Gibson*, 129 Ala. 503, 30 So. 23 (26). request properly applied to the evidence a familiar principle in the law of estoppel."

entirely on account of the fear which the plaintiff had created in his mind that his son-in-law, C. W. N., would be sent to the penitentiary unless the same were signed, and that N. would not be sent there if he did sign them, and the fear was such as to deprive the defendant of his understanding and deprive the transaction of its voluntary character, then you are instructed that such notes would be void, and your verdict should be for the defendant. If, however, you believe that the defendant has failed to prove that his mind was so overcome by such threats that he was deprived of reason and understanding then you will return a verdict for the plaintiff for the full amount of said notes sued on.²⁹

(d) Duress in the making of a contract exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him and unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence, and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest, however, must be wrongful and unlawful, and apparently about to be enforced.³⁰

§ 2152. **Duress—Abuse of Criminal Process—Lawful Imprisonment not Duress.** (a) The court instructs the jury, that if they believe, from the evidence, that the note sued upon, in this case, was obtained from the defendant through a wrongful perversion or abuse of criminal process, as explained in these instructions, then such note is void in the hands of the payee, or in the hands of any person taking it after maturity, or with notice of the manner in which it was obtained.³¹

29—*Nebraska Mut. Bond Ass'n v. Klee*, 70 Neb. 383, 97 N. W. 476-8.

"This state has already taken its place in line with the more advanced position upon this subject and that position is accurately set forth in the instructions given. To constitute duress sufficient to avoid a contract in this state the means adopted need only be of a character necessary to overcome the will and desire of the injured party, whether that person be above or below the average person in firmness and courage, and whether the means employed come clearly within the common law definition of duress or otherwise. In other words the law extends its protection to an individual without reference to whether he is strong or weak intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of ordinary intellect, firmness and courage. *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296 and cases cited; *Galusha v. Sherman*, 105 Wis. 263,

81 N. W. 495-501, 47 L. R. A. 417, 76 Am. St. 912. Under this view of the law the jury is properly directed to inquire into the mental capacity of the defendant, and whether the threats, whatever they were, probably deprived him of his free will, inducing him to make a contract that he would not otherwise have made, rather than to the particular threats made to see whether they meet with an arbitrary standard which may or may not be applicable to the person injured. The trial court committed no error in giving the instructions relative to the plea of duress."

30—*Kennedy v. Roberts*, 105 Ia. 521, 75 N. W. 363-5.

"Several objections are lodged against it, none of which are of sufficient importance to justify separate consideration. The instruction is an accurate definition of duress. See *Bish. Cont.* §715; 6 Am. & Eng. Enc. p. 64, and cases cited; *Baker v. Morton*, 12 Wall 150."

31—*Bowen v. Buck*, 28 Vt. 309;

(b) The jury are instructed, that a lawful imprisonment is not such duress as will, alone, enable a party to avoid a note made, while so imprisoned, on the ground of duress. And, in this case, although the jury may believe, from the evidence, that the notes in question were executed and delivered while the defendant was under arrest, still, if the jury further believe, from the evidence and under the instructions of the court, that such arrest was legal, then such arrest alone will not render the said notes void.³²

§ 2153. **Duress—Ratification of Voidable Note.** It is claimed by the defendant that the plaintiff, after the execution of said note, ratified the execution of same in the summer of ——. A contract that is fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all of the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter written by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the R. N. Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of fact would amount to a ratification of said note by plaintiff, and would prevent plaintiff from subsequently claiming that said note was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not to confirm the contract contained in said note, then said acts and statement would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with defendant to show that plaintiff ratified said note, by a preponderance of the evidence.³³

§ 2154. **Want of Consideration.** (a) It is contended on the part of the defendants that, if the said A. executed said note to the plaintiff, he did it upon consideration that the plaintiff would quit the patent-right business, go home and stay with his family, and

Fay v. Oatley, 6 Wis. 42; Cappell v. Hall, 7 Wall. 538; Schenk v. Phelps, 6 Brad. (Ill.) 612; Joyce on Comm. Paper, Sec. 108-109.

32—Heaps v. Dunham, 95 Ill. 583; Joyce on Comm. Paper, Sec. 108.

33—Kennedy v. Roberts, 105 Iowa 521, 75 N. W. 363 (365).

"Ratification is the adoption or confirmation of a voidable act. It

may be by express consent or by conduct inconsistent with any other hypothesis than that of approval. Intention to ratify, either explicit or presumed, is at the foundation of the doctrine of waiver or ratification. As applied to the facts of this case, we think the instruction was correct."

sell no more patent-rights or gates as long as A. lived; but the defendants further contend that the consideration of said note has failed, and that the plaintiff after making of said note sold patent-rights and gates, and therefore said note is void. The burden of proof is on the defendants to prove this contention by a preponderance of the evidence. In order to defeat the collection of said note under this branch of the defendants' contention, the defendants must prove by a preponderance of the evidence that all said consideration failed. If all the consideration of said note did not fail, then the note is valid, so far as the consideration is concerned.³⁴

(b) If you find from the evidence that the note in suit was executed by decedent, and that the sole consideration was that he would quit the patent-right business, and not sell any more patent-rights so long as X. should live, and go home and stay with his family, and sell no more patent-rights so long as said X. lived; and if you further find from the evidence that after the execution of said note, and during the lifetime of said X., said X. failed to keep his promise, and during said period did not quit the patent-right business, and did not go home and stay with his family, but during said period did engage in the patent-right business, did sell or attempt to sell patent-rights, either on his own account or as partner, assistant or agent of another,—then I instruct you the consideration of the note failed, and you should find for the defendants.³⁵

(c) The court charges the jury, that, if they believe from the evidence, that B. told the plaintiff that S. had bought stock in the patent-right; or that S. was going into the same; that such representations were false, fraudulent and material to the contract in this case; and that R. induced and controlled thereby, took stock in said patent-right,—then R. is not liable, and the note for \$—— to H. and transferred to B., cannot be offset against plaintiffs.³⁶

§ 2155. "Worthless" and "Doubtful" Notes. (a) In passing upon this question as to whether the notes were doubtful or worthless, you are entitled to take into consideration all the evidence introduced before you with reference to the property, financial standing, and credit of the several signers of the notes, and the words "doubtful" and "worthless" are to be understood by you as used in or

34—Ray v. Moore, 24 Ind. App. 480, 56 N. E. 937-8, citing *Hinshaw v. State*, 147 Ind. 387, 47 N. E. 157; *Anderson v. State*, 147 Ind. 451, 46 N. E. 901.

35—Ray v. Moore, *supra*.

"It puts upon appellees the burden of proving the entire failure of appellant to perform his entire promise. Nor can it be fairly said that it tells the jury that they may estimate the damages of an attempt to sell a patent-right."

36—Bomar v. Resser, 123 Ala. 641, 26 So. 510.

"And so with respect to the

second charge given for plaintiff. It hypothesized the facts set up in the fourth replication, and instructed the jury to find for plaintiff as to the matter involved in the third plea, if they believed the facts averred in said replication. Whether the patent was valuable or worthless was not averred in this replication, and the plaintiff was entitled to recover on the facts which were averred in it, if proved, wholly regardless of the consideration that the property for which plaintiff gave his note to H. was valuable or of no value."

dinary business transactions among men of ordinary business capacity.³⁷

(b) The court charges the jury that if they believe from the evidence, that the patent-right sold to R. is worthless, then B. cannot offset the note for \$——.³⁸

§ 2156. **Settlement of Old Debt—Consideration.** If H. owed to the plaintiff the amount of the note sued upon, and if the property of H. was in the control of the defendant, and if, at the request of H., the defendant gave to the plaintiff the note sued upon in satisfaction of the debt of H. to the plaintiff, and the plaintiff accepted the note as such satisfaction, then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due upon the note. What are the facts, the jury must determine from the evidence, and from that alone, and nothing in any instruction is to be taken as any intimation by the court as to what any of the facts are.³⁹

§ 2157. **Illegal Consideration.** (a) If the jury are reasonably satisfied from the evidence that the only or any material part of the consideration which defendant received for signing the notes sued on was an agreement or promise of F., the plaintiff, to keep secret the misuse or misappropriation of — dollars of F.'s money by S., and S. admitted in the presence of F. and defendant that he had misused or misappropriated \$—— of F.'s money, then the jury should find for defendant.

(b) If the jury are reasonably satisfied from the evidence that the agreement between F. and the defendant was that the notes were to be made due and payable one and two years after date, and that F. went off and wrote the notes, and came back to where S. was and said to defendant, S., "Here are the notes made out according to the agreement," and defendant, S., relying upon the truth of F.'s statement signed the two notes believing that they were due one and two years after date respectively, the jury must find for the defendant.

37—McCormick H. Mach. Co. v. Carpenter (unof.), 1 Neb. 273, 95 N. W. 617 (618).

"The instruction actually given by the court was not in itself erroneous, but should have been accompanied with an instruction plainly telling the jury the meaning of the contract upon the points in dispute."

38—Bomar v. Rosser, 123 Ala. 641, 26 So. 510.

"The charge given for the plaintiff asserts that if there was no consideration for the \$100 note, or in other words, that if the patent right for which the note was given, was worthless, the defendant could not set it off against plaintiff's demand. This was only to say that if the replication of want of consideration had been proved, de-

fendant could not recover on his plea of setoff; and there can be no doubt of the correctness of that proposition. If defendant desired to rely upon purchase of the note for value without notice, etc., he should have rejoined to this replication instead of taking issue upon it."

39—Harris v. Harris, 180 Ill. 157 (158), affg. 80 Ill. App. 310, 54 N. E. 180.

"We think it clear that the instruction lays down a correct proposition of law: In Underwood v. Hossack, 38 Ill. 208, it was held that an extension of time for the performance of an agreement or for the payment of a debt is sufficient consideration to support a contract."

(c) If the jury are reasonably satisfied from the evidence that F. agreed with and promised S., that if he would sign the notes sued on, he would keep secret the misuse of the \$—, and this was a material part of the consideration which caused defendant to sign the notes sued on, the jury must find for the defendant.⁴⁰

§ 2158. **Void Consideration—Sale of Liquor on Sunday—Note Executed on Sunday.** (a) The court instructs the jury that it is the duty of the jury to examine the books offered in evidence in connection with the almanac to ascertain if any items charged against the defendant were sold on Sunday, and if the jury believe from the evidence that any item in defendant's account was sold on Sunday to defendant, then they will find the verdict for the defendant.

(b) If the jury believe from the evidence that any item in defendant's account was sold to him on Sunday, then the jury will find for the defendant, whether the plaintiffs kept open doors at the time of the sale or not.⁴¹

(c) The jury are instructed that, to this complaint the defendant has answered by several paragraphs. First, he denies the execution of the note; second, he says he has paid it; third, that it was without consideration. In the fourth, fifth and sixth paragraphs he sets up against the note as a perfect defense that the note was executed on Sunday by himself, X., as surety for Y, and it was delivered by him on that day to his co-defendant, and that is as far as he has any knowledge of the note, and that he had received no consideration for the note. I hold upon that subject the law to be as follows: That, before the defendant can successfully make out that defense, he should have pleaded in writing, as well as proved by a fair preponderance of the evidence, that he not only executed the note on Sunday, but that it was delivered and accepted by the plaintiff on Sunday. The defendant, before he can avail himself of or properly make out the defenses to prevent a recovery on the note at the hands of the plaintiff, either upon the fourth, fifth or sixth paragraphs of answer, must have proven by fair preponderance of the evidence that this particular note in suit was executed by him upon Sunday, and that it was delivered by him upon that day, or some one representing him, to the plaintiff in this case. If the plaintiff then accepted the note, knowing these facts, then she stands in equal respect of the law as being guilty of a violation of the criminal statutes of this state. It is against the law to do common labor on the Sabbath day or the first day of the week, commonly called Sunday. If a note is executed upon the Sabbath day (I mean by execution signed), and it was afterwards delivered upon a Sabbath day, the plaintiff knowing the fact,—delivered to the plaintiff

40—Folmar v. Siler, 132 Ala. 297, 31 So. 719 (720).

Editor's note.—The term "reasonably satisfied" in the three preceding instructions, are held in some

states to mean more than a preponderance of the evidence and therefore erroneous.

41—Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699 (701).

on the Sabbath day,—then these facts being proven by a fair preponderance of the evidence, the plaintiff could not recover in the case.⁴²

§ 2159. **Consideration—Forbearing Suit on Note.** It is sufficient in this case for the plaintiff to prove a promise to forbear bringing suit upon the note in question for a reasonable time in consideration of the undertaking of M. to secure the signature on the said note of the two defendants, and the actual return of the note to the plaintiff bearing the signatures of the defendants, and that she thereafterwards actually forbore to bring suit for such reasonable time. This makes out a *prima facie* case for the plaintiff and sufficiently supports the declaration to maintain a judgment unless overcome by the testimony on the part of the defendants.⁴³

§ 2160. **Consideration—Settlement of Criminal Charge.** (a) The jury are instructed, that to render the forbearance of a claim, or an agreement not to enforce an alleged claim, a sufficient consideration for a promissory note, it is essential that the claim itself, if well founded, be sustainable, either at law or in equity, in favor of the person for whose benefit the note is given; and the court instructs the jury that a claim based upon the settlement of a criminal charge cannot be sustained, either at law or in equity, and if the jury believe, from the evidence, that the note in question was given in settlement of a criminal charge, then it is without consideration.⁴⁴

(b) If the jury believe, from the evidence, that at the time the note was given, the payee of the note, in good faith, claimed to have a lien upon said lands, for the payment of a debt due him, or some right or interest in or to the land, and that the note was given in consideration of his giving up and abandoning such claim, and that he did thereupon give up and abandon said claim, that would be a sufficient consideration for the note, and it would not matter, in such case, whether his claim was a valid one in law or not.⁴⁵

(c) A note given to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement.⁴⁶

§ 2161. **Accommodation Paper.** If the jury believe that the promissory notes sued on were given by the defendant to H., the

42—Conrad v. Kinzie, 105 Ind. 281, 4 N. E. 863 (864).

"When the instruction quoted is considered as an entirety, we think it was impossible for the jury to be misled thereby, or to infer therefrom what appellant's counsel claim was implied therein."

43—McMicken v. Safford, 197 Ill. 540 (543), aff'g 100 Ill. App. 102, 64 N. E. 540.

44—Heaps v. Dunham, 95 Ill. 583;

Parsons v. Pendleton, etc., 59 Ind. 36; Tucker v. Rank, 42 Ia. 80; O. & C. Rd. Co. v. Potter, 5 Ore. 228.

45—1 Chitty on Con., 29; Hindert v. Schneider, 4 Ill. App. 203.

46—Wolf v. Troxell's Estate, 94 Mich. 573, 54 N. W. 333.

"Under the facts of this case, no question of deceit being involved, this was a proper request, and should have been given."

decedent, for money due to said H. by him, or for money lent by said H. to defendant, then the plaintiff is entitled to recover. But, if the jury believe that no money was due by the defendant to said H., and that said notes were accommodation paper, given to said H. in order that he might raise money on them for his own purposes, or for some enterprise in which both were jointly interested, then the plaintiff is not entitled to recover.⁴⁷

§ 2162. **Payment—Burden of Proof.** (a) The burden of proof as to payment is on defendants, and, if the evidence is evenly balanced, your verdict on this point should be for the plaintiff.⁴⁸

(b) You are instructed that the burden of proof is on the plaintiff to show by preponderance of the evidence that the note was not paid as shown by the indorsement thereon, and that he purchased the same as alleged in his petition, and did not pay the same according to the said indorsement thereon.

(c) If you find from the evidence that the plaintiff paid the money on the note in controversy to the bank, and that the bank thereupon marked it "Paid," and that plaintiff accepted the same, and that nothing was said on the part of the bank about selling the same to plaintiff, then and in that event you will find for defendant.⁴⁹

§ 2163. **Payment—Deception as to Ownership of Note.** If you find from the evidence that plaintiff was at any time ready and willing to pay off the note, and that he so notified defendant, and if you further find from the evidence that the defendant was at the time of receiving such notice the owner of said note, then it was defendant's duty to act in good faith with plaintiff in his endeavor to pay same; and if you further find that defendant made any false statement to plaintiff in reference to the ownership or whereabouts of the note, for the purpose of deceiving him and preventing or delaying the payment thereof, and that plaintiff was deceived thereby, and was ready and willing to pay the same at all times until the note was finally paid, and that he used all reasonable endeavors to pay the same; and if you further find from

47—*McCarthy v. Harris*, 93 Md. 741, 49 Atl. 414.

48—*Turrentine v. Grigsley*, 118 Ala. 380, 23 So. 666-7.

"A party pleading or relying on payment has the burden of proof resting upon him, for, if the fact exists, it lies peculiarly within his knowledge. In all civil causes, if the testimony be evenly balanced, or in equilibrium, which is the same thing, then the verdict must be against the party on whom the burden of proof rests. *Vendeventer v. Ford*, 60 Ala. 610; *Lehman v. McQueen*, 65 Ala. 570. This is the proposition underlying the first instruction given at the instance of

the plaintiff, and in the giving of it the court below did not err."

49—*Riddle v. Russell*, 108 Ia. 591, 79 N. W. 363.

"It was error to refuse these. The first is specific as to the burden of proof, and the other announces a rule of law about which there can be no dispute, and which is not contained in the charge as given. The cancellation stamp on this note was presumptive evidence of payment. *Thomassen v. Van Wyn-gaarden*, 65 Iowa 687, 22 N. W. 927. Without regard to where the money was obtained that was given for this paper, or how it came to be paid, the burden was on plaintiff to overcome this presumption."

the evidence that by reason of the foregoing state of facts plaintiff was compelled to, and did, pay a greater amount of interest in paying off the note than he otherwise would have done,—then you will find the issues for the plaintiff, and assess his damages at a sum equal to the amount of such increased interest, not to exceed the amount sued for, that is, \$——.⁵⁰

§ 2164. Protest—Demand of Payment. (a) As a matter of law, if the holder of negotiable paper neglects to have it protested for non-payment by the maker, he thereby makes the paper his own and releases the indorser; and it makes no difference whether the maker was insolvent at the time the note came due, or that the indorser will sustain no injury from want of notice of non-payment by the maker.⁵¹

(b) Demand of payment from the maker and notice of non-payment of a promissory note may be waived by the indorser by any act of his calculated to put the holder off his guard and prevent him from treating the note as he otherwise would have done in regard to such demand and notice, and in this case, if the jury believe, from the evidence, that shortly before or about the time the note came due, plaintiff saw the defendant and spoke to him in reference to the payment of the note, and that defendant then stated (it's all right, I indorsed the note expecting to pay it when due, and will call in and see about it), this would amount to a waiver of a demand on the maker for payment and of notice to the defendant of non-payment.⁵²

(c) Any conduct on the part of an indorser, towards the holder of negotiable paper, calculated to put a person of reasonable prudence off his guard and to induce him to omit demand of payment from the maker or to give notice of the dishonor of the paper, will dispense with the necessity for taking these steps. And in this case, if the jury believe, from the evidence, that the defendant shortly before, and about the time the note became due (requested the plaintiff not to protest the note) or (that he said to the plaintiff that arrangement for the payment of the note was about being made, and to hold on, etc.), this would amount to a waiver of demand on the maker, for the payment of the note and of notice of non-payment.⁵³

§ 2165. Notes Given in Payment for Property. The giving of negotiable promissory notes on the purchase of property may well be treated as payments. The notes given by the plaintiff to N. & Co. on the purchase of the goods in controversy, being negotiable, can be enforced in the hands of innocent purchasers.⁵⁴

50—Rhodes v. Dickerson, 95 Mo. 395, 69 S. W. 47 (48).

51—Whitten v. Wright, 34 Mich. 92.

52—Love v. Vining, 7 Met. 212; Hale v. Danforth, 46 Wis. 554.

53—Boyd v. Bank, 32 Ohio St. 526; 30 Am. Rep. 624.

54—Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788 (790), 31 Am. St. 606.

§ 2166. **Assignee After Maturity.** An assignee of a promissory note, who takes it after maturity, is supposed to have notice of any defense that exists against it; and such defense may be made as effectually against the note in the hands of such assignee as if the suit had been brought by the original payee of the note.⁵⁵

§ 2167. **Assignee with Notice of Suspicious Facts.** (a) The court instructs the jury, that where a person takes an assignment of a promissory note for a valuable consideration, before due, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against all the world, and it will not be subject to the defense of a failure of consideration in his hands.⁵⁶

(b) A party who takes commercial paper, by indorsement before due, without knowledge of any defects of title or defense to it, and for a valuable consideration, will take a good title unaffected by any defense going to the consideration. Suspicion of the defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, will not defeat his title, or let in a defense not otherwise admissible against it in his hands. That result can only be produced by bad faith on his part.⁵⁷

(c) Although the assignee of a note may have reason to know, or may actually know, when he buys it, for what the note was given, that fact alone will not make him chargeable with knowledge of special defenses to it; and in this case, although the jury may believe, from the evidence, that the plaintiff knew when he purchased the note that it was given for, etc., yet, if the jury further believe, from the evidence, that he had no notice of the special defense now set up by the defendant, and had no reason to suspect it, he will not be chargeable with notice of the same; nor can he be effected with such defense in this suit; provided, the evidence shows that the said note was assigned to him in good faith for a valuable consideration, before the maturity of the note.⁵⁸

(d) If the jury believe, from the evidence, that the plaintiff, before he purchased said note, knew, or, as an ordinarily prudent man, had reason to believe, from circumstances brought to his knowledge, before he purchased it, that the defendant had, or claimed to have, a defense to said note, or to some part of it, then the plaintiff is not an innocent holder of said note.⁵⁹

§ 2168. **What Constitutes Innocent Holder.** (a) The notes sued on in this case are negotiable instruments, the execution of which is admitted by the defendant. You are instructed that a holder of negotiable paper, who takes it before maturity, for a valuable

55—Davis v. Neleigh, 7 Neb. 78.

56—Lafayette Sav. Bk. v. St. Louis, 4 Mo. App. 276.

57—Comstock v. Hannah, 76 Ill. 531; Goodman v. Harvey, 4 A. & E. 870; Goodman v. Simonds, 20

How. 343-363; Farrell v. Lovett, 68 Me. 326, 28 Am. Rep. 59.

58—Borden v. Clark, 26 Mich. 410.

59—1 Pars. on N. & B., 253; Edwd. on B. & N. 320.

consideration, in the usual course of trade, without knowledge of facts which impeach its validity, between antecedent parties, holds it by a good title. To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. The burden is on the defendant to establish by a preponderance of evidence that plaintiff is not a bona fide holder of the note sued on, as defined in this instruction.⁶⁰

(b) A holder of negotiable paper, who takes it before maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity, as between antecedent parties, is deemed a bona fide holder.⁶¹

(c) In order to defeat a promissory note in the hands of a bona fide holder, it is not enough to show that he took it under circumstances calculated to excite suspicion. To defeat the note in his hands it must appear, by a preponderance of evidence, that he was guilty of a want of honesty, or of bad faith in acquiring it.⁶²

(d) The jury are instructed, that a party about to take an assignment of a promissory note, is under no obligation to call upon the maker and make inquiry as to possible defenses, which he may have, but of which the purchaser has no notice, either from something appearing on the face of the paper, or from facts communicated to him at the time.⁶³

§ 2169. Bona Fide Holder—What Vitiates Note in His Hands.

(a) The note sued upon is in the form of a negotiable instrument, and a holder of negotiable paper who takes it before maturity, for a valuable consideration in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, is deemed a bona fide holder.

(b) In order to defeat a promissory note in the hands of a bona fide holder, it is not enough to show that such note was without consideration, nor is it sufficient to show that such purchaser took it under circumstances calculated to excite suspicion. To defeat such note in the hands of a bona fide holder, it must appear by a preponderance of the evidence, that such purchaser was guilty of a want of honesty, or of bad faith in acquiring it. A party purchasing a promissory note is under no obligation to call upon the maker, and make inquiry as to possible defenses which he may have, but of which the purchaser had no notice, either from something appearing on the face of the paper, or from facts communicated to

60—First Nat. Bank. v. Carson, 30 Neb. 104, 46 N. W. 276 (277).

61—Crosby v. Tanner, 40 Ia. 136; Twitchell v. McMurtrie, 77 Penn. St. 383.

62—Johnson v. Way, 27 Ohio St.

374; Shreeves v. Allen, 79 Ill. 553; Hamilton v. Marks, 63 Mo. 167;

Moorehead v. Gilmore, 77 Penn. St. 118, 18 Am. Rep. 435.

63—Houry v. Eppinger, 34 Mich. 29; Murray v. Beckwith, 81 Ill. 43.

him at the time, nor to make inquiry as to the identity of the indorser, in order to recover from the maker of such note.

(c) If you believe from the evidence that the defendant executed and delivered the note in question as alleged, and you further find from the evidence that the plaintiff purchased the same before maturity in the usual course of business, and for a valuable consideration, without knowledge of any facts which might impeach its validity as between said _____ and the person to whom the note was given, then the plaintiff is entitled to recover, although you may believe from the evidence that said _____ never received any consideration for said note.

(d) If you find from the evidence that defendant executed and delivered the note in suit, and that the plaintiff purchased the same before maturity for a valuable consideration, and without a knowledge of facts which might impeach its validity, as between _____ and the person to whom the note was given, the plaintiff is entitled to recover in this suit, although you may believe from the evidence that the defendant was swindled in the transaction, and received no consideration for said note; and the plaintiff if he purchased the note as aforesaid, was not required in law to call upon and inquire of the defendant if he had a defense to said note, but might rely upon the genuineness of the maker's signature to the note as a right to recover thereon.

(e) If you find that he did so execute said note as aforesaid, he must suffer the loss, if any, he has sustained thereby; because it is a maxim of the law that, where one of two persons must be made to suffer from the fraud or misconduct of another, the one who placed it within the power of such person to perpetuate the fraud or to do the wrong must bear such loss.⁶⁴

§ 2170. Assignee with Notice from an Assignee without Notice.

(a) The court instructs the jury, that if a note is assigned before maturity, for value, to a bona fide purchaser, without notice, the assignee will be protected against any defense by the maker; and a subsequent purchaser of the note from such assignee, even with notice, will succeed to his rights in the same condition he held them. A defense to the note having been once cut off by its transfer to an innocent holder, will not be revived by a subsequent assignment to a person with notice of such defense.⁶⁵

(b) The law is, that the holder, for value, of a negotiable note, may recover on the note, though he was fully informed, when he received it, that it was obtained from the maker by fraud; provided, such holder obtains it from a person who took the note, in the usual course of business, in good faith and for value.⁶⁶

§ 2171. Innocent Purchaser—Taken as Security for Pre-existing Debt. The court instructs the jury, that the indorsee of a promis-

64—The above series of instructions approved in *Crosby v. Ritchey*, 56 Neb. 336, 76 N. W. 895 (896).

65—*Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 540.

66—*Riley v. Shawacker*, 50 Ind.

sory note, before its maturity, taking it as security for a pre-existing debt, in the ordinary course of business and without any express agreement, is deemed a holder for a valuable consideration, and he will hold the note free from defenses on the part of the maker, of which he had no notice at the time of taking it.⁶⁷

§ 2172. **Note Taken in Payment or Part Payment.** If the jury believe, from the evidence, that before the alleged transfer of the note, the said A. B. (payee) was indebted to the plaintiff, and that the said note was assigned to the plaintiff by the said A. B. in (part) payment of such an indebtedness, then the plaintiff is what is known in law as an innocent purchaser of the note; provided, the jury further believe, from the evidence, that he took the note in good faith before it became due, and without any notice of the alleged defense thereto.⁶⁸

§ 2173. **Evidence Necessary to Overcome Presumption.** A person questioning the good faith of the assignment of a note in the hands of an assignee, in order to defeat a recovery, must prove, by a preponderance of evidence, that the assignment was made after the maturity of the note, or that it was not made for value, or that the transaction was for some fraudulent purpose; or that the assignee took the note with notice of the defense interposed by the defendant.⁶⁹

§ 2174. **Note Stolen, or Wrongfully Obtained.** (a) If the jury believe, from the evidence, that the defendant signed the note in question, in this case, knowing that it was a note, and they also believe, from the evidence, that the note was assigned to the plaintiff, for a valuable consideration, before the maturity of the note, in the regular course of business, and that the plaintiff, at the time of such assignment, had on notice that the note was not properly put into circulation, then the plaintiff will have a right to recover, even though the jury may further believe that the note was obtained from the maker by fraud (or that it was stolen from, etc.,) or otherwise wrongfully put into circulation.⁷⁰

(b) That, although the jury may believe, from the evidence, that the note in question was lost by the defendant (or stolen from him), or otherwise wrongfully put into circulation, still, if the jury further believe, from the evidence, that the plaintiff took the same, in the regular course of business, in good faith, for a valuable consideration, and before maturity, and without any knowledge of the

592; Bunker on Neg. Instruments 113.

67—Bowman v. Millison, 58 Ill. 36; Bunker on Neg. Instruments 72; Carlisle v. Wishart, 11 Ohio 172; Outwrite v. Porter, 13 Mich. 533; Stevens v. Campbell, 13 Wis. 375; Contra: Stalker v. McDonald, 6 Hill

93; Cook v. Helms, 5 Wis. 107; Grimm v. Warner, 45 Ia. 106.

68—Clary v. Sarrency, 58 Ga. 83.

69—Cook v. Helms, 5 Wis. 107; Depuy v. Schuyler, 45 Ill. 306.

70—Clark v. Johnson, 54 Ill. 296; Barsen v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Joyce on Comm. Paper, sec. 394.

manner in which it got into circulation, then the plaintiff is entitled to recover on the note.⁷¹

(c) The court instructs the jury, that in order to defeat the title of the purchaser, for value, before maturity, of stolen negotiable promissory notes, the circumstances proved must be such as to lead the jury to believe, from the evidence, that the purchase was made in bad faith, or with notice of the want of title in the seller; mere proof of negligence or want of caution on the part of such a purchaser, is not alone sufficient to defeat his title or right to recovery.⁷²

§ 2175. **Endorsement in Blank.** A note is said to be indorsed in blank when the indorser's name is written on the back, leaving a blank over the name for the insertion of the name of an indorsee, or person to whom it is indorsed. And when the indorsement remains in blank, the note may be passed from person to person by mere delivery, and the last holder has the right to fill in his own name as indorsee, and bring suit on the note in his own name, as though it had been indorsed directly to him in the first instance.⁷³

§ 2176. **Endorsement Before Maturity—Innocent Holder.** (a) The court instructs the jury that it is the law that when a note is assigned before maturity for a valuable consideration, and without actual notice to the purchaser of facts and circumstances which might constitute failure of consideration or fraud and circumvention in the procuring the execution of said note, then the defendant is not allowed to plead such failure of consideration or such fraud and circumvention in the procuring the execution thereof, and your verdict should be made without regard to such defense.⁷⁴

(b) In order to defeat a promissory note in the hands of a bona fide holder, it is not enough to show that he took it under circumstances calculated to excite suspicion. To defeat the note in his hands it must appear by a preponderance of evidence that he was guilty of a want of honesty or bad faith in acquiring it. Where a person takes an assignment of a promissory note, for a valuable consideration before due, and is not guilty of bad faith, even though he may be guilty of gross negligence he will hold it by a title valid against the world, and it will not be subject to the defense of failure of consideration in his hands.

(c) The indorsement of a negotiable promissory note before maturity, taking it as payment or security for a pre-existing debt, and without any express agreement, is deemed a holder for valuable consideration, in the ordinary course of trade, and holds it free from latent defenses on the part of the maker.⁷⁵

71—Franklin, etc., v. Heinsman, 1 Mo. App. 336; Shiply v. Carroll, 45 Ill. 285; Murry v. Lardner, 2 Wall. 110; Gavagan v. Bryant, 83 Ill. 376.

72—Duchess Co. Mutual Ins. Co. v. Hachfield, 73 N. Y. 226.

73—2 Parsons on Notes and Bills, 19, 20; Palmer v. Marshall, 60 Ill. 289.

74—Snively v. Meixsell, 97 Ill. App. 365 (367).

75—Webber v. Indiana Nat. Bank, 49 Ill. App. 336 (341, 342).

§ 2177. **Indorsement—Intention—Liability.** The jury are instructed, that it is immaterial in this case what idea the defendant had as to his liability as the indorser of the note; such liability is fixed by law. And if the jury believe, from the evidence, that the defendant sold and indorsed the note, then he is liable, in law, as the indorser, whatever may have been his intention or understanding at the time.⁷⁶

§ 2178. **Liability of Endorser—Due Diligence—Bringing Suit.**

(a) Due and reasonable diligence means such diligence as a careful, diligent and prudent man would ordinarily exercise in the conduct of his own affairs.⁷⁷

(b) The jury are instructed, that when the indorsee seeks to recover against the indorser of a promissory note, upon the ground that a suit against the maker would have been unavailing, the fact, if proved, that the maker was solvent when the note came due, will not affect the liability of the indorser, if it appears, from the evidence, that such solvency did not continue until a suit against the maker could have been made availing.

If the jury believe, from the evidence, that on or about, etc., the defendant sold to the plaintiff the note shown in evidence, and then and there assigned the same to him by writing his name on

"The Supreme Court in the case of *Comstock v. Hannah*, 76 Ill. 530, say: 'We accept the doctrine of cases as correct in principle which assert the law on this subject to be, "when the bill has passed to the plaintiff without any proof of bad faith in him there is no objection to his title," and "suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part." And the duty of active inquiry does not rest on the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.' The counsel for plaintiffs in error cite cases of the Supreme Court decided at an earlier date than the *Comstock* case, apparently supporting their contention that notice of facts that would excite inquiry, are of themselves, in the eye of the law, notice of the ultimate fact which such inquiry would have disclosed as to an assignee of a note before maturity; yet in the above case it is said, 'there never has been more than

an incidental assumption without discussion that such was the rule,' and that, 'we find nothing in previous decisions which should conclude us from adopting what, upon investigation, we are satisfied is the correct doctrine in principle, and the prevailing rule of law.' See also *Shreeves v. Allen*, 79 Ill. 553, and *Murray v. Beckwith*, 81 Ill. 43, which last case holds that 'the maker, who alone is responsible for the paper becoming an article of commerce, can not be permitted to defeat payment unless he can establish the fact that the holder purchased with notice. The sale and transferring of promissory notes enter largely into the commerce of the country, and public policy requires that an innocent purchaser should be protected.' The doctrine of the *Comstock* case is approved in the case of *Siegel v. Chicago T. & S. B.*, 131 Ill. 569 (574), 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. 51.

"It is clear from these authorities, the general doctrine that notice of facts that should excite inquiry, in the minds of a reasonably prudent person is notice of the ultimate fact which such inquiry would have disclosed, is not applicable to the assignment before maturity of such commercial paper as notes."

⁷⁶—*Hawkinson v. Olson*, 48 Ill. 277.

⁷⁷—*Judson v. Gookins*, 37 Ill. 286.

the back thereof, and that at the time when the note came due the said makers, and each of them, was insolvent, and have ever since remained so, and that a suit against them would have been unavailing, then the jury should find the issues for the plaintiff, and assess the damages at the amount due on said note.⁷⁸

(c) Due diligence does not consist in merely instituting a suit against the maker and prosecuting it to judgment, but, in order to show this diligence, the assignee must show, by a preponderance of evidence, that within the county where the suit was commenced he had used all the means that the law has furnished him with to enforce the collection of the money.⁷⁹

(d) The law does not require that the assignee of a promissory note shall resort to the extraordinary process of attachment against the maker before he can hold the indorser liable. If the jury believe, from the evidence, that before the maturity of the note in question the maker of the note had removed from this state and was residing out of this state when the note became due, then the plaintiff had a right to proceed at once against the defendant and hold him responsible for the payment of the note.⁸⁰

(e) The court instructs the jury, that in order to hold the indorser of a note liable on his indorsement, it is not necessary that the holder, in his attempts to collect the note of the maker, should have used the greatest possible degree of diligence. He is only required to use such diligence as is ordinarily used by careful, vigilant and prudent men in the conduct of their own affairs.⁸¹

(f) If the jury believe, from the evidence, that the plaintiff instituted a suit on the note in question, against the maker, in the circuit court of the county in which the maker resided, at the first term of said court after the note became due, and prosecuted said suit to final judgment, with all reasonable diligence, and, after the judgment was obtained, with all reasonable diligence caused an execution to issue thereon, and placed the same in the hands of the sheriff of said county; and if the jury further believe, from the evidence, that the sheriff at no time during the life of the execution, was able to find property of the defendant in the execution to satisfy the same, or any part thereof, and that at the expiration of (ninety) days from its issue he returned the execution, no property found, then the plaintiff is entitled to recover in this suit the amount of said note and interest, provided the jury further believe, from the evidence, that during the time the sheriff so held the execution, and ever since that time, said A. B. has had no property, out of which

78—*McClurg v. Fryer*, 15 Penn. St. 293; *Grilligham v. Bordman*, 29 Me. 79; *Bull v. Bliss*, 30 Vt. 127; *Stone v. Rochefeller*, 29 Ohio St. 625; *Miles v. Linnell*, 97 Mass. 298. But see *Bosman v. Akerly*, 39 Mich. 710, 33 Am. Rep. 447; *Frank v. Marsh*,

29 Wis. 649; *Craig v. Perkins*, 40 N. Y. 181, 100 Am. Dec. 469.

79—*Holbrook v. Vibbard*, 2 Scam. 465; *Wilson v. Binford*, 54 Ind. 569.

80—*Titus v. Seward*, 68 Ind. 456.
81—2 Pars. on N. & B., 141.

the said execution, or any part thereof, could have been made by the exercise of ordinary diligence on the part of the plaintiff.⁸²

(g) The court further instructs the jury, that the fact that a suit against the maker would have been unavailing, may be proved by any other legal testimony, as well as by the return of an execution against him unsatisfied. To entitle the plaintiff to recover, it is only necessary for the jury to believe, from the evidence, that such suit would have been unavailing.⁸³

§ 2179. **Return of the Officer not Conclusive.** The court instructs the jury, that the executions, introduced in evidence with the returns thereon indorsed of no property found, are not alone conclusive evidence that the maker of the note was at the time insolvent, or that due diligence against him would have been unavailing.⁸⁴

§ 2180. **Extension of Time.** (a) An agreement to extend the time of payment of a note, after its maturity, made between the holder and the principal maker, to have the effect to release the indorser, must be a valid agreement, upon a sufficient consideration, and one that the maker could enforce as against the payee or holder of the note. An agreement to continue to pay usury (or an agreement to continue to pay interest at the rate mentioned in the note) would not be such an agreement, and it would not release the indorser.⁸⁵

(b) In this case the defendant A. B. is sued as an indorser or guarantor of the note in question, and if the jury believe, from the evidence, that at or about the time the note became due, the plaintiff, without the knowledge or consent of the defendant, made an agreement with the maker of the said note to extend the time of payment of the same for the period of, etc., provided the maker of the said note would pay interest thereon in advance for such extension, at the rate of, etc., and that, in pursuance of such agreement, such advance interest was then and there paid, then such agreement to extend the time of payment of said note would release the defendant from all liability thereon.⁸⁶

§ 2181. **Endorsement Constitutes Prima Facie Liability.** This is an action brought by the plaintiff against the defendant upon an endorsement made on a certain promissory note. It is admitted that this endorsement by the defendant constitutes a prima facie liability of the defendant to the plaintiff for the amount of the note, or the balance due thereon.⁸⁷

§ 2182. **New Party—New Consideration.** That where one becomes a party to a note, after it has once been delivered, and the consid-

82—Judson v. Gookin, 37 Ill. 286.

83—Roberts v. Haskell, 20 Ill. 59.

84—Roberts v. Haskell, 20 Ill. 59.

85—Stewart v. Parker, 55 Ga. 656;

White v. Whitney, 51 Ind. 124;

Myers v. First Nat. Bk., 78 Ill.

257; Weed & Co. v. Oberreich, 38

Wis. 325; Fawcett v. Freshwater, 31 Ohio St. 637.

86—Randolph v. Flemming, 59 Ga. 776.

87—First Nat'l Bk. v. Anderson, 5 Ind. T. 118, 82 S. W. 693 (694).

eration passed, he will incur no liability unless there is a new consideration for his promise and a re-delivery of the note.⁸⁸

GUARANTORS AND SURETIES.

§ 2183. Guarantor—Liability Generally. The jury are instructed, that a guarantor of a promissory note cannot be made liable beyond the express terms of his contract or undertaking. He has a right to prescribe the terms and conditions upon which he will assume a responsibility, and no other person has a right to change those terms, not even with the design of diminishing the probabilities of ultimate loss by the guarantor; and it is wholly immaterial whether the change is advantageous to him or not.⁸⁹

§ 2184. When an Endorser Becomes a Guarantor—Illinois. The court instructs you that where the name of a person, not the payee of a note, is indorsed on it, before delivery, in the absence of evidence to the contrary, he indorses it as a guarantor.⁹⁰

§ 2185. Guarantor Liable Until Note is Paid—Delay Will Not Release. (a) That the liability of the guarantor of a note continues until the note is paid or barred by the statute of limitations, and he is not discharged by a mere delay in bringing suit against the maker.⁹¹

(b) That mere delay, on the part of a creditor, to proceed against the principal debtor, does not discharge the surety; all that the surety has a right to require is that the creditor should do no affirmative act to its prejudice.⁹²

§ 2186. Release of Guarantor—Extending Time—Surety. (a) The court instructs the jury, that a valid agreement between the payee or holder and the principal maker of a promissory note, for an extension of the time of payment of the note for a definite and fixed period of time, after its maturity, will release the guarantor (or surety), unless he consents to the agreement at the time it is made, or afterwards ratifies it.⁹³

(b) If the jury believe, from the evidence, that the defendant A. B. signed the note in question merely as surety and for the accommodation of the other makers of said note, and that this fact was known to the plaintiff when the note was given, and that at or about the time that the note came due, the plaintiff, without the knowledge or consent of said A. B., made an agreement with the other makers of said note to extend the time of payment of the same for the period of (sixty days), in consideration that such

88—Williams v. Williams, 67 Mo. 661; Briggs v. Downing, 48 Ia. 550.

89—Ryan v. The Trustees, 14 Ill. 20.

90—Glickauf v. Kaufmann, 73 Ill. 37.

91—Parkhurst v. Vail, 73 Ill. 343.

92—Villars v. Palmer, 67 Ill. 204.

93—Danforth v. Simple, 73 Ill. 170; Tracey v. Quillon, 65 Ind. 249; Barron v. Cady, 40 Mich. 259; Kittle v. Wilson, 7 Neb. 76.

other makers of said note would pay interest thereon, in advance, for such extension, at the rate of, etc., and that in pursuance of such agreement such advance interest was then and there paid, then such agreement to extend the time of payment of said note would release the defendant A. B. from all liability thereon.⁹⁴

(c) In this case the defendant A. B. is sued as an indorser or guarantor of the note in question, and if the jury believe from the evidence, that at or about the time the note became due, the plaintiff, without the knowledge or consent of the defendant, made an agreement with the maker of the said note to extend the time of payment of the same for the period of, etc., provided the maker of the said note would pay interest thereon in advance for such extension, at the rate of, etc., and that, in pursuance of such agreement, such advance interest was then and there paid, then such agreement to extend the time of payment of said note would release the defendant from all liability thereon.⁹⁵

§ 2187. Consideration for Guaranty. (a) The jury are instructed, as a matter of law, that to render a contract of guaranty binding, it must be upon a good or valuable consideration. If a guaranty is placed upon the back of a note, at the time of its execution or before its delivery to the payee, so as to form a part of the original transaction, then no other consideration need be shown.

(b) But when the name of a guarantor is written on the back of a note, after its delivery to the payee, then, to make the guarantor liable, the jury must believe, from the evidence, that there was some new consideration for such guaranty.⁹⁶

§ 2188. Insolvency May be Proved by Other Evidence—Return of Officer not Conclusive. (a) The court further instructs the jury, that the fact that a suit against the maker would have been unavailing, may be proved by any other legal testimony, as well as by the return of an execution against him unsatisfied. To entitle the plaintiff to recover, it is only necessary for the jury to believe, from the evidence, that such suit would have been unavailing.⁹⁷

(b) The court instructs the jury, that the executions, introduced in evidence with the returns thereon indorsed of no property found, are not alone conclusive evidence that the maker of the note was at the time insolvent, or that due diligence against him would have been unavailing.⁹⁸

§ 2189. Guaranty—Acceptance—Knowledge Thereof. If the guaranty was in fact accepted by the plaintiff, and knowledge of such acceptance of it was in fact brought home to the defendant, it is sufficient without proof of notice from the guarantee. If the jury find that defendant had knowledge of the acceptance, if any, of

94—Fawcett v. Freshwater, 31 Ohio St. 637; Winne v. Colorado Springs Co., 3 Col. 155.

95—Randolph v. Flemming, 59 Ga. 776.

96—Joslyn v. Collinson, 26 Ill. 61; Ware v. Adams, 24 Me. 177; White v. White, 30 Vt. 338.

97—Roberts v. Haskell, 20 Ill. 59.

98—Roberts v. Haskell, supra.

the guaranty, no special notice of the acceptance of the guaranty or the offer of guaranty was necessary.⁹⁹

§ 2190. **Co-Sureties—Partners.** You are instructed by the court that if you find from a preponderance of all the evidence that on March 20, 1899, the plaintiff and defendant, as co-sureties and the only sureties for S. Bros., signed the note for \$2,000 to G., and that thereafter the said note was wholly paid out of the proceeds of the property of plaintiff, and that defendant paid no part of the same, and that after the making of said note plaintiff bought from S. his interest in the firm of S. Bros., you must find for plaintiff and against defendant for an amount equal to one-half of the amount paid to satisfy the said G. note, together with interest on said amount of one-half from date of such payment at 7 per cent per annum until this time; unless you further find, from a preponderance of all the evidence, that plaintiff at the time of purchase of said S.'s interest, or thereafter, made a special promise to assume as a partner the indebtedness of said firm of said G.¹⁰⁰

§ 2191. **Lien of Surety—Title to Goods.** (a) If you find from the evidence that O. became surety for R. & J. to the Bank of N. for \$350.00 and that he was to have a lien upon the cotton that was ginned by R. & J. in case the said note became due and O. had to pay it, this would not prevent a recovery of the cotton in controversy by the interveners and the L. Cotton Company unless you further find that said L. Cotton Company bought said cotton with notice of said lien.

(b) If you find from the evidence that the plaintiff was not the absolute owner of the cotton in controversy, but was to hold the same or proceeds thereof until he was made safe or repaid for advances made by him, such would not be sufficient but the cotton must have been actually delivered to him, and if you find the cotton in controversy was bought and ginned in the ordinary course of business and the same was never delivered to O., he cannot sustain his action against the interveners, and you will find for the interveners.¹

§ 2192. **Lien of Surety—Bills of Lading Held by Title to Goods.** (a) If you find from a preponderance of the evidence herein, the defendant requested O. to become their surety to the bank and the defendants further gave him certain sums of money and it was further agreed he should hold the money and disburse the same for seed cotton, for them, and hold the bills of lading therefor and collect the proceeds of sale and repay his advances and was later on to receive compensation for services rendered, such an arrangement would not be sufficient to give such a title to the plaintiff as would

99—Mosaic Tile Co. v. Chiera, 133 Mich. 497, 95 N. W. 537 (538).

100—Strickler v. Gitchel, 14 Okla. 523, 78 Pac. 94 (96).

1—O'Neal v. Richardson, 78 Ark. 132, 92 S. W. 1117.

entitle him to recover in this suit and you should find for the interveners.

(b) If you find from a preponderance of the evidence herein in order to secure the means to run their gin, the defendants, R. & J., induced the plaintiff to go upon their notes to the bank for money and to make advances to them from time to time, they agreed the plaintiff should hold all funds received by defendants, and all cotton shipped or sold by them was delivered to plaintiff by the delivery of the bills of lading therefor, and the plaintiff was to be repaid for his advances and for the money borrowed on his name, and he was to receive a compensation therefor, such an arrangement would not confer the title of the cotton upon the plaintiff.²

§ 2193. Possession of Personal Property Evidence of Ownership.

(a) The court instructs the jury, that when one person sells personal property to another, and retains possession of it, the property would be subject to levy under an execution against the seller, so long as it remains in his possession, such a sale being, in law, fraudulent, as against subsequent purchasers in good faith, and execution creditors of the seller.³

(b) If the jury believe, from the evidence, that M., the maker of the note, was in possession of, and had under his control, personal property during, etc., such possession is presumptive evidence that he owned said property and unless the jury believe, from the evidence, that some one else owned the property, the presumption would be that it really belonged to the said M.⁴

2—O'Neal v. Richardson, 78 Ark. 132, 92 S. W. 1117.

3—Bump on Fraud. Con., 60.

4—Roberts v. Haskell, 20 Ill. 59.

CHAPTER LXXIV.

NUISANCES.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2194. Nuisance—Maintenance of factory—Injury to residence neighborhood.</p> <p>§ 2195. Nuisance—Injury to adjoining property through smoke and soot from stationary steam engine.</p> <p>§ 2196. Nuisances—Liability of owner for maintaining dangerous pit.</p> | <p>§ 2197. Nuisance—Damage to church property through establishment of railroad shops in neighborhood.</p> <p>§ 2198. Nuisance—Polluting stream—Depositing coal refuse from mine into stream—Admonishing jury to render verdict according to the evidence and law.</p> |
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§ 2194. **Nuisance—Maintenance of Factory—Injury to Residence Neighborhood.** If the jury find from the evidence that the defendant conducted his factory in the ordinary business way, and in a locality where there are other factories, then the wrong complained of must be naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits to entitle the plaintiff to recover, and the injury complained of must be material and direct from conduct of the defendant, without the operation of the other factories and manufacturing establishments, situate in the neighborhood of the dwelling of the plaintiff.¹

§ 2195. **Nuisance—Injury to Adjoining Property Through Smoke and Soot from Stationary Steam Engine.** (a) Even if the jury shall find from the evidence that defendant erected on his premises a stationary steam engine, and used it in connection with his business of making cigar and other light wooden boxes, such erection and use is not in itself a nuisance, and the plaintiff is not entitled to recover, if the jury believe defendant caused to be constructed and used, in connection with the machinery on his said premises, the best appliances to prevent the escape of smoke, steam, cinders, soot and dust from his said premises, and that said appliances did prevent such escape to the extent of not seriously interfering with the plaintiff in the comfortable enjoyment of his property or substantially damaging the same, and no unreasonable noise or vibration was caused by defendant's engine or machinery on his said premises.

(b) If the jury find from the evidence that defendant did not wrongfully cause to issue from the smokestack on his premises large quantities of offensive and unwholesome smoke, soot, and other matter, which fell upon the ground and penetrated the premises of

1—Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294 (295).

plaintiff, and that defendant did not, by noise and disturbing vibration produced on his premises, render the rooms in plaintiff's dwelling unfit for habitation, and did not cause plaintiff to lose tenants, and the plaintiff was not unable to use the yard on his premises for laundrying and other purposes, by reason of the causes above mentioned, and the defendant by use of the steam engine and machinery on his premises, and the manner he conducted his business, did not otherwise materially or substantially injure plaintiff's property or seriously interfere with his comfort or enjoyment thereof, then defendant, under the pleadings and evidence in this case, is entitled to a verdict in his favor.²

§ 2196. **Nuisances—Liability of Owner for Maintaining Dangerous Pit Adjoining Highway.** The jury are instructed that the owner of property adjoining a highway is bound to use his property so as to do no harm to persons lawfully traveling upon the highway, and if he digs a pit near a sidewalk, so that one, in passing, falls in, and is thereby injured, he is liable for damages to the person injured, provided said pit or cellar was not properly guarded, and such pit-falls or cellars, if contiguous to the public street, are nuisances for which the owner of the land is liable.³

§ 2197. **Nuisance—Damage to Church Property Through Establishment of Railroad Shops in Neighborhood.** (a) The suit is brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in consequence of the acts of the defendant. It is the personal discomfort more than anything else which is to be considered in regard to the assessment of damages. Now, I can very easily imagine, and it may often happen, that the construction of an improvement such as this might increase the value of property in the vicinity, and I am not sure at all that the erection of this workshop in that neighborhood may not really have increased the intrinsic value of the property belonging to this congregation. The evidence in the case does not, as it seems to me, show that this property has been depreciated by the construction of that workshop. We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus increase the population in that neighborhood, and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might have increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages.

(b) If you find all these facts, then, this shop is a nuisance, and

2—Lurssen v. Lloyd, *supra*.

3—Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572 (574).

a special annoyance to the congregation that worship in this church. Every man has a right to the comfortable enjoyment of his own house, in which enjoyment a neighbor cannot molest him; and no grant conferred by proper authority upon any corporation to construct a railroad along the public streets, or to build shops, can be construed as authorizing that company to construct a nuisance. If the work is of such a necessary kind that the company must have it, if the shop is of that character, and yet is a nuisance in the neighborhood, they must find some other place to put it. No legislature has a right to establish a private nuisance.

(c) If the jury find from the evidence that the engine house of the defendant is used for receiving its engines when they come into the city after a trip; that after coming into said engine house such engines more or less frequently blow off their steam, and that such blowing off of steam makes a loud and disagreeable noise, and that such engines are put in the stalls in said house, and emit the smoke from their fires through the chimneys of said house, and that the said engine house is used for the purpose of a shop in which to make a certain class of repairs upon the engines and cars of the defendant, and that a loud noise of hammering is created in making such repairs, and that said engine house is also used to receive coal for coaling the engines of defendant before going out, and that they are all coaled therein and also get up their fire and steam therein, and further find that said house is located so near the church of the plaintiff that the noises from said engine house can be distinctly heard inside of said church, and also that the chimneys of said engine house are so constructed that the tops thereof are not as high as the tops of the windows of said church, and shall further find that the smoke from said chimneys is thrown through said windows into said church in such quantities and so generally as to be a common annoyance and inconvenience to the congregation worshipping therein, and that said noises in said yard of blowing off steam are of daily and nightly occurrence, and are so distinctly heard in said church on Sundays, as well as the days of the week, as to annoy, harass, and inconvenience the congregation when engaged in divine worship therein, and that they disturb and greatly inconvenience the congregation in the enjoyment of said building as a church, then the plaintiff is entitled to recover, provided the jury find that said church was located upon the spot where it now is before the defendant established its engine house in its present position, and provided the jury further find that the annoyance and inconvenience to said congregation from the smoke and noises above mentioned occurred within three years before the date at which this suit was brought, and provided further that said noises and smoke depreciated the value of the property of the plaintiff within the period from April 1st, 1874, to March 22d, 1877.⁴

4—Baltimore & Potomac R. R. Co. v. Fifth Bap. Church, 108 U. S. 317 (322), 2 S. Ct. 719.

§ 2198. Nuisance—Polluting Stream—Depositing Coal Refuse from Mine into Stream—Admonishing Jury to Render Verdict According to the Evidence and Law. (a) Jurors in the trial of cases of this kind are apt to allow their feelings of sympathy on one side, or their feelings possibly of prejudice upon the other, to induce them to render verdicts which the law does not consider proper, because those verdicts are frequently contrary to the law and contrary to the evidence in the case. Therefore verdicts rendered in that way come to naught. They have to be set aside by this court, or, by an act of Assembly. Now, a higher court can reduce the verdicts where they are improper and not according to the evidence. The court of last resort has said in discussing these cases that the trial judge (myself in this case would be the trial judge) sits in some respects as a thirteenth juror, and it is his duty to see that the verdict rendered by a jury should be in accordance with the law and in accordance with the weight of evidence in the case, and not contrary to both or either. In a very recent case the Supreme Court has used this language in discussing a question of that kind. 'It is the clear duty of the court, in peremptory language, to hold the jury down to lawful damages, and, if they disregard the instructions of the court to set aside their verdict.' You see what my duty is, unless you, in reaching a verdict, are governed by the evidence and the law. If the court—the trial judge—in its instruction as to the law, makes a mistake or an error, in its view of the law, there is a remedy. Either side can appeal to the higher court, and whatever error the trial judge has been guilty of can be corrected by the Superior court or the Supreme court of this Commonwealth, reversing the court below. You are the judges of the fact under the law. And if you render a verdict contrary to the evidence and contrary to the law, under the peremptory instructions which the Supreme Court has laid down to us, it becomes my duty to set aside your verdict. Well, neither you nor the court want such a conclusion of a trial which has occupied now eight days. Therefore, knowing the tendency of jurors to allow their sympathies and their feelings to sway them in rendering verdicts, I have thought proper to draw your attention to your duty under the evidence, and to our duty if you disregard your duty, as we have been told it is our duty to do by our courts of last resort.

(b) The Supreme Court of this state has said: "There is no doubt that the owner of coal lands may mine and remove his coal in a proper manner. If the drainage from the mines falls into and pollutes a stream of water, and injuriously affects lower riparian owners, this fact alone does not impose liability upon the owner of the coal." Bear that in mind: that if the drainage of the mines falls into and pollutes a stream of water, and injuriously affects lower riparian owners—in this case the plaintiff was a lower riparian owner, owing property below where the Panther Creek emptied into

the Little Schuylkill river—that this fact alone does not impose liability upon the owner of the colliery.

(c) It is apparent to all of us that the mining operation of Schuylkill county are important not only to the owners of the collieries, but to all who live in this county; that, if you were to shut up the mines of the county and stop mining operations, it might work a great deal of injury to most all other persons or all other property situated within the county. The great industry of the northern part of the county is its mining operations, and, practically speaking, without those mining operations in the upper end of the county a great deal of that territory would be useless, possibly almost uninhabitable. Therefore, when you come to pass upon the negligence of the defendant and upon the rights of the plaintiff, it is your duty to bear in mind that the defendant company has a legal right to mine its coal upon its own land. The very fact of there being collieries in this county is an important thing to the people who live in those neighborhoods. It is right for you to take that into consideration, with the evidence in the case.⁵

5—*Bachert v. Lehigh Coal & Navigation Co.*, 208 Pa. 362, 57 Atl. 765 (766).

"The main objection urged to the charge is that it tended unduly to lead and control the jury, and was prejudicial to the plaintiff. In the part objected to, the learned judge told the jury that their verdict should be founded on the evidence, and cautioned them not to be influenced by sympathy or prejudice, and in clear and distinct, but temperate, language, admonished them that a disregard of this instruction might lead to a setting aside of their verdict. This was followed by a statement of the rights of each of the parties, the ground of the defendant's liability, if any existed, and the measure of damages in the event of a recovery. It was the right of the judge to give this caution, and, in view of the passions and prejudices that grew out of the labor troubles in the anthracite coal regions in 1902, and which existed at the time of the trial, it may be said to have been his duty to charge as he did. In the recent case of *Stevenson v. Ebervale Coal*

Co., 203 Pa. 316, 52 Atl. 201, it was said: 'It was the clear duty of the court below in peremptory language to hold the jury down to the lawful damages, and, if they disregarded the instruction, to set aside the verdict. What the plaintiff had a right to ask was that he be made whole, not rich. It was the duty of the court to see that this result, and this alone, was reached. This is always the rule. It was much better to reach a proper result by an instruction in advance of the verdict than by granting a new trial after it had been rendered. No question of fact was taken from the jury, and there was no attempt to control them, except by pointing out their plain duty, and advising them that their action was subject to review, and that it was not in the power of a jury to plunder at will.' The charge, as a whole, was a very clear and able presentation of the questions involved, and of the law applicable to them, and we see no valid ground of objection to any part of it."

CHAPTER LXXV.

PARTNERSHIP.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2199. Who are partners in fact.</p> <p>§ 2200. Partnership—How formed.</p> <p>§ 2201. As to third persons—Holding oneself out as partner.</p> <p>§ 2202. One cannot be made partner against his will.</p> <p>§ 2203. Articles not originally embraced in co-partnership added subsequently.</p> <p>§ 2204. Power of partner to bind the firm.</p> <p>§ 2205. Partner borrowing money, signing note in firm name.</p> <p>§ 2206. Partner engaging in outside transaction—Liability of other partners.</p> <p>§ 2207. What acts do not bind—Partner using partnership credit or effects.</p> <p>§ 2208. Note given by one partner—Presumption — Burden of proof.</p> | <p>§ 2209. Acts beyond the scope of partnership business.</p> <p>§ 2210. Whether individual or partnership funds—Amount of indebtedness of firm.</p> <p>§ 2211. Liability of particular partner—Credit extended on account of partnership in firm—Dissolution notice of.</p> <p>§ 2212. Sale of partnership interest Misrepresentation—Fact or opinion.</p> <p>§ 2213. Bound by ratification.</p> <p>§ 2214. When fraud of one partner binds the other.</p> <p>§ 2215. Notice of dissolution necessary, when—Sufficiency of notice.</p> <p>§ 2216. Action for accounting—When may sue at law.</p> |
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§ 2199. **Who are Partners, in Fact.** The court instructs the jury, that to constitute a partnership, as to the alleged partners themselves, it is only necessary that each of them contributes either capital, labor, credit or skill and care, or two or more of these, and that all the contributions are put together into a common stock or common enterprise, to be used for the purpose of carrying on business for the common benefit.¹

§ 2200. **Partnership—How Formed.** A partnership can only exist as between the parties themselves, in pursuance of an express or an implied agreement, to which the minds of the parties have assented; the intention, or even belief, of one party alone cannot create a partnership without the assent of the others.²

§ 2201. **As to Third Persons—Holding Oneself Out as Partner.** (a) Persons may be co-partners, as to third persons, and brought within all the liability of partners, as to third persons, who are not partners as between themselves; and they will be so regarded, as to third persons, if they voluntarily and knowingly so conduct themselves as to reasonably justify the public, or persons dealing with them, in believing that they are partners.³

1—Mechem on Part. § 1; Pars. on Part. 54.

2—Phillips v. Phillips, 49 Ill. 437; Mechem on Part. § 3.

3—Speer v. Bishop, 24 Ohio St. 598; Dailey v. Coons, 64 Ind. 545.

(b) The court instructs the jury, that if a person voluntarily and knowingly holds himself out, by his acts or language, to the public or to third persons, as the partner of another, and a third person deals with that other on the faith of an existing partnership, then the person so holding himself out will be liable as a partner to the person so dealing, notwithstanding there was, in fact, no such partnership.⁴

(c) When persons hold themselves out to the world by their acts or declarations as partners, they will be liable as such, whether such relation really exists between them or not. If they knowingly permit their names to appear in the style of the firm in the business cards, notices or advertisements of the firm, they cannot escape liability for debts contracted in the name of the firm.⁵

§ 2202. **One Cannot be Made Partner Against His Will.** A person cannot be made a partner against his will; so that if one does not consent to become a partner, and does not permit his or her name to be used as a partner, there can be no ground of liability as such.⁶

§ 2203. **Articles, not Originally Embraced in Co-partnership, Added Subsequently.** The court instructs you as law that, if you should believe from the evidence in this case that the business of steam fitters' supplies is not embraced in the articles of co-partnership in evidence, and that A., without the knowledge or consent of the defendant B., purchased and sold steam fitters' supplies in the name of said firm of A. & Co. to such an extent and for such a length of time, openly and publicly, that the dealing in steam fitters' supplies became a business within the apparent scope of the business conducted by A. & Co., then and in that case the defendant B would be bound for the contracts made by said firm in that line of business precisely the same as if it had been embraced in the articles of partnership, as to third parties dealing with the firm in good faith, without knowledge of the terms of the articles of partnership.⁷

§ 2204. **Power of Partner to Bind the Firm.** Every partner possesses full and absolute authority to bind all the partners, by his acts or contracts, in relation to the business of the firm, in the same manner, and to the same extent, as if he held full power of attorney from them; and as between the firm and third parties, who deal with it, in good faith and without notice, it is a matter of no consequence whether the partner is acting fairly with his co-partners, in the transaction, or not, if he is acting within the apparent scope of his authority, and professedly for the firm.⁸

4—Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; Peck v. Lusk, 38 Ia. 93; Story on Part. § 64; Jenkins v. Crane, 54 Wis. 253; Mechem on Part. § 69.

5—Ellis v. Bronson, 40 Ill. 455; Barnett, etc., v. Blackmar, 53 Ga. 98; Dodd v. Bishop, 30 La. An. Part 2d, 1178.

6—Providence Mach. Co. v.

Browning, 70 S. C. 148, 49 S. E. 325 (326).

7—Crane Co. v. Tierney, 75 Ill. App. 354 (357), reversed 175 Ill. 79, 51 N. E. 715.

Note.—The above instruction was approved by both the Appellate and Supreme Courts. The reversal was on other points in the case.

8—Pahlman v. Taylor, 75 Ill. 629;

§ 2205. Partner Borrowing Money, Signing Note in Firm Name.

(a) The court instructs the jury that, if the plaintiff has failed to prove, by a preponderance of the evidence, that F. & L. received money, and if the jury further believe from the evidence that the money was loaned to L. personally, then in such case, the jury should find a verdict for the defendant F., and that should be the verdict of the jury although it may appear, from the evidence, that L. at each of the times of making the several loans as security therefor gave to the plaintiff a note signed F. & L.

(b) The court instructs the jury that, before the plaintiff can recover in the case, he must prove by preponderance of the evidence either one or both of the following: First, that the firm of F. & L. actually received his money; second, that he actually loaned it in good faith to the firm of F. & L., and in good faith received their note therefor, the law being that, if the money was not received by the firm, and the money was loaned to L. personally, then the plaintiff cannot recover, although at the time of making such loans the plaintiff as security for his loans took from L. a note or notes signed by F. & L.⁹

§ 2206. Partner Engaging in Outside Transaction—Liability of Other Partners. (a) If a partnership, as such, engages in any transaction outside of its regular business, the acts and declarations of one partner, if proved, with respect to that transaction, bind the firm as much as though they were made with respect to some matter in the course of its ordinary and customary business.¹⁰

(b) The court instructs the jury that one partner cannot, without authority from the other members of the firm, bind the firm on an implied contract, not in any way connected with the business, or for its benefit; provided, that if the partner declared when he hired the horse that it was for the benefit of the partnership, then the firm would be responsible.¹¹

§ 2207. What Acts do not Bind—Partner Using Partnership Credit or Effects. The jury are instructed, that one partner has no right to apply the funds or securities, or other effects of the partnership, in payment of his own private debts, without the consent of his co-partners; and if he does so, the creditor dealing with such partner, if he knows the circumstances, will be deemed to have acted in bad faith, and in fraud of the other partners, and the transaction will be void as to them.¹²

First Natl. Bank v. Carpenter, 41 Ia. 518; Lindley on Part. (2nd Am. Ed.) 124.

9—Funk v. Babbitt, 156 Ill. 408 (413), aff'g 55 Ill. App. 124, 41 N. E. 166.

10—Sandilands v. Marsh, 2 B. & Ald. 673; Boardman et al. v. Adams et al., 5 Ia. 224.

11—Sweet v. Wood, 18 R. I. 386, 28 Atl. 335. The hiring of the horse

"was within the scope of the partnership business, and one partner is the agent of his co-partner in all matters within the scope of the partnership business. As such agent, his declarations are sufficient to bind his co-partner, whether in accordance with the fact or not."

12—Pars. on Part. 111; Story on Part. § 132.

§ 2208. Note Given by One Partner—Presumption—Burden of Proof. You are further instructed that, when a note, or other security, is given in the name of the firm, by one partner, in payment of his own individual debt, the law raises a presumption that it was done without the knowledge or consent of the other partners, and the burden of proving such knowledge and consent, is upon the party alleging it.¹³

§ 2209. Acts Beyond the Scope of Partnership Business. The court instructs the jury, that each member of a firm is presumed to have, and has, authority to bind the firm within the scope of the partnership business; but in order to bind the firm in matters outside of or beyond the apparent scope of the partnership business, the authority of one partner to act for the firm, must be shown, precisely the same as if any other person had performed the act.¹⁴

§ 2210. Whether Individual or Partnership Funds—Amount of Indebtedness of Firm. (a) The court charges the jury that if the money deposited by the plaintiff with R. & Co. was the individual money of the plaintiff, and was not taken from the partnership business of W. & Co., then defendant was not interested therein, and acquired no right therein, or on account thereof, against the plaintiff.

(b) The court charges the jury that whether they believe what Mr. H. says about the amount of indebtedness is a question for the jury, and if, from all the facts and circumstances in the case, they are not reasonably satisfied what he says about the amount is correct, they may find that he has not shown a reasonable certainty what the indebtedness of the firm was.¹⁵

§ 2211. Liability of Particular Partner—Credit Extended on Account of Membership in Firm—Dissolution, Notice Of. The jury are instructed to find for the plaintiff if they find from the evidence that R. was a member of the firm of P., R. & Co. at the time that firm commenced business, or afterwards before the indebtedness sued on was incurred, and the plaintiff extended the credit for the claim sued on in the faith of his belief that R. was such a partner, then and in that event the said R. would be liable for the amount of the note sued on and interest, unless he gave actual notice to the plaintiff, or gave notice generally by advertisement in some newspaper published in the locality or county, of the dissolution of the partnership before said indebtedness was incurred.¹⁶

§ 2212. Sale of Partnership Interest—Misrepresentation—Fact or Opinion. (a) The court charges the jury that a statement that

13—Mechem on Part. § 174; Story on Part., § 133.

14—McNair v. Platt, 46 Ill. 211; Boardman v. Adams, 5 Ia. 224; Lindley on Part. (2nd Am. Ed.) 124.

15—Hooper v. Whitaker, 130 Ala. 324, 30 So. 355 (356).

16—Rector v. Robins, 74 Ark. 437, 86 S. W. 667.

"This instruction covers the testimony on both sides and substantially states the law. Simonds v. Strong, 24 Vt. 642; Amidown v. Osgood, 24 Vt. 278, 58 Am. Dec. 171; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Moline Wagon Co. v. Rummell (C. C.), 12 Fed. 658; Kennedy v. Bohannon, 11 Mon. B. (Ky.) 118."

there was belonging to the firm a stock of goods amounting to \$——, was, if made, the statement of a fact, and not the statement of an opinion.

(b) The court charges the jury that a statement that there was enough money in the bank to pay the debts of the firm was, if made, the statement of an opinion.

(c) The court charges the jury that if W. told H. the firm of W. & Co. owned a \$—— stock of goods, and if there was only \$—— of goods in the stock, and if H. was ignorant of the truth of this matter, and in ignorance thereof, if H. acted on the belief that the statement was true and made the purchase, then the defendant would not be entitled to have the duebill credited with one-half the difference between \$—— and \$——.¹⁷

§ 2213. Bound by Ratification. The jury are instructed, that while one partner cannot rightfully appropriate partnership funds to the payment of his individual debts, yet, if he does do so, his acts, when they come to the knowledge of the other members of the firm, should be clearly and promptly repudiated; and if, when such knowledge comes to the other members of the firm, they do not, within a reasonable time thereafter, repudiate the transaction, they will be deemed to have ratified it, and will be bound to the same extent as though they had expressly authorized it in the first instance. Whether, in this case, the debt in question was paid out of partnership funds by the said A. B., and whether the other partners had knowledge of that fact, and whether they did repudiate the transaction, and notify the said ——, of that fact, as soon as it could reasonably be done, are all questions to be determined by the jury, from a consideration of all the evidence in the case.¹⁸

§ 2214. When Fraud of One Partner Binds the Other. The court instructs the jury, that if a fraud is committed by one partner, in the name of the firm, in the course of the partnership business, it will bind the firm, even though the other partners had no knowledge of the fraud, or participation in the transaction to which it relates.¹⁹

§ 2215. Notice of Dissolution Necessary, When—Sufficiency of Notice. (a) The court instructs the jury, that the law is, that when a partnership is dissolved, and one of the partners continues the business as before, the retiring partner, to protect himself from future liabilities, should see that public notice of such dissolution, or of his retirement, is given in some manner, so as fairly and reasonably to notify the public of the fact of his withdrawal from the firm; and if he does not do so, persons dealing with the partner who continues the business, without actual notice of the dissolution, will have a right to rely on the credit of the original firm.²⁰

17—Hooper v. Whitaker, 130 Ala. 324, 30 So. 355 (356).

18—Marine Co., etc., v. Carver, 42 Ill. 66; Evans v. Howell, 84 N. C. 460; Lindley on Part. (2nd Am. Ed.) 143.

19—Lindley on Part. (2nd Am. Ed.) 147; Story on Part. § 131.

20—Mechem on Part. § 260; Pars. on Part. 410.

(b) When one partner withdraws from the firm, and the business is continued by the other partners, the retiring partner should see that persons who have formerly dealt with the firm have reasonable notice of such retirement, or else those who continue to deal with the firm, without actual notice of his withdrawal, can hold him liable as a member of the firm.²¹

(c) The court instructs the jury that whether sufficient notice had been given of the dissolution is a question for you to determine; that defendant was not bound to publish notice in any of the C. papers; he was only bound to give actual notice to such parties there as had dealt with the partnership. But defendant was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and the question for you to determine is whether the defendant gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note; if he did not, he would still continue liable.²²

§ 2216. **Action for Accounting—When May Sue at Law.** Although the jury may believe, from the evidence, that the plaintiff and defendant were formerly partners, and that the account sued on grew out of their partnership business, and is claimed by the plaintiff as the balance due to him, upon a settlement of such business, still, if the jury further believe, from the evidence, that the partnership had been dissolved, and the partnership business settled between the parties, and a balance struck and agreed upon as the amount due to the plaintiff, before the commencement of this suit, then the plaintiff can maintain a suit for such balance.²³

21—Holtgreve v. Wintker, 85 Ill. 470; Davis v. Willis, 47 Tex. 154; Haynes v. Carter, 12 Heisk. (Tenn.) 7, 27 Am. Rep. 749; Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246; Gilchrist v. Brande, 58 Wis. 184.
22—Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336.

"The instruction respecting notice was correct. No court can deter-

mine for all cases what shall be sufficient notice and what shall not be; the question must necessarily be one of fact. Publication of notice of dissolution in a local newspaper is common, but it is not the only method in which notice can be given."

23—Wycoff v. Parnell, 10 Ia. 332; Ridgway v. Grant, 17 Ill. 117.

CHAPTER LXXVI.

REAL ESTATE—MISCELLANEOUS.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2217. Whether fixtures are personal or real property.</p> <p>§ 2218. Building personal property, when.</p> <p>§ 2219. Growing crops—When personal property.</p> <p>§ 2220. Sale of land—Title to growing crops.</p> <p>§ 2221. Sale of real estate—Withdrawal of offer.</p> <p>§ 2222. Conveyance of real estate—Valuable consideration.</p> <p>§ 2223. Assumpsit for value of party wall.</p> <p>§ 2224. Failing of party wall—Duty of owner to protect and maintain.</p> <p>§ 2225. Widow's title to real estate—Separation of spouses during life.</p> <p>§ 2226. Title to real estate—Purchase by father with money of children.</p> | <p>§ 2227. Oral contracts of real estate—What must be shown to take it out of Statute of Frauds.</p> <p>§ 2228. Notice of defect in title—Heirs—Facts calling for inquiry.</p> <p>§ 2229. Drains—Duty to keep open and free from obstructions.</p> <p>§ 2230. Special assessment—Railroad company restricted in the use of its right of way.</p> <p>§ 2231. Special assessment—What may be considered in determining special benefits.</p> <p>§ 2232. Taxation—Fixing valuation.</p> <p>§ 2233. Accretions defined—Riparian proprietor's right.</p> <p>§ 2234. Homestead—Place of residence—Ejectment—Measure of damages—Series.</p> |
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§ 2217. **Whether Fixtures Are Personal or Real Property.** The court instructs the jury that one of the material issues of this case is, whether the boiler and fittings in question passed by deed of the real estate to the defendants as fixtures to the real estate, or were, at the time of the execution and delivery of such deeds, personal property only. If the jury believe, from the evidence in this case, under the instructions given you, that the boiler and fittings in question were not so attached to the said real estate as to become fixtures thereto, but were personal property only, then the same do not pass by conveyance of the real estate.¹

§ 2218. **Building Personal Property, When.** (a) The court instructs the jury, that where a building is owned by one person, and the land on which it stands is owned by another, then the building is personal property; and it will always remain personal property until the ownership of the land, and that of the building, unite in the same person.²

(b) Where one wrongfully places a building on the land of another, in such a way as to attach it to the ground, the building will

1—Hacker v. Munroe & Son, 176 Ill. 384 (394), aff'g 61 Ill. App. 420, 23. 52 N. E. 12. 2—Crippin v. Morrison, 13 Mich.

belong to the owner of the land; but where one rightfully and lawfully places his building on the land of another, without any intention of having it belong to the owner of the land, then it will not belong to such owner.³

(c) If the jury believe, from the evidence, that R. was the owner of the land on which the building in question stands, and that M., as the tenant of R., placed the building on the land with R.'s consent, and with the understanding or agreement with R. that M. might remove the same at the expiration of his lease, then the building would be personal property, and it would not be conveyed by a conveyance of the land, so long, at least, as M. and those holding under him continued in possession of the property, under the lease.⁴

(d) If the jury believe, from the evidence, that before the house in question was built, the plaintiff and defendant entered into a contract, by which defendant agreed to purchase the land where the house was built from the plaintiff, and, under that contract, went into possession of the land and erected the house thereon, with the intention of having it remain there as a permanent fixture to the land, then the house, as soon as it was built, became a part of the real estate, and in law belonged to the owner of the land, and any alleged contract authorizing the defendant to remove the house therefrom, would have to be in writing to be binding on the plaintiff.⁵

§ 2219. **Growing Crops—When Personal Property.** The court instructs the jury, that growing crops, in law, are regarded for some purposes as personal property, and for some purposes as a part of the real estate upon which the crops are growing. As between seller and purchaser of real estate, they are regarded as belonging to the real estate, and will pass with the conveyance of the land to the purchaser, unless they are expressly reserved in writing.⁶

§ 2220. **Sale of Land—Title to Growing Crops.** The court instructs you that upon the question of ownership of growing wheat while it is growing upon the land, I instruct you that a sale or transfer of the title to the land carries with it the ownership in the crops growing thereon at the time of the transfer of the title to the land.⁷

§ 2221. **Sale of Real Estate—Withdrawal of Offer.** The plaintiffs allege that A. proposed to buy the property provided an abstract of title and deeds conveying the property to him from plaintiffs were furnished prior to ——. Now, if you believe from the evidence that prior to ——, said A. withdrew his offer to buy the property, and that the failure of plaintiffs to furnish an abstract of title to the property, and to execute a deed from them to A. before ——, was not the reason A. withdrew his offer before

3—Cooley on Torts 307; Adams v. Goddard, 48 Me. 212.

4—Cooley on Torts 306; Barnes v. Barnes, 6 Vt. 388; Smith v. Benson, 1 Hill. 176.

5—Crum v. Hill, 40 Ia. 506; Groff v. O'Conner, 16 Ill. 421.

6—Carpenter v. Jones, 63 Ill. 517.

7—Abbott v. Abbott, 68 Kan. 322, 75 Pac. 1040.

——, but that A. withdrew his offer before ——, for some other reason, then I charge you your verdict must be for defendant.⁸

§ 2222. Conveyance of Real Estate—Valuable Consideration. The court instructs the jury that if they believe that W. as a consideration for the deed from C. and wife to him, conveyed to them, or either of them, other land of value, or executed his negotiable promissory note to them, then such consideration is, within the meaning of the law, a valuable consideration.⁹

§ 2223. Assumpsit for Value of Party Wall. The court instructs the jury that notice of the existence of a party wall agreement given to an agent of a purchaser operates as a notice to such purchaser, and, if the jury believe, from the evidence, that J. M. conducted the negotiations for the purchase and conveyance of lot 9 in Higgins subdivision, etc., one of the lots testified about, for and in behalf of his brother, A. M., and with his consent; and, if the jury further believe, from the evidence, that said J. M. at the time of the purchase of said lot had notice, actual or constructive, of the existence of a party wall agreement, then such notice operated as a notice to A. M. of the existence of such agreement and contents thereof, if, by reasonable enquiry, he could have learned of its contents.¹⁰

§ 2224. Falling of Party Wall—Duty of Owner to Protect and Maintain. (a) The court instructs the jury that under and by the terms of said party wall contract between the said plaintiff, K., and the said B., the said B. and his heirs were the sole owners of the entire east wall of said burned building, and had the sole and exclusive control thereof until such time as the said plaintiff, K., exercised her right to pay for and use some portion of said wall, and that prior to the times the said K. exercised her right to pay for and use portions of said wall she had no right, title or interest in said wall or any part thereof.

(b) The court instructs the jury that under the terms of the party wall contract introduced in evidence between the plaintiff, K., and B., deceased, the said B. was, during his lifetime, and his heirs were after his death, the sole and exclusive owners of the portion of the east wall of said burned building not paid for by the said plaintiff, K., and that as to such portion of said east wall of said burned building as you find from the evidence was not paid for by the said K. under such party wall contract, the said defendants are charged with the same responsibility for the protection, care and

8—Cohen v. Cohen, 26 Tex. Civ. App. 315, 63 S. W. 544 (546).

9—Phoenix Ins. Co. v. Neal, 23 Tex. Civ. App. 427, 56 S. W. 91 (92).

10—McChesney v. Davis, 86 Ill. App. 380 (383).

"The contention of appellant that the instruction given by the court was erroneous is not tenable. It is argued in this action that notice of a fact affecting the title to an agent

conducting negotiations for the purchase of real estate is not notice to his principal. The authorities cited by counsel are not applicable to this case, nor to the instruction in question. The general rule is that notice to the principal, if the knowledge of the facts is acquired while the agent is acting for his principal. Williams v. Tatnall, 29 Ill. 553."

maintenance that they would have been charged with if there had been no party wall contract entered into between said K. and said B. deceased.

(c) The court instructs the jury that under the terms of said contracts between said plaintiff and said B., the said plaintiff, K., did not have any control over or right to use any portion of said east wall of said burned building until she had paid therefor, and that the fact that she had paid for and used portion of said wall gave her no rights in or control over the remainder of said wall, and that at no time did said K. have the right to go onto or touch the portion of said wall not paid for by her for the purpose of bracing, staying or protecting the same, to keep it from falling.

(d) The court instructs you that if you believe from the evidence that the portion of said east wall of said burned building, which was owned by said defendants, was above and to the rear of the portion of said wall which had been paid for and used by said plaintiff, and that the portion of said wall which was owned by said defendants was by them negligently permitted to lean, sag and fall over, and that said portion of said wall owned by said defendants in its fall pulled over a part of the portion of said wall which said plaintiff had paid for and was using, and that the portion of said wall which was paid for was used by said plaintiff would not have fallen if the portion of said wall owned by said defendants had not forced it over, then you should find said defendants guilty, and assess the said plaintiff's damages at such an amount as you believe from all the evidence and the instructions of the court, she was damaged by the falling of said wall.

(e) The court instructs the jury that as a matter of law the plaintiff has no right to go on or touch the portion of said east wall of said building not paid for by her, for the purpose of preventing the same from falling, or for any other purpose.¹¹

§ 2225. Widow's Title to Real Estate—Separation of Spouses During Life. The court instructs you that the fact that this widow (the plaintiff) may not have been living with him (her husband) for some time previous to his death would make no difference if she had not been divorced or he had not been divorced from her; she would be entitled to all the rights of a wife.¹²

§ 2226. Title to Real Estate—Purchase by Father With Money of Children. The court instructs the jury that if the defendants were minors at the time they worked and made the money, the money belonged to their father, (and) although he may have taken that money while they were in their minority, and purchased the property, the title thereto would nevertheless vest in their father.¹³

11—The above instructions were approved in *Beidler v. King*, 108 Ill. App. 23 (32-3), *aff'd* 209 Ill. 302, 70 N. E. 763, 101 Am. St. 246.

12—*Smith v. Smith*, 112 Ga. 351, 37 S. E. 407.

"This instruction was in perfect accord with the decision of this court in *Farris v. Battle*, 80 Ga. 187, 7 S. E. 262, which is controlling upon the question now raised."

13—*Smith v. Smith*, *supra*.

§ 2227. **Oral Contract of Real Estate—What Must Be Shown to Take it Out of Statute of Frauds.** (a) The jury are instructed that if they believe from the testimony that the defendant and W. S. entered into a contract for the sale and purchase of the land in controversy, and that such contract was oral and not in writing, then, in order to take such contract out of the statute of frauds by reason of the possession of the defendant it must appear from the evidence that the defendant took possession of said property solely under the contract and in reference exclusively to it.

(b) If you find that the defendant entered into a verbal contract for the purchase of the land in question, and took possession of it under the contract, and solely in reference to it, these facts take the case out of the statute of frauds, and the contract is as good to prove the sale as if it was in writing, and if you find that the defendant, while continuing in possession, made the payment agreed upon, his title became perfect, and is good against the claim of the plaintiff, although he has no deed or other written evidence of title.¹⁴

§ 2228. **Notice of Defect in Title—Heirs—Facts Calling for Inquiry.** (a) Actual notice is where a party to be affected by notice either has knowledge of the fact or is conscious of having the means of knowledge, although he may not use them. Therefore, when the party to be charged is shown to have knowledge of such facts and circumstances as would lead him, by the exercise of due diligence to a knowledge of the principal fact sought to be established, it would be actual notice. Whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although it was not known for want of investigation. Any fact or circumstance that would put a prudent man upon inquiry, which, if pursued would lead to a knowledge of all the facts pertaining to the matter inquired about is notice. The registration of a deed in the county where the land is situated, properly authenticated is notice to every one of its contents as shown by such record.

(b) A purchaser who buys property from the heirs of one who is dead is bound to take notice of who all the heirs of the dead person are.¹⁵

(c) The court instructs the jury, that whatever is sufficient to put a purchaser of land upon inquiry, as to the existence of an unrecorded deed, is sufficient notice of such deed. That in general, where notice is required to affect the rights of parties, a knowledge of such facts as ought to put an ordinarily prudent person upon inquiry, is deemed in law equivalent to notice of the facts, to the knowledge of which such inquiries would have led.¹⁶

14—Fox v. Spears, 78 Ark. 71, 93 S. W. 560 (561).

15—Root v. Baldwin, — Tex. Civ. App. —, 52 S. W. 586 (587).

16—Bump on Fraud. Con. 232;

Forbes v. How, 102 Mass. 427, 3 Am. Rep. 475; Heaton v. Prather, 84 Ill. 330; Rice v. Melendy, 41 Ia. 395.

(d) The court instructs you, that to charge a person with notice, on the ground that he had knowledge of such facts as ought to have put him upon inquiry, it must appear, from the evidence, that the information he had received was of that character that it was calculated to excite the attention of an ordinarily prudent person, and that such person, by the exercise of reasonable and ordinary diligence, could, upon inquiry and investigation, arrive at the knowledge of the fact with which he is sought to be charged.¹⁷

(e) Whatever is notice enough to excite attention, and put a party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led; and every unusual circumstance is ground of suspicion, and prescribes inquiry.¹⁸

§ 2229. **Drains—Duty to Keep Open and Free From Obstructions.** If you find from the evidence in this cause that the plaintiffs, who are the petitioners for the construction of the proposed ditch, permitted the ditch now existing across their lands to be trampled in by stock, or otherwise to become filled up and in need of cleaning, and you find that the exclusive benefits to be derived from the construction of the ditch in question here would be to clean out and put in proper condition said ditch now existing, and you further find that said filling up of said existing ditch was caused by neglect or fault of the plaintiffs alone, then you would be authorized to find that the proposed ditch is not of public utility, as a person cannot allow a ditch on his own premises through his own fault or neglect to become out of repair and then call upon his neighbors or parties owning land along the route of the proposed ditch to help him pay for necessary cleaning of the same, and if you find such facts to exist, it would then be your duty to find for the defendants.¹⁹

§ 2230. **Special Assessment—Railroad Company Restricted in the Use of Its Right of Way.** The court instructs the jury that the right of way of the ——— Railroad Company, which is assessed for the improvement of M. avenue, is held by said company only for railroad purposes and uses, and the said company cannot law-

17—City of Chicago v. Witt, 75 Ill. 211.

18—Russell v. Raeson, 76 Ill. 167.

19—Berry v. Driver, — Ind. —, 76 N. E. 968.

"If any part of such ditch shall be obstructed by the negligence of the owner or occupant of any land, or by his stock, he must, under the provisions of section 5639, remove such obstructions at his own expense before the 31st day of August of each year. In view of these statutory provisions it cannot be said that the owner of lands charged with the maintenance of allotted portions of a ditch are under no legal duty to free the same of obstructions except as required

by the township trustees, and the instructions given at the request of appellees is incorrect in so declaring the law. It is equally plain that such land owners may not negligently suffer or cause a ditch to become filled up and obstructed, and under the guise of constructing a new work compel others to contribute to the expense of removing such obstructions, where the existing ditch, if properly cleaned and repaired, would effectually drain their lands and dispense with the necessity for the proposed improvement. It follows that the instruction tendered by appellants should have been given."

fully apply said right of way to any other use or purpose than such as is necessary for the operation and maintenance of its railroad.²⁰

§ 2231. **Special Assessment—What May Be Considered in Determining Special Benefits.** The jury are instructed that the only special benefits to the property they can consider in this case are those that will come to the property assessed from the making of the improvement provided for in the ordinance, and it is not proper for them to assume that any other improvements will be put into the street before the building of the pavement provided for.²¹

§ 2232. **Taxation—Fixing Valuation.** (a) Gentlemen, you will not pay any attention to what the tax assessor did, nor what the county board of revenue did, but you will fix the valuation of the defendant's property from the evidence solely, as if no valuation had been made by the tax assessor, or any one else, as the case is now tried *de novo*.

(b) What the assessor did with the assessment of the defendant's property has nothing to do with this case as it is now tried *de novo*.²²

20—I. C. R. R. Co. v. Chicago, 141 Ill. 509 (513), 30 N. E. 1036, 17 L. R. A. 530.

"The first section of the Act of Congress of September 20th, 1850, which granted lands to the state of Illinois to aid in the construction of Illinois Central Railroad, gave to the state the right of way through the public lands for the construction of a railroad, the right of way over the public lands being a strip of land two hundred feet wide. (9 U. S. Statutes at Large, p. 466). Following the act of Congress, the act of February 10th, 1851, incorporating the Illinois Central Railroad Company, was passed. Section 15 of the act contains the following: 'The right of way over and through lands owned by the state is hereby ceded and granted to said corporation for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches as in this act provided. Here is a particular specified use fixed by law, which is beyond the power of the owner to change. Where such is the case, what is the correct rule in ascertaining whether a tract of land is benefited by an improvement?'

"When land is held by an individual, the benefits are not to be determined alone by the market value of the property for the use to which it was then devoted by the owner, but the market value may be shown for any use for which the property may properly be used, as

the owner may change the use of the property at any time at his own will or pleasure. But in a case like the one under consideration, where the law has devoted the property permanently to a particular use, it would seem that it could only properly be benefited to the extent that its fitness to that particular use was increased and enlarged. In a proceeding to condemn land for public purposes, where the lands are restricted by statute or the instrument under which the owner holds the title to a particular use, the measure of compensation to the owner for the lands taken will be their value to him for the special use to which the lands are restricted. This doctrine was announced in Railroad Co. v. Catholic Bishop, 119 Ill. 529, 10 N. E. 372. So also in C. & N. W. Ry. Co. v. Chi. & Evanston R. R. Co., 112 Ill. 590, where it was held: 'Where in the nature of things there can be no market value of a piece of property by reason of it being used in connection with and as a part of some extension business or enterprise, its value must be determined by the uses to which it is applied.'

It was held to be reversible error to refuse to give the above instruction.

21—Holdom v. Chicago, 169 Ill. 109 (111), 48 N. E. 164.

The court held that the refusal to give the above instruction was reversible error.

22—Stahmer v. State, 125 Ala. 72, 27 So. 311.

§ 2233. Riparian Proprietors' Rights—Accretions Defined. (a) The court instructs the jury that under the law of this state that persons owning land on or bounded by the Mississippi river own to the water's edge, and when the water recedes gradually the land is made thereby, the owner of the land bounded by the river is owner of the land so made, and such owner's rights to such made land remain equal to his river front, and such riparian rights cannot be encroached upon by adjoining owners so running their boundary lines as to diminish such river front or accretions.

(b) The court instructs the jury that the term "accretion," as used in the instructions in this case, means portions of soil added to that already in possession of the owner by gradual deposit caused by a change in the bed of the river, and that accretion belongs to the owner of the land, and it makes no difference whether the accretions were formed before or after the ownership has accrued, and that ownership may be acquired by adverse possession as well as by deed.²³

§ 2234. Homestead—Place of Residence—Ejectment—Measure of Damages—Series. Plaintiff's Instructions. (a) The jury are instructed that the widow of a deceased person is entitled to the possession of the mansion house, and plantation used in connection therewith, of her deceased husband, from the time of his death until her dower shall be assigned her, and the fact that said widow may have lived separate and apart from her said husband before and at the time of his death cannot defeat her of her rights to the possession of the said premises. And the jury are further instructed that the mansion house of a person is his chief place of residence, and the residence of a person, when once established, remains until it is abandoned, and, in order to constitute abandonment, it is not enough that he should at times absent himself from it, or lease it out, if he intends at the time he so absents himself or makes such lease to return to such homestead and make it his home, and that this absence shall be temporary. And if the jury shall believe from the evidence that in the fall of ——— the deceased, K., lived upon the place known as "Peabody" with his family, and that said place

"It appears that this was not a proceeding on appeal to the circuit court to correct the action of the board of equalization of the county for raising the assessment of defendant's property as made by the tax assessor, which he seeks to review, but to correct the assessment as made by the tax commissioner of the county. In a proceeding on appeal to correct the action of the board of equalization in the trial in the circuit court in a case of the first named character, we have heretofore held that the assessment of the tax assessor should be regarded as prima facie correct, wholly regardless of the board's

action. *Sullivan v. State*, 110 Ala. 95, 20 So. 452. But, when the assessment has been made by the tax commissioner as here, the assessment by him supersedes that of the assessor, and the assessment by the latter, when introduced in evidence, would not be entitled to this prima facie presumption of correctness, and the principle invoked in the case referred to, is without application."

23—*Benne v. Miller et al.*, 149 Mo. 228, 50 S. W. 824 (826).

"The instructions given for defendants, defining the term 'accretions' and riparian proprietors' right to such, were correct."

was his home, then the chief house on said premises was the mansion house of said K. And even though you should believe from the evidence that there was a separation of said K. and his wife, and that his wife and younger children did not remain at "Peabody," and that said K. leased said house and some of the land on said place to his son J. for the period of ——— years, and that said K. was at times absent from said place, yet if you shall further believe from the evidence that said K. at the time he made said lease and at the time he left said premises intended to return to the same as his home, and that he had not in his own mind left said place with the intention of remaining away from the same permanently, then said place continued as his homestead, and you will find a verdict for the plaintiff.

(b) Although the jury may believe from the evidence that said K. made a lease of the Peabody house and a part of the lands adjacent to the same to his son J. for the term ——— years, and that he went to E. for his health, recreation or business, but that said K. intended at the times of leaving said premises, and when he made said lease intended, to be absent from said premises only temporarily, and to return to the same as his home, then said K. had not abandoned said homestead, and your verdict must be for the plaintiff.

(c) The court instructs the jury that the lease to the defendant, J., of the lands in said lease described having expired on the ——— day of ———, and before the death of K., said K. was, from that time up to the time of his death, entitled to the possession of said lands.

(d) Although the jury may believe from the evidence that K. went to the state of California for the purpose of establishing a domicile there for the purpose of instituting a suit for divorce against his wife, but that it was the intention of said K. at the time he left Peabody, and all the time, to finally return to Peabody farm to live upon the same as his home, then the said K. had not abandoned said Peabody as a homestead, and your finding must be for the plaintiff.

(e) If the jury find for the plaintiff, they will find that she is entitled to the possession of all the lands that were a part of the home farm of said K., and by him managed and operated as one farm or plantation; and also assess her damages at such sum as they may believe from the evidence was the value of the rents and profits of the premises, that the jury may determine the plaintiff is entitled to, from ———, to this date; except that if you shall find plaintiff entitled to the ———, amounting to ——— acres, in estimating the damages on that land for the year ——— you shall estimate such damages for that year at \$—— per acre; and the jury will further find the monthly value of the rents and profits of such of the premises as the jury shall find the plaintiff entitled to the possession of.

(f) The jury are instructed that there is no evidence in this case that K. Sr. acquired a domicile in the city of St. L.

Defendant's Instructions:

(g) The court instructs the jury that in this case the burden of proof rests upon the plaintiff, and it devolves upon the plaintiff to prove, by a preponderance of the evidence, that at the time of the death of K. he resided upon the land described in the petition, and, unless the jury find and believe from the evidence that the plaintiff has so proven, then your verdict will be for the defendant.

(h) The jury are instructed that the right of plaintiff to dower in her husband's land, of which he died seised, is not denied or brought into question in this case, and that her dower rights cannot be determined in this suit.

(i) Notwithstanding the jury may believe from the evidence that K. went to C. for the purpose of instituting a suit for divorce against his wife, or that he went there for the purpose of improving his health, or that he went there for both of said purposes, yet if the jury believe from the evidence that he went there with the intention of making C. his home, and with no fixed purpose of returning to Peabody and making that place his home, the verdict must be for the defendant.

(j) The jury are instructed that K. had the right to change his residence at any time independent of his wife's wishes in that regard; and if you believe from the evidence that the said K. leased the premises theretofore occupied by him as a home, and left said premises with the intention of not returning thereto to make it his residence, and you further find and believe that said K. died while residing at another place, then your verdict must be for the defendant.

(k) If the jury believe from the evidence that K. abandoned the premises in dispute, as his residence, and removed from the same, with the intention not to return and make said premises his residence, and was not residing thereon at the time of his death, then your verdict must be for the defendant; although you may further believe from the evidence that said K., by such removal or abandonment, intended to deprive his wife of any right of quarantine which she would have had if he had continued to occupy the same.

(l) The court tells the jury that the effect of the written lease in evidence, bearing date ———, was to convey and let to J. all of the lands described therein, and the exclusive use and control of the mansion house, and all buildings appurtenant to the same, situated thereon, during the continuance of said lease; and, if you believe from the evidence that said J. was in possession of said premises under said lease, then said K. had no right to interfere with said J.'s possession and exclusive control of said premises; and although you may believe from the evidence that said K. made frequent and repeated visits to his son, and remained there as his guest for greater or less periods of time, such fact did not give the said K. any right to occupy said mansion house as a residence.

(m) The right of plaintiff to recover in this case depends upon the question as to whether or not the deceased K. was occupying the

mansion house on the premises sued for as his home at the time of his death. If he was so occupying the same as his home, plaintiff should recover; but, on the other hand, if he had left the same without the intention of returning, and left defendant in the possession of the same, then the verdict must be for defendant, notwithstanding the jury may believe from the evidence that before his death he did form the intention of returning to and occupying said premises as his home, but was prevented by death from carrying out said last-named intention.

(n) If the jury believe from the evidence that deceased, K., in the year ———, left the state of M., and went to the state of C., with the intent to change his domicile from the state of M. to the state of C., and that while in the state of C. he determined to make that state his home, and never again to reside in the state of M., and that on account of sickness or for business reasons he returned to M. without the intention of remaining, but with the intention of returning to C. and make that state his permanent home, and that he was prevented by sickness from going back to C., but died in M., then the verdict must be for defendant, notwithstanding you may further believe from the evidence that said K. did not establish any residence or home while he was in C., and it makes no difference in this case how long he remained in C.

(o) If the jury find for the defendant, they may return their verdict in the following form: "We, the jury, find the issues for the defendant. ———, Foreman."

(p) By the words "preponderance of the evidence," as used in the instructions given, is meant the greater weight of the credible testimony.²⁴

24—King v. King, 155 Mo. 406, 56 S. W. 534 (535-6-7).

Comment by the court:

"The first and second instructions given on the part of plaintiff are criticised, upon the ground that they, in effect, told the jury that, if K., at the time he made the lease to defendant, intended to be absent only temporarily, and intended at the time to return to Peabody farm as his home, that he had not abandoned said homestead, and directed the jury, upon the finding of that fact alone, to find a verdict for plaintiff. While we think these instructions are subject to verbal criticism, for the reason stated by defendant, when considered in connection with the facts disclosed by the record, and the other instructions in the case as they should be, they are not subject to serious objection."

"Plaintiff's third instruction is challenged on the ground that it is a mere abstract proposition of law,

having no proper place in the case, and its tendency to mislead and confuse the jury. By this instruction the jury were told that, the lease to the defendant of the lands in question having expired on the first day of March, 1894, K. was from that time entitled to their possession. This condition might have more merit, if it were not for the sixth instruction given at his instance, in which the jury were, in substance, told that the effect of this same lease was to convey to defendant the lands and house in question, and the exclusive use and control thereof, during its continuance, and that K. had no right, during the existence of said lease, to occupy said mansion house as a residence. Conceding, for the sake of the argument, that the criticism upon plaintiff's instruction is just, when the instruction is considered in connection with defendant's sixth instruction, with regard to precisely the same matter, it is

impossible to see how the jury could have been misled thereby, nor do we think that it was.

"It is also claimed that plaintiff's fourth instruction is erroneous, upon the ground of the improper use of the word 'domicile.' But when this instruction is taken in connection with defendant's third, in regard to the same matter, the contention seems to be without merit. By plaintiff's fourth instruction the jury were told, if K. went to C. for the purpose of establishing a domicile there for the purpose of instituting a suit against his wife for divorce, but that it was his intention at the time he left P., and all the time, to finally return to P. to live upon the same as his home, while defendant's third instruction told them that, if he went to California for the purpose of institut-

ing a suit for divorce, yet if he went there with the intention of making California his home, and with no fixed purpose of returning to Peabody and making that place his home, the verdict must be for defendant. These instructions were both with respect to the purpose of K. in going to California, one saying to make it his domicile to enable him to sue his wife in the courts of that state for divorce, while the other said to make it his home. There is no substantial difference between the meaning of the two words 'home' and 'domicile,' and even if the use of the word 'domicile' was improper, it would not, under the circumstances, authorize a reversal of the judgment on that ground; for, clearly, it was not prejudicial."

CHAPTER LXXVII.

REPLEVIN.

See Erroneous Instructions, same chapter head, Vol. III.

§ 2235. Plaintiff need not own the property.	§ 2240. Demand necessary when plaintiff loaned property to defendant.
§ 2236. Replevin by mortgagee after default.	§ 2241. Demand necessary where property seized under process.
§ 2237. No demand necessary when defendant claims title.	§ 2242. Burden of proof on plaintiff.
§ 2238. Demand necessary when plaintiff consented to defendant's possession.	§ 2243. Burden of proof—Issue of detention.
§ 2239. Demand not necessary when defendant's possession tortious.	§ 2244. Levy on crops and taking possession.
	§ 2245. Property attached to and part of real estate not subject to replevin.

§ 2235. **Plaintiff Need Not Own the Property.** (a) That it is not essential to a recovery by the plaintiff in this suit, that he should have been, at any time, the absolute owner of the property; it is sufficient if the proof shows that, before and at the time of the commencement of this suit, the plaintiff was entitled to the possession of the property; that he demanded the same of the defendant, before commencing the suit, and after the plaintiff became entitled to such possession, and that the defendant refused to surrender the property to the plaintiff upon such demand.¹

(b) The jury are instructed that before the plaintiff can recover in this action he must prove, by a preponderance of evidence, that at the time of the commencement of this suit he was the owner of the property in question, or that he was then entitled to the immediate possession of the same, and he must also further prove, by a preponderance of the evidence, that the defendant wrongfully took the property in question, or else that he wrongfully detained it from the plaintiff, after a demand made upon him by the plaintiff for the property.²

§ 2236. **Replevin by Mortgagee After Default.** (a) The court instructs the jury that, if you believe from the evidence that the defendant executed the note and chattel mortgage in evidence and that she has made default in the payment of the money as provided in the mortgage, and that the plaintiff before the commencement of this suit made demand for the possession of the property described

1—Campbell v. Williams, 39 Ia. 646; Noble v. Epperly, 6 Ind. 414; Loomis v. Youle, 1 Minn. 175; Bramwell v. Hart, 12 Heisk. 356. 2—Bardwell v. Stubbut, 17 Neb. 485, 23 N. W. Rep. 344; Cobbey on Replevin (2nd ed.), sec. 533.

in the mortgage, which was refused, then the plaintiff would have the right to seize said property by writ of replevin, and sell the same at public or private sale, and out of the proceeds of the sale pay and satisfy the balance due them on said note and chattel mortgage, and render the surplus, if any, to the defendant.³

(b) The jury are instructed by the court that plaintiff brought an action in replevin claiming to have been entitled to the immediate possession of the cattle in controversy at the time of the commencement of this action by virtue of a chattel mortgage which plaintiff claims corresponds with the purported copy given to you in evidence, claiming that said chattel mortgage was a valid existing mortgage remaining unsatisfied at the time of the commencement of this action, and that in the giving of said mortgage it was intended by the makers of said mortgage and plaintiff bank that a lien or mortgage be thereby created upon the cattle in controversy herein to secure the payment of the promissory note given to you in evidence. Defendant denies the right of the plaintiff to a lien upon the cattle in controversy for any reason whatever, and denies that the cattle in controversy were mortgaged by the said R. Bros. to plaintiff bank.

(c) On the issues formed, to entitle plaintiff to recover, the burden of proof rests upon the plaintiff to convince you, by a preponderance of all the evidence, first, that said note given in evidence was given for the loan of money as plaintiff claims, and that said note was unsatisfied at the time of the commencement of this action; second, that the chattel mortgage as claimed by plaintiff was given upon the cattle in controversy or upon any portion thereof for which you might find a verdict for plaintiff, and remaining unsatisfied at the commencement of this action. If plaintiff has so made out a case, then your verdict should be for plaintiff that at the time of the commencement of this action it (the bank) was entitled to the immediate possession of the cattle in controversy; if the evidence be equally balanced as to plaintiff's right to recover, or if it preponderates in defendant's favor, then you could not find for plaintiff, and your verdict should be for defendant.

(d) The jury are instructed by the court that the plaintiff must prove by a preponderance of the evidence that R. Bros. owned the cattle described as the N. cattle at the time the alleged chattel mortgage was given, before it could recover any of such cattle in this suit, and unless the plaintiff has so made out its cause, you must find for the defendant as to all the cattle taken on the order of replevin herein.⁴

3—John L. Jones & Co. v. Chamberlain, 97 Ill. App. 328-30. Held that a modification by adding the words "unless you believe, from the evidence, that the conditions or terms in the mortgage were changed by agreement of parties thereto" was erroneous, the court said there was no competent evi-

dence introduced to warrant this addition to the instruction, as an executed parole agreement could not change the terms of a contract under seal.

4—Thayer Co. Bank v. Huddleson, 1 Neb. (Unoff.) 261, 95 N. W. 471.

§ 2237. No Demand Necessary When Defendant Claims Title.

The court instructs the jury that, by this plea in this case, the defendant claims title to the property in himself (and in one A. B.), and denies the right of property and of possession in the plaintiff; and although the jury may believe, from the evidence, that the defendant came rightfully into possession of the property, still, under the pleadings in this case, it is wholly unnecessary for the plaintiff to prove a demand and refusal before commencing the suit, to entitle him to a verdict of wrongful detention; provided, the jury further believe, from the evidence, under the instructions of the court, that the plaintiff was entitled to the possession of the property at the time of the commencement of the suit.⁵

§ 2238. Demand Necessary When Plaintiff Consented to Defendant's Possession. If the jury believe, from the evidence, that the property in question came into the possession of the defendant with the knowledge and consent of the plaintiff, then, before the plaintiff could properly commence this suit, he would have to make a demand on the defendant for a return of the property, and unless it appears, from a preponderance of the evidence, that he did make such demand, the jury should find for the defendant, unless the jury further believe, from the evidence, that the defendant, before the commencement of this suit, had, by his conduct or language, or by both, manifested an intention to disregard and repudiate any claim of right or title in the property by the plaintiff.⁶

§ 2239. Demand Not Necessary When Defendant's Possession Tortious. (a) If the jury believe, from the evidence, under the instruction of the court, that the plaintiff was the owner of the property, and entitled to the possession of it, and that the defendant took the property wrongfully from the possession of the plaintiff, then a demand and refusal before the commencement of this suit is not necessary to be proved, under the issues in this case, to entitle the plaintiff to recover.⁷

(b) When property is wrongfully taken from the possession of the party legally entitled thereto, then no demand for the property is necessary to enable the person so entitled to the possession to bring his suit in replevin. And in this case, if the jury believe from the evidence that the plaintiff was the owner of the heifer in question, and that defendant went to plaintiff's pasture and took the heifer

5—Seaver v. Dingley, 4 Greenlf. 306; Lewis v. Masters, 8 Blackf. 244; Smith v. McLean, 24 Ia. 322; Lewis v. Smart, 67 Me. 206; Cobbey on Replevin (2nd ed.), secs. 447, 510. So a plea of title in defendant waives demand. Cobbey on Replevin (2nd ed.), sec. 448.

6—Lewis v. Masters, 8 Blackf. 244; Cobbey on Replevin (2nd ed.), sec. 447.

The effect of failure to make demand, when necessary, will at least prevent the recovery of costs, but in any event plaintiff can dismiss, make proper demand, and bring another action. Cobbey on Replevin (2nd ed.), sec. 447.

7—Dickson v. Randal, 19 Kans. 212; Jones v. Ward, 77 N. C. 337, 24 Am. Rep. 447; Cobbey on Replevin (2nd ed.), secs. 447, 453.

therefrom without plaintiff's permission, and against his will, then no demand was necessary before commencing this suit.⁸

(c) The court instructs the jury that if you find, from the evidence, that the S. L. Co. never sold the lumber in question to O., but that O. was to dry said lumber and deliver the same to a certain building, then said S. L. Co. is entitled to recover in this suit, and it makes no difference whether S. K. & Co. and Smith knew of the arrangement between the S. L. Co. and O.⁹

§ 2240. Demand Necessary When Plaintiff Loaned Property to Defendant. That if the jury believe, from the evidence, that the defendant borrowed the property in controversy from the plaintiff for a temporary use or purpose, giving the plaintiff to understand that he would return the property whenever the plaintiff should desire it, then the plaintiff would not be entitled to commence this suit until after he had first demanded the property from the defendant; and if the plaintiff has failed to show such demand and refusal, by a preponderance of evidence, then the jury should find for the defendant; provided, the jury further find, from the evidence, that before the commencement of this suit, the defendant had done no act inconsistent with the plaintiff's right to the property, or showing an intention to repudiate the same.¹⁰

§ 2241. Demand Necessary Where Property Seized Under Process. (a) The jury are instructed, that if they believe, from the evidence, that the defendant A. B. was an acting constable in and for the county of C., and that as such constable, the execution shown in evidence came into his hands, to be executed by him, and that while the property in dispute was in the possession and under the control of one or both of the defendants in said execution, and said constable levied the execution upon the property in controversy, as the property of one or both of the defendants, such taking and levy would not be unlawful as to the plaintiff, and in such case, unless the jury believe, from the evidence, that a demand for the property was made before bringing this suit, then the defendant would not be guilty of a wrongful taking, or of a wrongful detention.¹¹

8—*Gilchrist v. Moore*, 7 Ia. 9; *Newman v. Jenne*, 47 Me. 520; *Stillman v. Squire*, 1 Denio 327; *Rhoades v. Drummond*, 3 Col. 374.

9—*Schwamb Lumber Co. v. Schaar*, 94 Ill. App. 544 (545).

"In order to sustain replevin where the possession is wrongful, a previous demand of possession is unnecessary. *Clark v. Lewis*, 35 Ill. 418-23; *Stock Yards Co. v. Mallory*, 157 Ill. 563, 41 N. E. 888, 48 Am. St. 341; 5th Am. & Eng. Ency. of Law, 528 I (1st ed.); *Galvin v. Bacon*, 11 Me. 28 (2 Fairfield Rep.), 25 Am. Dec. 258; *Wells on Repl.*, sec. 365; *Butters v. Houghwout*, 42 Ill. 18-24, 89 Am.

Dec. 401; *Bruner v. Dyball*, 42 Ill. 36; *Hardy v. Keeler*, 56 Ill. 152; *Tuttle v. Robinson*, 78 Ill. 332-4; *Oswald v. Hutchinson*, 26 Ill. App. 273; *Trudo v. Anderson*, 10 Mich. 357-67, 81 Am. Dec. 795; *Rosum v. Hodges*, 1 So. Dak. 308, 47 N. W. 140, 9 L. R. A. 817-9."

10—*Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Cobbey on Replevin* (2nd ed.), secs. 458, 462.

11—*Tuttle v. Robinson*, 78 Ill. 332. But if the officer acts without authority, or levies upon property of one not named in the writ, no demand is necessary. *Cobbey on Replevin* (2nd ed.), sec. 497.

(b) The jury are instructed that, as regards the defendants, C., D., and E. (the officer and plaintiffs in execution), the indorsements and return of the officer upon the execution read in evidence, are *prima facie* proof of the time when the execution came into the hands of the officer, the time of the levy, upon what property the same was levied, and what became of the property.¹²

§ 2242. **Burden of Proof on Plaintiff.** (a) The court instructs the jury that this is an action of replevin commenced by the plaintiffs by the filing of an affidavit, wherein they claimed, under oath, that they are entitled to the possession of certain diamonds described therein. Before the plaintiffs can recover under their claim, they must establish, by a preponderance of the evidence, that the diamonds which they took from the possession of H. L. under the replevin writ issued upon the strength of said affidavit for replevin, were and are the diamonds which were originally sold and delivered by the plaintiffs to H. L.; and upon this issue it is the duty of the plaintiffs to prove the facts by a preponderance of the evidence, and if they have not done so, then the plaintiffs cannot recover, and the verdict of the jury should be for the defendants.¹³

(b) The burden of proof is on the plaintiffs to prove the issues and claims made by them by a preponderance of the evidence; that is, that they are the owners of said cattle, and are entitled to the immediate possession thereof. But by the terms of the contract the defendants are to assume the burden of proof, and prove that all cattle which have died during the time said cattle were in their possession were lost from causes other than from want of proper feeding.¹⁴

(c) The burden rests upon the plaintiff, S., to make out his case by a preponderance (that is, by a greater weight) of the evidence. Unless he has done so, your verdict should be in favor of the defendant, M. If you shall believe from the evidence that at the time of the commencement of this suit the heifer in controversy was the property of the plaintiff, you will return a verdict in his favor. On the other hand, if you shall believe from the evidence that at the time of the commencement of this suit said heifer was not the property of the plaintiff, you will return a verdict in favor of the defendant, and also find the present value of said heifer.¹⁵

12—Phillips v. Elwell, 14 Ohio St. 240; Harper v. Moffit et al., 11 Ia. 527.

13—Chicago Title & Trust Co. v. Goldsmith, 173 Ill. 326 (330), aff'g 69 Ill. App. 22, 50 N. E. 676.

14—Farrar et al. v. McNair et al., 65 Kas. 147, 69 Pac. 167 (168).

15—Bright v. Miller, 95 Mo. App. 270, 68 S. W. 1061 (1062).

The court said: "When the jury was told in said instruction that the burden rested upon the plain-

tiff to make out his case by a preponderance (that is, by a greater weight) of evidence, and if it should believe from the evidence that at the time of the commencement of the suit the heifer was not his property it should find for the defendant; it was fully instructed, in effect, that the plaintiff could only recover upon the strength of his own title, and not upon the weakness of defendant's title."

§ 2243. **Burden of Proof—Issue of Detention.** The court instructs the jury that, to entitle the plaintiff to recover upon the issue of detention, it is incumbent upon the plaintiff to establish, by a preponderance of evidence, that the goods and property replevied were in the possession of the defendant, or under his control, and that he detained the same from the plaintiff at the time the suit was commenced; and unless the jury believe, from the evidence, that the property in question was in the possession of the defendant, or subject to his control at the time the suit was commenced, and that he then detained the same from the plaintiff, then, as to the issue of wrongful detention, the jury should find for the defendant.¹⁶

§ 2244. **Levy on Crops and Taking Possession.** Although the law requires an officer, in levying on personal property, to take the same into his possession, yet, in the case of growing crops, or other bulky or heavy articles, it only requires him to take such possession thereof, as the article, from its nature, will reasonably admit of; and if the jury believe, from the evidence in this case, that the officer, in attempting to make the levy in question, went to the fields of grain levied on, and had the same in his immediate view and presence, and notified the defendant in the execution that he had taken the crops, under the execution introduced in evidence, this would be a sufficient levy on the property in question.¹⁷

§ 2245. **Property Attached to and Part of Real Estate Not Subject to Replevin.** The jury are instructed that property which has been attached to and become a part of the real estate, is not the subject of replevin; and if the jury believe, from the evidence in this case, that, at the time of the issue and service of the writ of replevin herein, the defendants were the owners and in the actual possession of block 18 . . . and that, prior to that time, the property in controversy, or any part thereof, had become attached to and made a part of such real estate, then as to such property so attached and made a part of the real estate, the jury will find in favor of the defendant.¹⁸

16—Reynolds v. McCormick, 62 Ill. 412. On burden of proof, see also Cobbey on Replevin (2nd ed.), secs. 1005, 1006.

17—Pierce v. Roche, 40 Ill. 292.
18—Hacker v. Munroe & Son, 176 Ill. 384 (395), aff'g 61 Ill. App. 420, 52 N. E. 12.

CHAPTER LXXVIII.

SALES.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2246. Sale defined.</p> <p>§ 2247. Sale completed between parties—When agreement made.</p> <p>§ 2248. When the title passes—Difference between a sale and an agreement to sell.</p> <p>§ 2249. Same—Consideration paid in installments.</p> <p>§ 2250. Sale upon condition that price is paid in full.</p> <p>§ 2251. Completion of sale—Delivery—Consideration a past indebtedness—Ascertaining price of measurement and inspection.</p> <p>§ 2252. Same—Transfer of bill of lading.</p> <p>§ 2253. Subject matter pointed out—Quantity to be subsequently ascertained by measurement.</p> <p>§ 2254. Installments of payments whether considered as rent or not—Sale intended.</p> <p>§ 2255. Subject matter of sale destroyed before delivery—Question of title at time of destruction.</p> <p>§ 2256. A thief acquires no title and can convey none.</p> <p>§ 2257. Sale by sample—Rejection by a real and substantial difference—Resale in good faith.</p> <p>§ 2258. Refusal to take residue ordered—Resale without notice.</p> <p>§ 2259. Ready and willing to deliver as required—Failure to accept.</p> <p>§ 2260. Refusal to accept—Excuse for non-delivery.</p> <p>§ 2261. Delivery—Duty to protect the goods from rain.</p> <p>§ 2262. Time of payment—When interest would begin to run.</p> | <p>§ 2263. Market value defined.</p> <p>§ 2264. Coming up to test required—Waiver.</p> <p>§ 2265. Grapes shipped to be resold—Merchantable condition when loaded.</p> <p>§ 2266. Sale by assignee—Guaranty—Trust property—Agreement to buy back.</p> <p>§ 2267. Contract for sale of mining claims—Condition precedent to marking of claim.</p> <p>§ 2268. Construction according to order of vendee and under the superintendence of vendee's agent.</p> <p>§ 2269. Contract of sale—Goods to be of a specific quality, quantity and description—Mingled with other goods—Delivery—Acceptance—Refusal and tender back—Sale for benefit of vendee—Series.</p> <p style="text-align: center;">WARRANTY.</p> <p>§ 2270. Warranty—What constitutes.</p> <p>§ 2271. Warranty of title by vendor.</p> <p>§ 2272. Warranty by agent—Ratification of agent's acts.</p> <p>§ 2273. Acceptance waives implied warranty.</p> <p>§ 2274. Reliance on representations necessary to constitute a warranty.</p> <p>§ 2275. Implied warranty of manufactured article.</p> <p>§ 2276. Purchaser to give trial and notice—Provision of returning machine.</p> <p>§ 2277. In absence of special contract—Purchaser buys at his own risk—Contract to purchase machinery installed on trial.</p> <p>§ 2278. Burden of proof.</p> |
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§ 2246. **Sale Defined.** The court instructs you that in law a sale is the agreed transfer of property having some value to another for a valuable consideration. A sale may be shown by facts and circum-

stances as well as by direct proof. The valuable consideration above mentioned may not be in money, but may be any article of value.¹

§ 2247. Sale Completed, Between Parties—When Agreement Made.

(a) The jury are instructed that, as between the parties themselves, the title to personal property passes without delivery whenever the sale is completed, and the parties intend it as such. An agreement to sell an article by weight or measure, where the article is selected and identified, and the price agreed upon, may be a completed sale without delivery, if the parties intend it as such.²

(b) As between the parties, delivery is not essential to the completion of a sale of chattels. If the sale is completed and nothing remains to be done but to deliver the property, then the purchaser may take the goods at any time after the sale, provided he takes them before any lien attaches in the hands of the vendor and the transaction is conducted in good faith.³

§ 2248. When the Title Passes—Difference Between a Sale and an Agreement to Sell. The jury is instructed that there is a difference between a sale of personal property and an agreement to sell; under a mere agreement to sell no title passes; but whenever parties have agreed upon the terms of a sale and the precise property sold is identified and nothing remains to be done but to deliver it, and it appears, from the evidence, that the parties understood and intended the title to pass without actual delivery, then the title will pass without such delivery; but where anything remains to be done, by way of selecting out or separating the property from other property of the same kind, for the purpose of identifying the property sold, then no title will pass until the property has been so selected and identified.⁴

§ 2249. Same—Consideration Paid in Installments. The court instructs the jury that if they believe, from the evidence, that the plaintiffs delivered the property in question to the said P. under an agreement by which P. was to hold the same as the property of the plaintiffs until he paid them the sum of \$—, in weekly installments of \$— per week, and that the said P. has never fully paid the said sum of \$—, but did attempt to sell the said property to the defendant, and that the defendant took the property in good faith, still the defendant, in such case, acquires no better title to the property than the said P. himself had, and the jury should find the right of property in the plaintiff.⁵

1—Johnson v. State, — Tex. Crim. App. —, 55 S. W. 968, citing Black Intox. Liq. § 403.

2—Riddle v. Varnum, 20 Pick. 280; Reed v. Burgess, 34 Ill. 193; Prescott v. Locke, 51 N. H. 94; Russell v. Carrington, 42 N. Y. 118; Morse v. Sherman, 106 Mass. 430; Lester v. East, 49 Ind. 588; Wilkinson v. Holiday, 33 Mich. 386; McClung v. Kelley, 21 Ia. 508.

3—Cruikshank v. Cogswell, 26 Ill. 366.

4—Robinson v. Hirshfelder, 59 Ala. 503; Smith v. Sparkman, 55 Miss. 649, 30 Am. Rep. 537; Fletcher v. Ingram, 46 Wis. 191; Hahn et al. v. Fredericks, 30 Mich. 223.

5—Sanders v. Keber et al., 28 Ohio St. 630.

Compare Orr et al. v. Farmers' Alliance Warehouse and Commis-

§ 2250. **Sale upon Condition that Price is Paid in Full.** If the jury believe from the evidence that the plaintiff sold the machine in question to A. B. at an agreed price to be paid at a future time, and then delivered the said machine to the said A. B., but upon the express condition and agreement that no title should pass to him until after the purchase price was paid in full, and that, in the meantime, the title should remain in the plaintiff, then, if the jury further believe, from the evidence, that the purchase price has never been paid in full, the machine still remains the property of the plaintiff.⁶

§ 2251. **Completion of Sale—Delivery—Consideration a Past Indebtedness—Ascertaining Price by Measurement and Inspection.** If the jury believe, from the evidence, that at the time of the alleged sale, A. was indebted to B. in the sum of \$—, and that A. turned out and sold the lumber in question to B., under an agreement between them that the same should be applied in payment or in part payment of such indebtedness, and that they then put the lumber in charge of one C., and that he agreed to take charge of the same and look after it for B., then such transaction amounted to a completed sale and transfer of the title, although the jury may further believe, from the evidence, that the amount of the lumber was to be ascertained by future measurement, and the purchase price to be determined by future inspection, the purchaser to pay any excess of the purchase price over his debt, and the seller to make good any deficiency, your verdict should be for B.⁷

§ 2252. **Same—Transfer of Bill of Lading.** The jury are instructed, as a matter of law, that the transfer of a bill of lading in good faith in the ordinary course of business and for valuable consideration operates to transfer to the holder thereof the title to the goods mentioned or covered by the bill of lading.⁸

sion Co., 97 Ga. 241, 22 S. E. 937 (938).

Where the court held it was not required to prove the application of specific installments of payments and said that the action herein being upon a check given by the defendants to the plaintiff as a partial payment on account for various lots of cotton sold by the latter to the former, and the defense in part being that the plaintiff had damaged the defendants by a failure to deliver according to its contract certain portions of these several lots of cotton, it was error to charge: "Certain checks have been introduced in evidence by defendants, showing payments on these cottons. It is the duty of the defendants to show which special checks were paid on each lot of cotton. The defendants must go further, and show which identical check was

paid on each identical lot. If the defendants have failed to do this, then there should be a verdict for the plaintiff."

6—Jowers v. Blandy, 58 Ga. 379; Bradshaw v. Warner, 54 Ind. 58. But compare Shafer v. Russell, 28 Utah 444, 79 Pac. 559 (561).

Where the court instructed the jury "that where the chattels are sold to a vendee on condition that the title to said property is not to pass to the vendee until the purchase price is fully paid, all payments made, whether in property or money, prior to the default of the vendee become forfeited to the vendor," and the instruction was considered as an incorrect statement of law.

7—Colwell v. Keystone Iron Co., 36 Mich. 51.

8—Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Cochrane v. Riply, 13 Bush 495; Cent. Sav. Bk. v.

§ 2253. Subject Matter Pointed Out—Quantity to be Subsequently Ascertained by Measurement. The jury is instructed that if they believe, from the evidence, that the lumber which the plaintiff claims to have bought was standing in a pile by itself, and that the plaintiff and the said A. B., upon the occasion in question, were speaking of that particular lot of lumber and the plaintiff said, I will take the lumber at \$20 per 1,000, and the said A. B. replied, you can have it (or the lumber is yours), this would constitute a valid sale and sufficient to pass the title at that time to the plaintiff, although the quantity of lumber in the pile was then unknown, and it was necessary to measure the lumber to ascertain the quantity or the amount of money to be paid therefor, your verdict should be for the plaintiff.⁹

§ 2254. Installments of Payments Whether Considered as Rent or Not—Sale Intended. The court instructs the jury that, although the written contract introduced in evidence in terms speaks of the said machines as having been rented from the said plaintiff to the said P. and calls for installments of payments to be paid as rent, still, if the jury believe, from the evidence, and from all the facts and circumstances proved on the trial, that a sale was, in fact, intended between the parties, and that stipulated payments were in reality understood to be payments upon the purchase money, and that the machine was delivered by the said plaintiff to the said P. under such contract, and if the jury further believe, from the evidence, that the defendant afterwards purchased the said machine from the said P. in good faith, relying upon his possession and apparent ownership, and paid him for the same, and without any knowledge that the plaintiff had not been paid in full therefor or that he set up any claim to the said machine, then the jury should find the right of property in the defendant.¹⁰

§ 2255. Subject-Matter of Sale Destroyed Before Delivery—Question of Title at Time of Destruction. If you believe from all the evidence that defendant contracted with plaintiff and J. J. R. to take fifty cords of wood at \$2.50 per cord, and that defendant would furnish a barge to load it upon and you further find that J. J. R. sold or surrendered his interest in said contract to plaintiff, and that plaintiff complied with the contract so made, if you find it was made, and you further find that defendant broke the contract by failing to furnish the barge, and you find that the wood was burned up without the fault of plaintiff, then, if you believe these facts, if facts they be, the plaintiff is entitled to a verdict.¹¹

Garrison, 2 Mo. App. 58; Price v. Wisconsin, etc., Ins. Co., 43 Wis. 267.

9—Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42.

10—Geer v. Church, 13 Bush 430; (Ky.) Domestic Sewing Machine Co. v. Anderson, 23 Minn. 57.

11—American Oak Extract Co. v. Ryan, 104 Ala. 267, 15 So. 807 (809).

"Let the following principles governing this case be first stated: 'The doing of a thing pursuant to an offer may be both an acceptance and performance. If one makes an offer to another, or to all persons in general, and does not withdraw it while the other person in the former case, or any one in the latter, goes forward

§ 2256. **A Thief Acquires No Title and Can Convey None.** The court instructs the jury that by a larceny of goods, a thief acquires no title to them, and if he attempts to sell the goods, he cannot convey any title to them as against the person from whom they were stolen. But whether, in this case, the horse formerly belonged to the plaintiff, and whether the said A. B. stole the horse from him, etc., etc., are all questions of fact to be determined by the jury from the evidence in the case.¹²

§ 2257. **Sale by Sample—Rejection for a Real and Substantial Difference—Resale in Good Faith.** (a) If the jury believe from the evidence that the flour delivered was materially and substantially equal in quality to the samples, and that the plaintiffs exercised good faith and reasonable diligence in reselling the flour in bulk in the O. market, then the plaintiffs should recover.

(b) If the defendants P. & Co. made no demand for notice of the time and place of the resale, then the plaintiffs were not required to give such notice to the defendants.

(c) If the flour shipped by plaintiffs to defendants was equal in quality to the sample by which it was sold, then defendants had no right to reject said flour, and in order to authorize the defendants to reject said flour, there must have been a real and substantial difference between said flour and the samples, and not an imaginary, fanciful difference.

(d) If the plaintiffs, in making the resale, acted in such manner as to obtain the highest cash price, under the circumstances, for the entire lot of flour in the O. market, they faithfully performed their trust in conducting the resale.¹³

and does the thing, such performance carries with it an acceptance of the offer; and the person who made it must pay or do what he promises. Bish. Cont. §§ 329, 330. In unilateral contracts, it is often, if not generally, the case, that acceptance of the offer is only to be inferred from the performance of the consideration. If this is performed in accordance with the terms of the offer, a contract is thereby formed without notifying the offeror of the intention to perform, or of the completion of the performance.' 1 Pars. Cont. 492, note 1 and authorities. So too, it has been held, that if one offers to another to do something, if that other will do something else, and the party to whom such offer is made acts upon it, either to the advantage of the offeror, or to his own disadvantage, such action makes the contract complete and notice of the acceptance of the of-

fer by the party offered, before proceeding to carry it out, is unnecessary. Bank v. Watkins, 154 Mass. 387, 28 N. E. 275; 1 Pars. Cont. 493; 3 Am. & Eng. Enc. Law 847, and authorities cited. Where a contract does not specify a particular time for its performance, the presumption is that the parties intended performance within a reasonable time. And this is sometimes a question of fact, and at others one of law. When it depends upon facts extrinsic of the contract which are matters of dispute, it is a question of fact; but when it depends upon a construction of a contract in writing, or upon undisputed, extrinsic facts, it is matter of law. Cotton v. Cotton, 75 Ala. 346; Howard v. Railroad Co., 91 Ala. 269, 8 So. 868."

12—Breckenridge v. McAfee, 55 Ind. 141.

13—Penn. et al. v. Smith et al., 104 Ala. 445, 18 So. 33 (39).

(e) The court instructs you that if defendants, by themselves or their agent thereto authorized, examined said macadam, or had full opportunity to examine said macadam, before they purchased, then in such case the defendants became and were liable to pay to the plaintiff for all said macadam so delivered to and received by defendants under said contract, provided the same was such macadam as had been exhibited to the said defendants or to their said agents prior to the making of the contract.¹⁴

§ 2258. Refusal to Take Residue Ordered—Resale Without Notice. If you believe, from the evidence, that the defendants agreed to receive and pay for ——— pictures, and that before all of said pictures had been delivered, defendants refused to receive the residue of said pictures, and told plaintiffs that they might do what they pleased with the residue of said pictures, then plaintiffs might resell the residue of said pictures without giving defendants any notice of the sale.¹⁵

§ 2259. Ready and Willing to Deliver as Required—Failure to Accept. The court instructs the jury that in a suit by a seller of personal property to be delivered at a certain time and place, in order to recover damages for not receiving it, it is necessary for the plaintiff to prove that it was ready and willing to deliver the same at such time and place, and on the terms agreed upon.¹⁶

§ 2260. Refusal to Accept—Excuse for Non-delivery. If you find from the evidence that the oranges which were last offered by the defendants to the agent were in fact of the sizes and quality required by the contract, and if you further find that the agent refused to accept the oranges, or stated that his firm would not accept them, then that would be a sufficient excuse for the defendants' omission to deliver or tender the oranges at Milwaukee.¹⁷

§ 2261. Delivery—Duty to Protect the Goods from Rain. (a) You are instructed that if you believe from the testimony that the goods were put upon the wharf when it was not raining, and that the defendants had been previously notified that they were to be unloaded upon the wharf, then it was the duty of the defendants to take the goods and to provide means for protecting them if a reasonable time was given so to do. And if you believe from the testimony that the weather was threatening at the time the goods were put upon the

14—Moore v. Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798 (800).

15—Wrigley v. Cornelius, 162 Ill. 92 (95), aff'g 61 Ill. App. 279, 44 N. E. 406.

The court said in comment that the "law is well settled that, where the vendee refuses to receive goods purchased, the vendor may re-sell the goods, and sue for the difference between the contract price and the amount received upon re-sale.

There may be, and doubtless are, cases where the vendor would be required to give the vendee notice before making a sale, but the conduct of the vendee may be such that notice will be waived."

16—Iroquois Furnace Co. v. Hardware Co., 201 Ill. 297 (300), aff'g 102 Ill. App. 68, 66 N. E. 257.

17—Seefeld v. Thacker, 93 Wis. 518, 67 N. W. 1142 (1143).

wharf, then defendants should have used greater diligence in protecting the goods.

(b) If you find from the evidence that the plaintiffs or their agents discharged the oats in question upon the wharf in the rain, the defendants would not be required, under such circumstances, to accept them, if they were injured by the rain in consequence.

(c) If you find from the evidence that through the fault of the plaintiffs or their agents, a considerable portion of the oats were damaged before delivery, to defendants, then defendants had a right to reject all.¹⁸

§ 2262. Time of Payment—When Interest Would Begin to Run. The court instructs the jury that, if all those bills for these goods were in this form, terms stated at ——— days, and the party took the goods with that upon it, and made no objection to that in any way, it would be an implied agreement that that was the time within which the goods were to be paid for, and that, if they were not paid for, after that interest would begin to run by way of damages from the expiration of the ——— days.¹⁹

§ 2263. Market Value Defined. The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard.²⁰

§ 2264. Coming up to Test Required—Waiver. (a) To entitle the plaintiff to recover for the “melting furnaces,” so called, and the gas-producing machine connected therewith, he must satisfy the jury by a fair preponderance of evidence that such melting furnace and gas-producing machine so constructed by him operated in the several tests and in the work of melting iron to the satisfaction of the defendant company, or that the defendant company actually waived said trial, and accepted the same.

(b) To entitle the plaintiff to recover for the gas-producing machine made to furnish fuel for the defendant’s boilers and annealing

18—Heinberg et al. v. Cannon et al., 36 Fla. 601, 18 So. 714 (716).

19—Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022 (1023).

The court said that in the “absence of any agreement, the price of the goods would be payable on delivery. The parties could make any agreement about it that they chose to make. If the plaintiff notified the defendant that it was willing to give him a credit of — days on each bill, and that the price would be payable at the expiration of that time, it was a

proposition in the defendant’s favor; and if he made no objection, his assent would be implied, and he would be bound by the contract. The fact that in subsequent statements interest was not charged was evidence that the plaintiff was then willing to waive its legal right to interest; but in the absence of a settlement upon the statement, it would not deprive it of its right in this suit to recover interest according to the terms of the original contract.”

20—Watson v. Loughran, 112 Ga. 837, 38 S. E. 82 (84).

ovens, the jury must be satisfied by a fair preponderance of the evidence of one of the following propositions: First, that such machine was furnished by the plaintiff to the defendant without the condition that it was to do the work for which it was constructed satisfactorily; second, that the trial or test thereof was made which was satisfactory to the defendant; third, that by or through the fault of the defendant, to which the plaintiff neither contributed nor assented, such trial or test was not made within the time contemplated by the parties.²¹

§ 2265. Grapes Shipped to be Resold—Merchantable Condition When Loaded. In determining whether the grapes were in a merchantable condition when loaded into the car at Portland, N. Y., you should take into consideration the condition in which the grapes were when loaded into said car, the length of time merchantable grapes will keep when properly loaded into cars used for the purpose of carrying grapes, the length of time the grapes were in transit, the manner in which the grapes were loaded into said car, with all the facts and circumstances in evidence, and from all the facts and circumstances in evidence say whether the grapes were or were not in a merchantable condition when loaded in the car at Portland, N. Y.²²

§ 2266. Sale by Assignee—Guaranty—Trust Property—Agreement to Buy Back. (a) The court instructs you that if M. authorized R. to assure L. that a purchaser would be found for him (L.) for certain of the assets which he (L.) did not want, if such was the case, and if you find that the object and purpose of M. in having such assurance made to L., if such assurance was made, was to enable him (M.) to thereafter become the purchaser from said L. of said assets, or any part thereof, and that, in furtherance of such object and purpose, M. did thereafter become the purchaser from said L., then you are instructed that such sale was, and as to said M. is, invalid, and this notwithstanding L. may not have been aware of the object and purpose of M. in having him so assured.²³

21—Turner v. Muskegon Machine & Foundry Co., 97 Mich. 166, 56 N. W. 356 (359).

22—Truschel v. Dean, 77 Ark. 546, 92 S. W. 782.

23—Nabours v. McCord, 36 Tex. Civ. App. 504, 75 S. W. 827 (834).

"Courts of equity are so rigid in requiring good faith, honesty, and integrity on the part of trustees, that when they fall short in these respects, in purpose or intent only, though no actual harm results, if they reacquire the property which they have disposed of with such fraudulent intent, it will be reimpressed with the trust, although the purchaser to whom it has been sold, and from whom the trustee has acquired it, may not have been a party to, or had knowledge of,

the trustee's wrongful intent. Perry on Trusts, paras. 222, 830; Ellis v. Singletary, 45 Tex. 41.

"While the refused instruction might have been so framed as to present the question more definitely, it embodied a correct principle of law applicable to a phase of the case presented by the testimony and not covered by the main charge, and which it was the right of plaintiffs in error to have submitted to the jury. In other words, if M. resorted to the alleged promise of guaranty, not for the purpose of securing a fair price for the property, but as a scheme on his part to enable him to finally acquire it, then, in my judgment, he should not be permitted to hold it as against the plaintiffs."

(b) The court instructed you that an assignee is not permitted by law to sell to himself, either directly or indirectly, the property of the assigned estate. So if you believe from the evidence that on or about May 5, 1897, the assignees, H. and M., made to L. a transfer of the properties herein sued for, and then belonging to the assigned estate of said C. and C. and the — Bank, or any of said properties, and you believe that it was either expressly or impliedly agreed or understood at the time on the part of said M. and L. that said transfer should not be an absolute sale of said property to said L., but that it was either expressly or impliedly understood at the time of or prior to said sale to L. that the said M. should have the right and privilege of purchasing all or any part of said property from the said L., and that the said L. would sell the same to said M., and you believe that after said transfer to said L., said M., whether for himself or for other persons, did purchase said property, or any part thereof, either in his own name, or in the name of other persons for his own benefit, then you are instructed that said sales and transfers of so much of said property as was included within said agreement between M. and L. were invalid, and that the title to such portion of said property did not pass by said sale from the said assignees, and you will find for plaintiffs as to such property.

(c) If you believe from the evidence that L. purchased the assigned property from H. and M. absolutely, without any promise, agreement or understanding, either express or implied, with M. that he (M.) should have any interest in said purchase. or that he should be permitted to purchase it, then you will find for defendants.²⁴

§ 2267. Contract for Sale of Mining Claims—Condition Precedent to Marking of Claim. The court instructs the jury that the existence of a mining location as contemplated by the United States law (that is, discovery of a mineral-bearing lode in place, and the marking and staking upon the ground of the claim) for the claims described in the contract herein, and to be conveyed by such deed as is provided for, is a condition precedent for plaintiff's rights to recover the contract price. And if you find that the plaintiff did not have all the claims so properly located at the time of the making of the contract and the execution of the deed, then plaintiff is not entitled to recover.²⁵

§ 2268. Construction According to Order of Vendee and Under the Superintendence of Vendee's Agent. (a) The court instructs

24—Ibid.

25—La Grande Inv. Co. v. Shaw, 44 Ore. 416, 72 Pac. 795.

"Now, while there is no reference made in this particular instruction to any fraudulent purpose, it must be read in connection with the general charge. In reality all these instructions are conditioned upon the proof of fraud in connection therewith, as the

court at the very outset told the jury that the burden of proving the alleged fraudulent representations was with the defendant, coupled with a clear definition as to what would constitute such a fraud and deceit as would relieve the defendant of his alleged obligation. The exceptions, therefore, to this instruction were not well taken."

the jury that if McC., with appellant's knowledge and consent, directed the kind of material to be used, and superintended the construction of the machines, and that they were constructed according to his order, then the appellees should not be held responsible for defective material.

(b) The jury is instructed that if McC., as the appellant's agent, requested the appellees to employ J. as their moulder, and to have charge of the castings, etc., and he was employed at such request, and McC. recommended him as a competent man to do the work, that this was a guarantee on appellant's part that he was a competent man, and appellant was estopped to claim that he did his work improperly or inefficiently, or claiming damages for reason of his want of skill.

(c) The jury is instructed that if McC., as agent, etc., without appellees' consent, interfered with the construction of the machine by reason of which the machines were improperly put together without appellees' fault, then appellees were not barred of recovery of the contract price, if the machines failed to work on account of such interference, and the material was first class.

(d) The jury is instructed that, though there were defects in the machine and workmanship, yet if the jury believe from the evidence that such defects could with reasonable prudence have been seen by the defendant or his agent, and that the defendant or his agent had sufficient opportunity to examine such machines before accepting the same, then it was the duty of defendant or his agent to have rejected said machines, or to have called the attention of the plaintiffs to such defects and given them an opportunity to correct the same, therefore if the jury believe from the evidence that defendant or his agent accepted said machines in a defective condition, or having sufficient opportunity to know that they were defective in workmanship or material, without giving plaintiffs opportunity to correct the same, then defendant is estopped from now setting up said defects as a defense to this action, and plaintiffs are entitled to recover whatever the evidence may show to be due them under the contract.²⁶

§ 2269. Contract of Sale—Goods to Be of a Specific Quality, Quantity and Description—Mingled with Other Goods—Delivery—Acceptance—Refusal and Tender Back—Sale for Benefit of Vendee—Series.

(a) The court instructs the jury that under an executory contract for the purchase of goods of a certain quality and description, to be shipped to the buyer at a distant place, if the seller mingle with the goods sold, and include in the same shipment, with general freight charges on all the goods, additional goods, which have not been ordered or purchased, and insists on payment of the whole, including the charge for the additional goods, he cannot compel the buyer to accept and pay for the whole, or to select from the whole so many of the goods as were in fact ordered.

(b) If the jury believe from the evidence that the defendants,

through their agent, made a contract with the plaintiff, in — for the purchase of goods of certain specific quality, quantity, and description, to be prepared and shipped by plaintiff from — to defendants' address, at M., and there was no agreement or understanding that the delivery of the goods to the carrier at C. should be taken as an acceptance by the defendants, then the mere delivery to the carrier would not operate as such acceptance; and, on arrival of the goods at M., the defendants were entitled to reasonable time and opportunity to inspect the goods, to ascertain whether they conformed to the contract, and this included the further right, within a reasonable time, to refuse to accept the goods if they did not conform to the contract of purchase; and what is a reasonable time is a question of fact to be determined by the jury, from a consideration of the situation and business relations of the parties and all the other circumstances in evidence.

(c) It was a condition precedent to the sale in this case that plaintiff deliver goods of the kind and quality ordered, and the quantity ordered; and if the jury believe from the evidence that defendants gave plaintiff an order to ship them only those goods listed in the memorandum exhibited by witness, H. C. S., and for the aggregate price of \$—, as therein stated, and that plaintiff shipped and invoiced them the goods listed in plaintiff's bill of particulars, aggregating in price, \$—, and that several pieces shipped were materially different in quality, and inferior in value, to that ordered, then defendants were not bound to accept any of the goods.

(d) If the jury from the evidence, and, under the other instructions in the case, find, that the goods delivered to defendants did not correspond with the contract, it was the right of the defendants to promptly notify plaintiff of their refusal to accept the goods, and to tender them back, and after waiting a reasonable time, and learning of plaintiff's refusal to take back the goods, then to store them for plaintiff, or, if expensive, to keep and care for them; then to sell them to the best advantage for plaintiff's account; and in such case, if the goods were stored, then the defendants have the right to claim reimbursement for all freight paid, necessary and reasonable storage charges, insurance and drayage, and expense of repacking, properly incurred in keeping and caring for said goods until they could be sold to advantage; and the reasonableness of such charges is for the jury.

(e) In this case, if the jury believe from the evidence that the plaintiff, in a substantial or material matter or matters, failed to comply with the contract of sale which is sued upon, and that defendants refused to accept the goods, and notified the plaintiff that the same would be held or disposed of for its account, then the jury will not consider any of the evidence as to the amount of money received by defendants or the S. Co. on afterwards disposing of the goods, except as bearing upon the question whether the defendants voluntarily ratified the shipment after knowing all the facts.

(f) It is a cardinal rule that one party seeking to enforce an executory contract must show a compliance with all conditions on his part. If the jury believe from the evidence that the defendants, through their agent, made a contract with the plaintiff in Chicago, for the purchase at a certain price of certain goods, of a specified quality and description, to be thereafter shipped by plaintiff from C. to defendants' address at M., and that plaintiff shipped goods of a quality substantially different from those ordered, and of less value, and included also in the same shipment, and mingled with the other goods, additional goods,—that is to say, furniture that was never ordered or purchased by defendants,—then the defendants had the right, on discovering these facts, to reject the shipment.²⁷

WARRANTY.

§ 2270. **Warranty—What Constitutes.** The court instructs you that to constitute a warranty, no particular words or expressions are necessary, nor need the words “warrant” or “warranty” be used. Any distinct representation or affirmation of the condition or quality of the article or thing sold, made by the seller at the time of the negotiations for the sale, which he intended, and from which the purchaser at the time had reasonable grounds to suppose and believe were intended by him, to effectuate the sale, that the purchaser, in fact, did so believe in making the purchase, relied thereon, and on the truth thereof, and which were operative in effecting the sale, is a warranty. It is not necessary to show that the seller at the time intended to cheat or deceive the purchaser in the sale, nor is the plaintiff required to show that the seller at that time knew the representations to be false; but he has the right to rely upon the representations or affirmations so made. The mere praise of the property sold, or a bare affirmation of its soundness, at the time when it was exposed for the purpose of inspection, does not, of itself, constitute a warranty; or, if the purchaser had determined to purchase without such representations or affirmations, and formed his own opinion, and relied upon his own judgment, and did not rely upon the representations or affirmations, if any were made, then there is no warranty. In this case, if you find from the evidence that the defendant, at the time of and just before the beginning of the sale of the hogs, made the statements to the persons there assembled for the purpose of bidding on the hogs then to be sold, that the hogs were all right, which he intended, and from which plaintiff had reasonable grounds to suppose and believe that the defendant intended, thereby to effectuate a sale of the hogs, and did in fact so suppose and believe, relied thereon, and upon the truth thereof, and that such representations were operative in making the sale; that in fact said hogs were all right,

27—Approved as a series in *Strauss v. Nat'l Furniture Co.*, 76 Miss. 343, 24 So. 703 (704).

but were diseased with swine plague, hog cholera, or other infectious disease, then the plaintiff will be entitled to recover upon the first count of his petition. If you fail to so find, you must find for the defendant thereon.²⁸

§ 2271. Warranty of Title by Vendor. The court instructs the jury that where a vendor in possession of personal property, either by himself or agent, sells the same to a purchaser who buys in good faith, believing he is obtaining a clear title to the property, there is an implied warranty of title by the vendor; and if, in such case, there is an outstanding claim of title, evidenced by a duly filed chattel mortgage on the property sold, and the mortgagee takes possession of said property under a writ of replevin, thereby depriving the purchaser of the possession of said property, and upon the trial of the replevin suit the judgment for the possession of the property is for the mortgagee, then and in that case the purchaser of said property would be entitled to recover, against the vendor of the same, damages by reason of the failure of the vendor's title.²⁹

§ 2272. Warranty by Agent—Ratification of Agent's Acts. (a) The testimony shows that the machine in question was bought from one O. It is further shown that said O. received his agency to sell the machine in question from one G. & J., who were the agents of the plaintiff herein. You are therefore instructed, as a matter of law, that if you find, from a preponderance of the evidence, that said O. took defendants' order for said machine, and gave defendants a written warranty for said machine, and you further find from the evidence that plaintiff delivered said machine upon said order and accepted defendants' notes on said order, they thereby ratify the warranty made by O. and are bound thereby.

(b) If you find from the evidence that the plaintiff's agent did warrant the machine as represented, and that it failed to answer its warranted character, the measure of defendants' damages is the difference in the condition it actually was at the time of the sale, and what it would have been had it answered its warranted character.³⁰

§ 2273. Acceptance Waives Implied Warranty. (a) The court instructed the jury substantially, that, if they found it to be as alleged by the plaintiff, there was an implied warranty that the machine was suitable for the work it was intended to do; and, if not

28—*Powell v. Chittick*, 89 Iowa 513, 56 N. W. 652 (653).

29—*Hartwig v. Gordon*, 37 Neb. 657, 56 N. W. 324 (325).

30—*Esterly Harvesting-Mach. Co. v. Frolkey*, 34 Neb. 110, 51 N. W. 594 (596).

The court held that "it would be unjust to permit plaintiff to adopt that part of the contract made by its agent as is beneficial to it, and reject the remainder. The instruc-

tion complained of properly submitted to the jury the question of the ratification of O.'s acts by the plaintiff. *Esterly v. Van Slyke*, 21 Neb. 616, 33 N. W. 209; *Sycamore Marsh Harvesting Co. v. Sturm*, 13 Neb. 210, 13 N. W. Rep. 202; *Chariton Plow Co. v. Davidson*, 16 Neb. 377, 20 N. W. 256; *Manufacturing Co. v. Wagoner*, 25 Neb. 443, 41 N. W. 287; *Rogers v. Hardware Co.*, 24 Neb. 655, 39 N. W. 844."

suitable therefor, defendant had the right to return it to plaintiff within reasonable time after discovering its defects.

(b) If the jury find that the defendant, after he knew or ought to have known from the test he made that this machine was an unsatisfactory machine on ———, and, after determining that he was not satisfied with it, nevertheless went on and worked with it on ———, for the purpose of completing his harvest, the law would consider that an acceptance of the machine.

(c) The court further instructed the jury that, if they found defendant's version of the contract the correct one, he had the right to return the machine if not satisfied with it, unless he had theretofore accepted it under the rule of acceptance above stated; and, if he did thus accept it, the right to return it was lost.³¹

§ 2274. Reliance on Representations Necessary to Constitute a Warranty. (a) The court further instructs the jury to entitle the plaintiff to recover in the suit, it is not only necessary for the jury to find from the evidence that the defendant warranted the animal in question as alleged in the petition, but it must further appear from the evidence that the plaintiff relied upon said warranty in making the purchase of the horse, and was induced to make said purchase by said warranty, and it must also appear from the evidence that the horse was not as warranted at the time of the sale; and, unless all of these facts appear from the evidence, the jury should find for the defendant.³²

(b) That if the jury shall find from the evidence that the agent of the plaintiffs, in making sale of the fertilizer sued for in this case, represented the same to be as good a fertilizer, and as well adapted to raising potatoes, beans, cabbage, and other vegetables, as any other in the market of like price, and also represented that the said fertilizer was as good a potato special as any other in the market, as is set out in the defendant's first special plea, and was authorized to do so by the said plaintiffs, such representations will not amount in themselves to a warranty, unless the jury shall further find that the said representations, when so made by the plaintiff's agent, were intended by him to cause the sale; and, furthermore, that the said defendant understood the said representations to be a warranty of said fertilizers, and was induced thereby at the time to become the purchaser thereof.

(c) The court instructs the jury that if they believe from the evidence that the plaintiff's fertilizers were first introduced into this community for sale ———, and the spring of ———, and further

31—Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090 (1892).

32—Watson v. Roode, 30 Neb. 264, 46 N. W. 491 (1894).

"The law undoubtedly is, and has been so declared by this court, that the purchaser of personal

property must have relied upon the statements of the seller as to the quality of the article sold, in order to make the representations a warranty," citing, Little v. Woodworth, 8 Neb. 281; Halliday v. Briggs, 15 Neb. 219, 18 N. E. 55.

believe that it was the custom or usage of the farmers of this section not to buy any fertilizer when first introduced, upon the analysis thereof, but to require a warranty that the said fertilizer be as good as any other fertilizer on the market, dollar for dollar, as crop-producing, and if they further believe that S. warranted the fertilizers which he sold to the defendant, as alleged in his plea, then they are instructed that the plaintiffs are bound by such warranty, although they may further believe that he was restricted from making such warranty by any contract entered into between the plaintiffs and said S., unless they further find from the evidence that the said written restriction was known to the said B. at the time he made the said purchase.

(d) If the jury believe from the evidence that S. was authorized by the plaintiffs orally to warrant to the purchasers of their fertilizers, that they were as good as any other in the market of like price, and that he warranted to the defendant, B. when making sale of said fertilizers, that the said fertilizers were as good as any other in the market for the same price, dollar for dollar, and they further find from the evidence that the said fertilizers were not as warranted, then they should find for the defendant such damages as have resulted naturally from the breach of the said warranty.³³

§ 2275. Implied Warranty of Manufactured Article. As to the regular boxes, you are instructed that if you believe from the evidence that the defendant submitted to the plaintiff a design for said boxes, and informed the plaintiff of the use to which they were intended to be put, and the conditions they must meet in order to perform the intended service, then the plaintiff in undertaking to make and sell such boxes in accordance with such design, impliedly warranted their sufficiency for and adequacy to the service for which it was intended they should be put, under the necessary conditions of that service, unless you find from the evidence that the plaintiff objected to such design as inadequate, or protested against it, or otherwise relieved itself from responsibility therefor.³⁴

§ 2276. Purchaser to Give Trial and Notice—Provision of Returning Machine. (a) The jury are further instructed that in no case would the defendant, under the terms of the article or contract given in evidence, be entitled to damages, even if the jury find from the evidence that the machinery in question did not fulfill the warranty. For, by the terms of the contract it was his duty to give the machinery such trial as the contract contemplates, and if it failed to fulfill the warranty to give such notices and return the machinery, as the contract provides, and if he neglected to give the notice or return the machinery in the manner provided by the contract, but continued to

33—Reese et al. v. Bates, 94 Va. 321, 26 S. E. 865 (870). mie Falls Power Co., 29 Wash. 292, 69 Pac. 759 (764).

34—Moran Bros. Co. v. Snoqual-

keep and use it, even to his own detriment, he is not entitled to any damages either as a set-off against the notes or otherwise.

(b) The jury are further instructed that the provisions of the warranty clause contained in the order or agreement given in evidence concerning the purchase of the machinery in question in this suit, that the defendant should "inside of five days from the day of the first use by him of said machinery" give notice of any failure of said machinery to fulfill the warranty to the plaintiff and to the local agent of whom he purchased it, and that the continued use of said machinery after the expiration of said time should evidence a fulfillment of the warranty and satisfaction to the defendant, is just as binding and conclusive upon the parties as any other provision of the contract, and the jury cannot lawfully find that the same has been waived or released, unless they believe from the evidence that there is a preponderance of all the evidence in the case that the same has been released or waived.³⁵

§ 2277. In Absence of Special Contract—Purchaser Buys at His Own Risk—Contract to Purchase Machinery Installed on Trial. (a) The jury are instructed that there is no special warranty or guaranty in the written contract that the property should be of any quality, and in the absence of such warranty or guaranty the presumption is the plaintiff was buying at his own risk, and relying on his own judgment.³⁶

(b) I instruct you that by this written contract the plaintiff did not warrant his furnace or gas-producing machine to do any particular class or quality of work or service. He simply offered to put his melting furnace and gas producer into the defendant's works on a trial of ——— days; and if the defendant, after such trial of thirty days, was satisfied with the furnace and producer, it was to accept and pay for them; and it lay solely with the defendant to say whether it was satisfied or not. If it said it was not satisfied, it had a right to reject the property, and it owed the plaintiff nothing; but I charge you that, if the plaintiff constructed the works within a reasonable time after the proposal and acceptance thereof, and at the place required by the defendant, and that the defendant had notice of the completion of the same, and that the same were completed ready for use and trial, according to the contract, and as understood by the parties, and if you further find from the testimony in the case that the parties to the contract understood that the trial of the fur-

35—C. Aultman & Co. v. Wykle, 36 Ill. App. 293 (299).

36—W. St. L. and P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641.

The court said that in this case the written contract containing no warranty, and there being an express contract, no contract of warranty could exist by implication; the law must presume there

was no warranty, and the purchaser bought at his own risk and on his own judgment, and the contract being in writing, it was the duty of the court to construe it and instruct the jury it contained no warranty, citing Walker v. Brown, 28 Ill. 378, 81 Am. Dec. 287; Ogden v. Kirby, 79 Ill. 555.

nace and gas-producer was to take place immediately after they were complete and ready for use and trial; then the defendant had ——— days after such completion and notice to make the trial; and if defendant was not satisfied with the furnace and producer after such trial, it was the duty of defendant to so notify the plaintiff. But if the defendant failed to make such trial or failed within a reasonable time after the expiration of said ——— days to notify the plaintiff that the property was not satisfactory, then the law conclusively presumes that the defendant was satisfied, and had accepted the property, and imposes upon the defendant the liability to pay therefor the contract price, unless you are satisfied from the testimony that the plaintiff assented and agreed to some delay or postponement of the time of trial, or that further trial might be made.

(c) As to the melting furnace, I further charge you that if the defendant by its authorized agent on ———, agreed with the plaintiff to give the furnace another trial of ——— days on malleable iron, to commence the trial as soon as possible from such time, and, if the furnace worked all right, to accept it, and if you find that the defendant did not attempt to give the furnace another trial of ——— days, commencing as soon as possible after ———, then I charge you that the defendant is liable to the plaintiff for the furnace and producer used with it, and you will accordingly find in favor of the plaintiff for the contract price of the same.³⁷

§ 2278. **Burden of Proof.** The burden of proof is upon the plaintiffs in the first instance to satisfy you by a preponderance of the testimony that the material sued for in this action was delivered in the quantities and of the quality provided for in the agreements between the parties, but, if the defendants claim that there was a guaranty made by the plaintiffs that any specific description of the material should be of a certain quality, the burden of proof is upon the defendants to satisfy you, by a preponderance of the testimony, that such guaranty was given.³⁸

37—Turner v. Muskegon Machine and Foundry Co., 97 Mich. 166, 56 N. W. 256. 38—Clarke v. Van Court, 34 Neb. 154, 51 N. W. 756 (758).

CHAPTER LXXIX.

SLANDER AND LIBEL.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2279. Words must be proved as charged—"Sets of Words."</p> <p>§ 2280. Proof of actionable words—All the words need not be proved.</p> <p>§ 2281. Presumption of good reputation—Burden of proof on defendant.</p> <p>§ 2282. Words presumed to be used in their ordinary meaning.</p> <p>§ 2283. Malice and damage presumed from speaking actionable words.</p> <p>§ 2284. Words not spoken maliciously.</p> <p>§ 2285. Publication of proceedings in good faith or with design and intent to injure—Question for jury.</p> <p>§ 2286. Defendant subject to criticism—Bona fide belief that publication of proceedings of Board of Trustees necessary in defense of character—Jury may judge of truth of charges.</p> | <p>§ 2287. What jury are to consider on question of malice.</p> <p>§ 2288. Anger no justification—In mitigation, when.</p> <p>§ 2289. Plea of justification—How proved.</p> <p>§ 2290. Plea of justification in good faith.</p> <p>§ 2291. Not an aggravation of damages, when.</p> <p>§ 2292. Repeating report.</p> <p>§ 2293. Charge of fornication or adultery—Effect of retraction.</p> <p>§ 2294. Charge of dishonesty.</p> <p>§ 2295. Privileged communications.</p> <p>§ 2296. Definitely pointing out person libeled.</p> <p>2297. Libel—Truth of words—Defense.</p> |
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§ 2279. Words Must be Proved as Charged—"Sets of Words."

(a) Though the jury may believe, from the evidence, that the defendant spoke words which are equivalent to the words charged in the declaration, and which convey the same meaning, still, if the jury further believe, from the evidence, that the words proved are not, substantially, the same words as those charged in the declaration, then the plaintiff is not entitled to recover.¹

(b) The plaintiff is not entitled to recover upon the proof of the speaking of words which are only similar to, or have the same meaning as, the words charged in the declaration, but are not the same words. She can only recover upon proving the speaking of the material words of some one or more of the slanderous statements charged in the declaration, precisely as therein charged.²

1—Flinn v. Barlow, 16 Ill. 39; 2—Wallace v. Dixon, 82 Ill. 202; Ransom v. McCurley, 140 Ill. 626, 31 Ill. v. Swank, 202 Ill. 453, 66 N. E. N. E. 119; Roberts v. Lamb, 93 1042. Tenn. 343, 27 S. W. 668.

(c) The court instructs the jury for the defendant, that before the plaintiff is entitled to recover any verdict in this case, he must prove by a preponderance of the evidence that the defendant uttered and spoke of and concerning the plaintiff some one or more of the sets of alleged slanderous words mentioned in the declaration, and that such words were spoken by the defendant, in the presence and hearing of some person or persons other than the plaintiff. By "sets of words" is meant the groups of words as they are embraced within the quotation marks in the declaration. The court further instructs the jury that proof of equivalent words will not be sufficient, but they must prove the words alleged in the declaration as alleged in the declaration, or some one set of words.³

§ 2280. Proof of Actionable Words—All the Words Need Not be Proved. (a) The court instructs the jury that while it is necessary, to entitle the plaintiff to recover in an action of slander, that she should prove the slanderous words alleged in the declaration or some count thereof, still it is not necessary to prove all the words that are charged to have been spoken. It is sufficient to prove substantially any set of words in some one or more of the statements of slanderous words contained in the declaration, and the different counts thereof.⁴

(b) To authorize a verdict for the plaintiff in an action of slander, it is not necessary that all the slanderous words alleged in the declaration should be proved, unless it takes them all to constitute the slander charged; and, in this case, if the jury believe, from the evidence, that a sufficient number of the words charged in the declaration to amount, in their common meaning, to a charge of (larceny) against the plaintiff, have been proved to have been spoken by the defendant, as charged in the declaration, then the jury should find the issues for the plaintiff.⁵

§ 2281. Presumption of Good Reputation—Burden of Proof on Defendant. You are instructed that the law presumes, in the absence of evidence to the contrary, that plaintiff possesses a good character and reputation, and that she is innocent of the crimes charged; and you are instructed that she is entitled to recover in this case, unless the defendant has proven by a preponderance of the evidence all the elements necessary to convict plaintiff of prostitution and abortion. The burden of proof is upon defendant to show the plaintiff guilty of the commission of these crimes.⁶

3—Finnell v. Walker, 48 Ill. App. 331 (333).

Note.—Some states hold that it is sufficient to prove the words substantially as charged. See Cooley on Torts (3d ed.) 419, and cases cited.

4—Iles v. Swank, 202 Ill. 453, aff'g 105 Ill. App. 9, 66 N. E. 1042.

"This instruction was proper, as all the counts charged slanderous

words actionable per se. Ransom v. McCarley, 140 Ill. 626, 31 N. E. 119; Thomas v. Fischer, 71 Ill. 576."

5—Baker v. Young, 44 Ill. 42; Dufresne v. Weise, 46 Wis. 290, 1 N. W. 59; Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280 (282); Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. 126, 11 L. R. A. 162.

6—Whiting v. Carpenter, 4 Neb. (Unof.) 342, 93 N. W. 926 (927).

§ 2282. Words Presumed to be Used in Their Ordinary Meaning. The jury are instructed, that when one person utters slanderous words concerning another, which, in their ordinary and common signification, impute the crime or offense, of, etc., it must be presumed it was in that sense they were used, and understood by the bystanders who heard them, unless other words are used at the same time which limit or qualify the ordinary meaning of the slanderous words used; and a defendant, when sued, cannot excuse his guilty conduct by an explanation in his testimony, that he did not use the words to impute the crime or offense thereby indicated; provided, the jury believe, from the evidence, that the defendant spoke the words, as charged.⁷

§ 2283. Malice and Damage Presumed from Speaking Actionable Words. All the plaintiff is bound to prove on his part to entitle him to recover in this case is the speaking, by the defendant, of enough of the slanderous words charged in the declaration to amount to a charge of (stealing or larceny) against the plaintiff; and if the jury believe, from the evidence, that the defendant is guilty of the speaking of the slanderous words, charged in the declaration, of and concerning the plaintiff, then express malice or ill-will need not be proved. Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse.⁸

§ 2284. Words Not Spoken Maliciously. If the jury believe, from the evidence, that the defendant in speaking the words charged, was not actuated by malice, but simply repeated them as something he had heard from others, and without any malice towards the plaintiff, and did not intend to be understood as imputing any offense to her, then the jury should find for the defendant. And it is a question for the jury to determine from all the facts and circumstances proved, and from all the evidence in the case, whether the defendant did thus repeat the words, and whether he acted maliciously in so doing.⁹

§ 2285. Publication of Proceedings in Good Faith or with Design and Intent to Injure—Question for Jury. (a) If, however, the defendants published in good faith, for the reason claimed by them, actuated solely by a desire to protect the college, and give its patrons correct and full information of the entire proceedings, in such case there would be no malice, and the jury should answer the third issue "No."

(b) If these defamatory statements were false, and defendants published them with a design and intent to injure the plaintiff, or because they were mad at him for testifying against the president of the college,—if that was the motive, or one of the motives, that induced the publication,—it would be malicious, and you will answer the issue "Yes."¹⁰

7—Miller v. Johnson, 79 Ill. 58.

8—Smart v. Blanchard, 42 N. H. 137; Lick v. Owen, 47 Cal. 252; Wilson v. Noonan, 35 Wis. 321; Rea-
rick v. Wilcox, 81 Ill. 77; Penning-

ton v. Meeks, 46 Mo. 217; Indianapolis, etc., v. Horrel, 53 Ind. 527.

9—Cummerford v. McAvoy, 15 Ill. 311.

10—Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931 (933).

§ 2286. **Defendant Subject to Criticism—Bona Fide Belief that Publication of Proceedings of Board of Trustees Necessary in Defense of Character—Jury May Judge of Truth of Charges.** (a) The jury are instructed that if the jury believe from the evidence that the defendant K. had been subject to criticism and adverse comment and attacks in the press (from another than the plaintiff), and he bona fide believed that the publication of the proceedings before the board of trustees was necessary in defense of his character and standing, and he published the speech as part of the proceedings, in order that the whole investigation might be laid before the public, that it might judge of the truth of the charges against him, then the jury should answer the third issue (as to malice) "No" as to said K.

(b) A man first assailed in public prints has a right to defend himself, and, if the facts stated in prayer are true, and the publication was made by defendant K. in good faith, and solely for the reasons given, there would be no malice as to him, and the jury should, by their verdict, excuse defendant K. on the third issue.¹¹

§ 2287. **What Jury Are to Consider on Question of Malice.** On the question whether there was malice in the publication of the words complained of, you have a right to consider the words of the libel itself, and the circumstances attending its publication.¹²

§ 2288. **Anger No Justification—In Mitigation When.** (a) The court instructs the jury, that anger is not a justification for the use of slanderous words, and it ought not to be considered, even in mitigation of damages, unless the anger is provoked by the very person against whom the slanderous words are used.¹³

(b) If the jury believe, from the evidence, that the defendant spoke in the presence and hearing of others, of and concerning the plaintiff, the slanderous words charged in the declaration, then it is immaterial whether the words were uttered with or without anger or passion on the part of the defendant, unless the jury further believe, from the evidence, that such passion was wrongfully caused or provoked by the plaintiff; and even in such case, anger or passion would be no justification, it could only be considered by the jury in mitigation of damages, in case they find the plea of justification not established by a preponderance of testimony, and find the defendant guilty.¹⁴

(c) The jury are instructed, that while it is true, that anger or passion is not a justification for the use of slanderous words, or even a mitigating circumstance, unless provoked by the person against whom the slanderous words are spoken, yet, if the party complaining does wrongfully provoke such anger, the fact may be taken into ac-

11—Gattis v. Kilgo, supra.

12—Gattis v. Kilgo, supra.

"If the words of the libel are clearly malicious,—that is, if they show clear evidence of actual malice on their face, they may be

considered by the jury, as in the case of Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775."

13—Janch v. Janch, 50 Ind. 135.

14—Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280 (282).

count and considered by the jury in fixing the amount of their verdict, in case they find the defendant guilty.¹⁵

§ 2289. Plea of Justification—How Proved. (a) The court instructs the jury, as a matter of law, that where a plea of justification, in an action for slander, accuses the plaintiff of a crime, the defendant, in order to sustain the plea, must prove the guilt of the plaintiff, as charged in the plea, beyond a reasonable doubt. So far as the degree of proof is concerned, the plaintiff occupies the same position as if he were on trial upon an indictment for the offense charged.¹⁶

(b) The court instructs the jury, that, in this case, the plea of justification alleges that the plaintiff was guilty of the crime of (perjury), and to prove the truth of that plea, it is incumbent upon the defendant to prove everything requisite to constitute the crime of (perjury) beyond a reasonable doubt.¹⁷

(c) In order to sustain the plea of justification, it is not necessary that the defendant should establish the truth of that plea beyond a reasonable doubt; it is sufficient if it is established by a preponderance of the evidence.¹⁸

§ 2290. Plea of Justification in Good Faith. (a) The court instructs the jury, that, although they should find, from the evidence, that the defendant in this case has not sustained his plea of justification, still, the fact that he has filed such plea must not of itself be regarded by the jury as evidence of malice on the part of the defendant.¹⁹

(b) And in this case, the fact that defendant has filed a plea justifying the speaking of the words charged, does not relieve the plaintiff from the necessity of proving the speaking of the words alleged. The plea of justification cannot be used to convict the defendant; he is not bound to make his defense till there is evidence showing his guilt.²⁰

§ 2291. Not an Aggravation of Damages, When. The filing of a plea of justification in this case does not necessarily aggravate the

15—Freeman v. Tinsley, 50 Ill. 494; McClintock v. Crick, 4 Ia. 453.

16—Merk v. Gelzhaenser, 50 Cal. 631; Corbly v. Wilson, 71 Ill. 209.

17—Barton v. Thompson, 46 Ia. 30; Mott v. Dawson, 46 Ia. 533; Tucker v. Call, 45 Ind. 31.

Above Iowa cases overruled in Riley v. Norton, 65 Ia. 306, 21 N. W. 649. In the latter case the court holds that such proof need only be made by a preponderance of the evidence.

18—Cooley on Torts (3d ed.) 417, Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Blaeser v. Milwaukee, etc., 37 Wis. 31, 19 Am. Rep. 747; Knowles v. Scribner, 57 Me. 495; Rothschild v. Am. Cent. Ins. Co., 62 Mo. 356; Burr v. Wilson, 22 Minn. 206; Jones v. Graves,

26 Ohio St. 2; Riley v. Norton, supra.

Note.—See Cooley on Torts (3d ed.) 417, 418, for cases cited in support of both doctrines, viz., that it is sufficient to prove a crime in a civil suit of slander or libel by a preponderance of the evidence, and contra that it must be proved beyond a reasonable doubt.

19—Harver v. Harver, 78 Ill. 412. Contra, that a plea of justification not proven is evidence of express malice, see Coffin v. Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. 422, 55 L. R. A. 732.

20—Farnan v. Childs, 66 Ill. 544. In some states an unsuccessful attempt to justify may be considered in aggravation of damages. See Cooley on Torts (3d ed.) 418, 423, and cases cited.

damages, even though the jury find that it has not been proved; provided, the jury further believe, from the evidence, that defendant filed such plea, believing in good faith that it was true, and that he could prove it.²¹

§ 2292. **Repeating Report.** If the jury believe, from the evidence, that the defendant is guilty of speaking the slanderous words charged in the declaration, then the fact, if proved, that defendant gave the statement as a report in the neighborhood, and mentioned his authority for the statement, would not exonerate him from liability.²²

§ 2293. **Charge of Fornication or Adultery—Effect of Retraction.**

(a) The court instructs the jury, that words, which, in their common acceptation, amount to a charge of fornication or adultery, if spoken in the presence of others, and not spoken under privileged circumstances, or for justifiable ends, as explained in these instructions, are slanderous and actionable in themselves, and the law will imply malice from the mere speaking of such words.²³

(b) Now I think this is a good case to submit to twelve men in S. county, to say what damages a plaintiff shall have who has been treated as X. has. Has he been injured, or has the defendant pursued a proper and justifiable course in which to treat a citizen, who is a man of good character, and where the defendant does not set up the truth? Or has the defendant, while the plaintiff is away, tried to find out what the truth is, and then published the libel with the truth, with the allegation of the wife? Now, you will have this article before you. It is put in the declaration exactly I understand as it was printed, and the first question is: Do you find that to be, as I have suggested,—that paragraph with the whole article,—to be practically a charge of adultery? If it is, and it is not true,—and it is not claimed to be true,—then the plaintiff is entitled to whatever damages you think a man is entitled to, who has a good character, and who is above reproach, who is accused in a public journal like the B. Journal of that crime, and sent out under the circumstances which this was; because you are to take in mitigation, if there is anything in mitigation of it,—you are to take into consideration that the defendant had published what was published in N. Y., that the article was not true, so that, when the defendant published this article, it had not only the fact that Mrs. — but that — also denies that there was any truth in that accusation. But still the defendant published it with their denial. Now, it is for you to say whether the defendant is justified in doing that, or whether, when the defendant found out both from the plaintiff and his wife, acting sep-

21—Thomas v. Dunaway, 30 Ill. 373. igate damages. Cooley on Torts, supra.

22—Compare with previous section.

23—Fowler v. Chichester, 26 Ohio St. 9; Blocker v. Schoff, 83 Ia. 265, 48 N. W. 1079; Cooley on Torts (3d ed.) 458, and cases cited. May mit-

23—Schmisser v. Kreilich, 92 Ill. 347; Dufresne v. Weise, 46 Wis. 290, 1 N. W. 59; Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280 (282).

arately and from different sources, that there was not a word of truth in the article, that it was a gross libel, whether the defendant can go on and publish it, and then set up as an excuse that the defendant consulted both the plaintiff and his wife, and that they both said that it was not true. And, if you say it is a libel under the rules I have given you, you are to say what the damages are.²⁴

§ 2294. Charge of Dishonesty. If the jury believe, from the evidence, that at or about the time charged in the declaration, the plaintiff was engaged in the business of, etc., and that the defendant, in a conversation with the plaintiff, in the presence and hearing of other persons, within (one year) before the commencement of this suit, said to the plaintiff, "You are a rascal; you have put your property out of your hands to cheat your creditors out of their pay," and that this was said with an intent to charge the plaintiff with having fraudulently conveyed his property with intent to defraud his creditors, or to hinder or delay them in the collection of their just debts, then the jury should find the defendant guilty, and assess the plaintiff's damages at what they think is just and right, under the evidence in this case.²⁵

§ 2295. Privileged Communications. The jury are instructed that the people of our town and cities have a right to know how their municipal affairs are being conducted, and how the duties of their officers are being performed, and that it is one of the privileges of newspapers to give the people this information, and that, if the information so given is true, or if the publishers believe it to be true, and have reasonable and probable cause for so believing, the law protects them; that the press must not be muzzled; that the public good requires that it be allowed to speak; and that all which the law requires of its editors and publishers is good faith and an honest belief that their statements are true, and that such belief be founded on reasonable and probable grounds.²⁶

§ 2296. Definitely Pointing Out Person Libeled. (a) I charge you that, in order for him to recover in this suit, he must prove by evidence, to your satisfaction, that the effect of the article, as it appeared in the newspaper, was to point to him, and to no other person by the name of "John Finnegan." A written or printed publication of a person is libelous on its face, and therefore actionable *per se*.

24—Bishop v. Journal N. Co., 168 Mass. 327, 47 N. E. 119 (120).

"The tone of a charge is not a subject of exception, unless the effect of the charge is to cause a mistrial or a failure of justice. Beal v. Railway Co., 157 Mass. 444, 32 N. E. 653. We do not think that such was the case here. The defendant did not contend that the charges were true."

25—Nelson v. Borchentus, 52 Ill.

236; Phillips v. Hoefer, 1 Pa. St. 62; Fitzgerald v. Redfield, 51 Barb. 484; Orr v. Skofield, 56 Me. 483.

26—In an action against a newspaper for a libel upon the plaintiff, who was a public officer and falsely charged with cruelty to an insane pauper, the above instruction was held correct in O'Rourke v. Lewiston D. S. Pub. Co., 89 Me. 310, 36 Atl. 398 (399).

when it charges him with the commission of a crime, or induces the belief that he has committed a crime, or tends to bring him into public disgrace, or imputes something disgraceful to him, or throws odium upon him, or induces an ill opinion of him in the community. Such publication is presumed to be both false and malicious. Whether the article complained of relates to the plaintiff, or was calculated to injure the plaintiff, is a question for you alone to determine, by the facts and circumstances of this case. If the article related to the plaintiff, and was calculated to injure him in respect to his reputation or standing in the community, then, as to him, it is libelous.

(b) I charge you that identity of name is evidence of identity of person. If the article related to the plaintiff, and was calculated to injure him in respect to his reputation and standing in the community, then as to him it is libelous.

(c) And right here let me state to you, gentlemen, that you have heard the article which was published by the defendant two days after the libel was published, and, if you believe it was intended as an apology, you may consider it as bearing upon the question of damages.²⁷

§ 2297. **Libel—Truth of Words a Defense.** The court instructs the jury, that if the defendant has established the truth of the words set out in the fourth count of the declaration herein, by a preponderance of evidence, then the plaintiff cannot recover as to such fourth count.²⁸

27—"I have been unable to discover any error in either of these paragraphs as they stand in the charge as given." *Finnegan v. Detroit Free Press*, 78 Mich. 659, 44 N. W. 585 (590).

28—*Lodge v. Hampton*, 116 Ill. App. 414 (420). "By appropriate allegation of extrinsic matter and innuendoes, the fourth count of the declaration averred some of the words in the article alleged

to be libelous, to have been used ironically, and as to this count, appellee properly justified that the words were true in the sense imputed to them. The innuendo, if properly applied, is a substantial part of the libel charged. Proof, therefore, of the truth of the mere words does not satisfy a plea of justification averring the truth of the words in the sense imputed by the innuendo."

CHAPTER LXXX.

TRESPASS.

See Erroneous Instructions, same chapter head, Vol. III.

TO PERSONAL PROPERTY.

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- § 2323. Cattle on highway with attendant not "at large."
- § 2324. Cattle—Failure to furnish attendant.
- § 2325. Cattle—Party taking up must care for.

TO PERSONAL PROPERTY.

§ 2298. One Rightfully in Possession May Sue For. (a) The court instructs the jury that a trespass to personal property consists in the unlawful disturbance, by force, of another's possession of such property, and in order to sustain the action it is only necessary that the plaintiff show that, at the time of the alleged trespass, he was the general owner of the property, and then in the actual possession of it, either by himself, his agent or servant, and, further, that the defendant unlawfully interfered with the property, either by injuring it, or by taking it and carrying it away without lawful right, and against the will of such owner.¹

1—Scott v. Bryson, 74 Ill. 420; Addison on Torts, 442; Miller v. Clay, 57 Ala. 162.

(b) In order to maintain an action for trespass to personal property, it is sufficient if the evidence shows that the plaintiff had what is called a special property therein, together with the actual possession of the property, and a right to such possession; and that the defendant unlawfully, and without right, interfered with or disturbed such possession, either by injuring the property or by taking it and carrying it away, against the will of the person so in possession.²

(c) That a person who is in the actual, peaceable and exclusive possession of personal property, without showing any other right, has a sufficient title in the property to maintain trespass against one who, with force, intermeddles with such possession without showing any right or title to the property, or to the possession thereof.³

§ 2299. **Justification—Burden of Proof Upon Defendant.** The law is, that when the rights of private property are invaded by one whose acts would constitute a trespass, unless he is protected by legal authority, then it is incumbent upon such person to show, by a preponderance of evidence, that he was justified, by legal authority, to do the acts complained of; and if he is unable to do this, he must be regarded as a trespasser. It is not enough that such a person intended to perform an official duty, but authority of law for the act complained of must exist, or he will be a trespasser.⁴

§ 2300. **Ratification of Wrongful Levy—Refusing to Release Property Taken.** (a) If the jury believe, from the evidence, under the instruction of the court, that defendant A. B. (the officer), is guilty of a wrongful taking of the property of the plaintiff under the execution introduced in evidence, and that after the property had been so taken the plaintiff went to the defendant C. B. (plaintiff in execution), and requested him to consent to a release of the property by the officer, and that he refused to so consent, then the jury may find the said defendants both guilty, although the defendant C. D. was not present at the time of the taking, and did not direct the officer to levy on the particular property in question.⁵

(b) The court instructs the jury, as a matter of law, that if an act of trespass is committed in the name of another person, or professedly in the interest of such other person, and the latter subsequently ratifies the act by claiming any benefit under it, he would be bound by the act to the same extent as if he had expressly authorized it before it was done.⁶

§ 2301. **Ratification of Wrongful Distress.** The court instructs the jury that if an officer, in executing a distress warrant, seizes the property of a stranger, and the landlord ratifies the act, and retains

2—Miller v. Kirby, 74 Ill. 242;
Cooley on Torts (3d ed.) 840.

3—Cooley on Torts (3d ed.) 841;
Scott v. Bryson, 74 Ill. 420; Miller
v. Kirby, 74 Ill. 242.

4—Lindblom v. Ramsey, 75 Ill.
246.

5—Cook v. Hopper, 23 Mich. 511.
6—Smith v. Lozo, 42 Mich. 6, 3 N.
W. 227.

the property, after knowledge of the facts, he will thereby render himself liable for the trespass committed by the officer.⁷

§ 2302. **No Levy Without Officer Taking Possession.** (a) It is not a sufficient levy of an execution on personal property, as against third persons, for an officer to indorse a levy, with an inventory of the property, on the execution, in the presence of the judgment debtor, while the property is before them; the officer must also take the property into his possession.⁸

(b) The court further instructs the jury that, if property seized, under an execution, is permitted to remain with the defendant for an unreasonable time after the levy, with the consent of the creditor, the levy will be deemed fraudulent and void as against a subsequent execution.⁹

(c) The law will not sustain a levy which is only colorable, and designed to shield the property from the claims of other parties—and, in this case, though the jury may believe that the execution in question was levied on the property in controversy at the time indorsed on the execution, still, if the jury further believe, from the evidence, that such levy was not made in good faith, and with a bona fide intention of satisfying the said execution out of said property, but that, with the knowledge and consent of the plaintiffs in the execution, the said levy was made for the purpose of covering up said property, and keeping it for the benefit of the said (defendant in execution), then such levy was absolutely void, as against the other creditors of the said —, and the jury should so find, in determining the rights of the parties in this suit.¹⁰

TO REAL ESTATE.

§ 2303. **Trespassers Are Jointly and Severally Liable.** (a) The court instructs the jury that, in an action of trespass, if the jury believe, from the evidence, that a trespass has been committed, as alleged in the declaration, and that there was more than one wrong-doer engaged in the trespass, then such wrong-doers are jointly and severally liable, and the plaintiff is under no obligations to sue all who are engaged in the trespass—he may, at his election, proceed against any one or more of such wrong-doers.¹¹

(b) The court instructs the jury, as a matter of law, that in an action of trespass, if it appears that a trespass has been committed, all who encouraged, advised or assisted in the act of trespass, are equally guilty, whether they were present and took part in the act or not.¹²

7—Becker v. Du Pree, 75 Ill. 167.

8—Havely v. Lowry, 30 Ill. 446.

9—Davidson v. Waldron, 31 Ill. 120.

10—Murphy v. Swadener, 33 Ohio St. 85.

11—Ously v. Hardin, 23 Ill. 403.

12—Barnes v. Ennenga, 53 Ia.

§ 2304. Meaning of Terms: Break and Enter—Force and Arms.

(a) Now, gentlemen, do not be misled by the question of breaking and entering. Entering is simply the lifting of a rail; simply a lifting of anything, that is erected to inclose the premises, an entry through anything put there to keep persons out, as breaking the glass, like breaking into a house. You raise a window that is closed; that is breaking. That is what the law means by breaking. If he had no permission to remove the fence, and go upon the premises, and dump dirt,* then damages would lie for the damages he caused that party; but if he had permission, if he had authority to go there, no matter how it was granted to him, then he had a right to go, and he cannot be held for what he did, unless, as I have before said, he went beyond the line where he was permitted to go.¹³

(b) "Force and arms" does not mean actual force or dangerous weapons, but that if the defendants or their servants entered upon plaintiff's lands contrary to his expressed will, and if they knew it was contrary to his expressed will, then the entry would be "with force and arms", and that it was not necessary that they should have actually broken into any enclosure or through any fence.¹⁴

§ 2305. One Holding Title to Land and Possession of Part, May Recover for Trespass. (a) If the jury find that plaintiff has a deed which covers the land in dispute, and that she is living on a part of such land, then her possession extends to all the land covered by her deed, and she has a right of action against any one for damages who trespasses upon such land.

(b) Where one who has no title enters upon land in possession of another, who has color of title to the same, and against the will of such person cuts down and removes the trees and timbers growing thereon, such person is liable in damages to the one in possession under color of title.¹⁵

§ 2306. Where Both Plaintiff and Defendant Have Title to the Land. If, however, the plaintiff has a title, and the defendant has a title, both have titles to the same land, then the party having the oldest title would be entitled to it; that is, the party whose title is the older; that is, if both titles cover this land in dispute. If the plaintiff's title covers it, and the defendant's title covers the land in dispute, both titles cover it, then the oldest title would prevail, and whichever one had the oldest title would be entitled to the possession of the land. But if neither one of them have it, if the titles of neither party cover this land, then your verdict should be for the defendant. If you don't think, under the testimony in the

497, 5 N. W. 597. See *Boswell v. 190, 68 Pac. 206 (208), 98 Am. St. Gates, 56 Ia. 143, 8 N. W. 809. 977.*

13—*McCusker v. Mitchell, 20 R. 15—Connor v. Johnson, 59 S. C. I. 13, 36 Atl. 1123 (1124). 115, 37 S. E. 240 (244).*

14—*Cosgriff v. Miller, 10 Wyo.*

case, that the title of the plaintiff or the title of the defendant, either one, covers this land, but it belongs to somebody else, and is in the possession of somebody else, then your verdict should be for the defendant, because, before the plaintiff can recover, she must satisfy you, by the testimony in the case, that she was in possession of this land, and entitled to be in possession of it by paper title or color of title when the trespass was made by the defendant, if any trespass was made by him at all. If the defendant's title covers the land, if you believe under the testimony that the defendant's title covers the land, and the plaintiff's title does not, then, of course, your verdict would be for the defendant.¹⁶

§ 2307. Proof of Title in Third Person No Protection to One Who Has No Title Against Suit For Damages. (a) Proof of title in a third person will not protect one who has no title against a suit for damages on account of a trespass committed on land which is in possession of another under color of title.¹⁷

(b) If the jury believe, from the evidence, that the plaintiff was in the open, notorious, exclusive and adverse possession of the land in controversy at and before the time the same was fenced by the defendant and that the defendant acquired possession of the said land wrongfully and without the permission of the plaintiff, and ousted the plaintiff from said land, then the court instructs you that the defendant cannot defeat the plaintiff's recovery in this action by showing an outstanding title in a stranger, with which outstanding title the defendant has in no way connected himself.¹⁸

§ 2308. Trespass Upon the Possession Under Rightful Title. The court instructs the jury that it would not be legal cause, or good excuse, for the defendants to show that they had the title to the property, or that they owned it, provided B. and G. were in the possession. The jury are instructed not to consider the question of the title of the property, as a justification to the defendants, provided B. and G. had the possession.¹⁹

16—Connor v. Johnson, *supra*.

17—Connor v. Johnson, *supra*.

18—Sullivan v. Eddy, 164 Ill. 391 (396), 45 N. E. 837.

"We think the instruction lays down a correct rule of law. The substance of the charge is that a mere intruder upon the notorious, adverse possession of another cannot protect his trespass and intrusion under an outstanding title in a stranger. This is a correct principle, and one that is fully sustained by the authorities. See Jackson v. Harder, 4 Johns. 211, 4 Am. Dec. 262; Japscott v. Cobb, 11 Gratt. 172; Williams v. Sweetland, 10 Iowa 51; Carlton v. Town-

send, 28 Cal. 219; Enfield v. Permit, 8 N. H. 512, 31 Am. Dec. 207; Jackson v. Schaubert, 7 Cow. 187; Fisher v. Philadelphia, 75 Pa. St. 392; Page v. Campbell, 25 Wis. 618; Hardin v. Forsythe, 99 Ill. 312."

19—Withers v. State, 117 Ala. 89, 23 So. 147 (148).

The court said that "the charge given for the state correctly stated the law. This is not a proceeding for the trial of title to real property. If B. and G. were in possession, as the evidence shows they were, defendants had no right to trespass upon the possession, although in point of act they may have been entitled to the posses-

§ 2309. Unlawful Cutting of Timber. (a) The court instructs you that before the jury can find for the plaintiff, they must be satisfied from the evidence that the trees and saplings alleged to have been cut were cut before the commencement of this suit.²⁰

(b) If you are reasonably satisfied, from all the evidence, that the defendant cut or caused to be cut and removed from the land described in the complaint, the trees, and can reasonably ascertain from the evidence the number and value of the trees so cut and removed by the defendant, you should find for the plaintiffs.²¹

(c) That if you believe from the evidence that the defendant willfully and knowingly, and without the consent of the plaintiff, after the — day of —, —, and prior to the commencement of this suit, cut down pine trees on the — in — county, that the plaintiff was then the owner thereof, then the jury must find for the plaintiff as to that portion of the land mentioned in the complaint, and assess plaintiff's damages at — dollars for each pine tree or sapling the evidence shows that defendant had so cut on said land.²²

(d) If the plaintiff did consent that the defendant might go across plaintiff's land for the purpose of hauling timber or logs, this, within itself, did not authorize the defendant to go upon the lands and cut down trees or saplings.

(e) If the plaintiff owned the lands described in the complaint, and if there was a road or roads across the land or a portion of it, and the plaintiff consented that the defendant might go across his land, this was not a consent of the plaintiff that the defendant might enter upon the land and cut down trees or saplings.²³

(f) You are instructed that if you believe and find from the evidence that at the time the timber was so taken the defendants, by themselves or their tenants, were in the actual possession of the said lands, claiming and exercising the rights of ownership over the same, your verdict should be for the defendants.²⁴

§ 2310. Purchaser at Tax Sale Cutting Timber. (a) If the jury believe from the evidence that the defendants, W. M. & M., bought at a tax sale made by the tax collector of G. County, Alabama, in —, —, the land described in the complaint, and at the sale they received from the tax collector a certificate of purchase in the usual form, and under the certificate they (the defendants), in good faith, believing they had the legal right to do so, went into the actual possession of the land, and that they remained in possession of the land, and that they were at the time they cut the timber in the actual

sion as the holders of the title. *Lawson v. State*, 100 Ala. 7, 14 So. 870."

20—*Postal Tel. C. Co. v. Brantley*, 107 Ala. 683, 18 So. 321 (322).

21—*Lowery v. Rowland*, 104 Ala. 420, 16 So. 88 (91).

22—*Hamilton v. Griffin*, 123 Ala. 600, 26 So. 243 (244).

23—*Jernigan v. Clark*, 134 Ala. 313, 32 So. 686.

24—*Holliday-Klotz L. & L. Co. v. Markham*, 96 Mo. App. 51, 75 S. W. 1121.

possession of the land, under the purchase at tax sale, and were in good faith claiming and asserting title to the land, the jury should find for the defendants.

(b) If, at the time the trees were cut, the defendants were in possession of the land under color and claim of title, and were bona fide and in good faith claiming and asserting title to the land, and were in open, adverse possession of the land, under color and claim of the title, the jury should find for the defendants.

(c) The court charges the jury that if, at the time of the alleged cutting of the trees in controversy, the defendants were in actual, notorious, adverse possession of land upon which the trees grew, claiming it, bona fide, as their own, and asserting title thereto under tax title, then they should find for the defendants.²⁵

§ 2311. Cutting Trees for Telephone System. If you believe from the preponderance of the credible testimony that the defendant's agents, servants or employes did not cut any more limbs and branches from the trees of plaintiff's premises than was necessary for a proper construction and good operation of the telephone system, which defendant was constructing, and if you believe that such agents, servants or employes exercised their best judgment in determining what branches and limbs should be cut of said trees, and acted in the matter with a due regard for the right of the plaintiff, and with an honest purpose and desire of doing as small amount of damage as was possible, and that in doing such cutting they acted with reasonable prudence and a careful observation of the condition of affairs existing at the place where the trees were cut, and that they did not wantonly or without any reasonable excuse cut off or trim the branches and limbs of the trees in question, then your verdict should be for the defendant.²⁶

§ 2312. Entry Upon Land Obtained by Fraud. And in this case, if the jury believe, from the evidence, that the said A. B., by preconcert with the other defendants, and by false pretenses or by any subterfuge, obtained an entrance into the dwelling-house of the plaintiff, and after such entry, contrary to the express command, or against the known wishes of the plaintiff's (wife), unbolted and opened the door of said house for the purpose of allowing the other defendants to enter, and that they did then and there enter, then the entry of all the defendants was a trespass, and the jury should find the defendants guilty.²⁷

§ 2313. Right to Eject Trespassers by Force. If you find from the evidence that the two Ps were trespassers as herein defined, upon the leased premises, then the defendant would have the right to order

²⁵—White v. Farris, 124 Ala. 461, 27 So. 259 (260).

"We think the court erred in refusing above written charges, each

of which contained correct legal propositions."

²⁶—Meyer v. Standard Tel. Co., 122 Iowa 514, 98 N. W. 300.

²⁷—Kimball v. Custer, 73 Ill. 389.

the Ps to leave the premises, and if after being so ordered, they refused to leave, or did not leave, then the defendant would have the right to eject them from the premises, provided he should use no more force than was reasonably necessary therefor; but the defendant would not have the right to arm himself with a deadly weapon for that purpose, nor would he have the right to use a deadly weapon for that purpose.²⁸

§ 2314. When Defendant Liable for Act of Independent Contractor. (a) The jury are instructed that if they believe from the evidence that the defendant let a contract to one A., for the pulling down of certain buildings on W. Avenue, owned by the said defendant, and if they believe from the evidence that the natural and necessary consequences of the carrying out of said contract according to its terms would be to damage and injure the property of the plaintiffs, which property you may find from the evidence the plaintiffs, at that time, lawfully had in one of said buildings, then and in that case the fact that the defendant let the work by an independent contract can not release him from liability.

(b) If the jury believe from the evidence that the defendant told _____, the contractor, that he must not interfere with the buildings of the plaintiffs, and if they further believe from the evidence that the construction of the building occupied by the plaintiffs and of the adjoining buildings was such as to permit the adjoining buildings to be torn down without injuring the building occupied by plaintiffs, if such work should be done in a proper and careful manner, then the jury should find a verdict for the defendant.²⁹

§ 2315. Trespass to Land—Writ of Sequestration. The burden is on the plaintiff to establish his right to possession of the premises sued for at the time of the filing of this suit, by a preponderance of evidence, and the burden is on the defendant to establish his injury by reason of the levy of the writ of sequestration by a preponderance of the evidence.³⁰

28—State v. Mitchell, 130 Iowa 697, 107 N. W. 804 (806).

"The language of the instruction is not criticised, but it is said that it is erroneous, because it does not state that the defendant 'would have the right to use a deadly weapon in case the Parkers made an assault upon him.' It is impracticable to give all of the law governing a case in one paragraph of the charge, as we have often said, and in other instructions the court very carefully and fully announced the law governing the question of self-defense and as carefully applied it to the peculiar facts before the jury."

29—Florsheim v. Dullaghan, 58 Ill. App. 593 (595).

30—Freeman v. Slay, — Tex. Civ. App. —, 88 S. W. 404-5.

"This charge is objectionable in that its last clause seems rather restrictive, and possibly had a tendency to mislead the jury as to the extent to which the burden of proof was on appellee, but this is not the precise objection made to the charge. It was correct as far as it went, and appellant cannot avail himself of such error of omission without having requested a charge to supply it which might have been given."

§ 2316. **Damages to Real Property—No Effort to Prevent It.** The jury are instructed that a person can in no case recover for damage to his business or property which he permits to go on, knowing that it is going on, and without making every reasonable effort and taking active steps to prevent it, or have it stopped. If you believe, from the evidence, that plaintiffs knew their premises were being damaged, and that they permitted the damage to continue when, by their own efforts, the damage might have been stopped, or prevented, then the defendants are not liable for the damage so caused, and plaintiffs cannot recover in this suit for any such damage.³¹

§ 2317. **Trespass on Sub-let Premises as Trespass Against Lessor.** If you believe that the defendant at the time of the alleged trespass, was in the yard of L. S., and if you believe beyond a reasonable doubt from the evidence, that L. S. occupied the yard as a servant merely of F., and under him, who held the plantation under a lease from other parties, then he was on the premises of F., and is guilty as charged in the indictment, the other elements above defined being established beyond a reasonable doubt.³²

§ 2318. **Adverse Claim of Title Will Not Excuse Trespass in Face of a Warning From the Legal Owner.** The court instructs the jury that there is no actual occupancy of land, or such possession as the law determines not to be adverse, the law casts the possession with the legal title. And in the face of direct and positive warning from the legal owner, who is in possession, no adverse claim or color of title will excuse trespass, or the severance and carrying away of anything from the freehold.³³

§ 2319. **Settlement of Disputed Fence Line by Arbitration.** If the jury believe beyond a reasonable doubt from the evidence that there was a dispute between G. and the defendant as to where the line between them was, and that they agreed to leave it to arbitrators, and the arbitrators established the C. line as the true line, and that in accordance with the decision the defendant moved his fence to his side of the line, and G. built his fence on his side of the line, then each party owned to the C. line; and if they further so believe that the defendant tore down G.'s said fence and left it down in Shelby county, and within twelve months before the beginning of this prosecution, they should find the defendant guilty.³⁴

BY ANIMALS.

§ 2320. **Cattle—Adjacent Lands—No Division Fence.** (a) When two or more persons have adjoining lands enclosed in one common field by outside fences, and have no division fence, then, if there is

31—Hartford Dep. Co. v. Calkins, 186 Ill. 104 (106), 57 N. E. 863.

32—Maddox v. State, 122 Ala. 110, 26 So. 305 (306).

33—Boykin v. State, 40 Fla. 484, 24 So. 141 (144).

34—Shaw v. State, 125 Ala. 80, 28 So. 390 (391).

no agreement or arrangement between them to the contrary, each person is bound to keep his own stock upon his own land, and if he does not do so, and injury results therefrom to an adjoining owner, he will be liable in trespass therefor.³⁵

(b) You are further instructed that if you believe from the evidence that plaintiff sold defendant certain feed stuff to be fed defendant's cattle in a feed lot on plaintiff's premises, to be fenced off by plaintiff from the remainder of the premises with a fence sufficient to prevent defendant's cattle from breaking over into the other parts of said premises, and plaintiff failed to construct such fence as agreed, then, notwithstanding the fact that defendant's cattle did break over into the other parts of plaintiff's premises and eat or destroy the corn in question you must nevertheless return a verdict for the defendant, unless you believe from the evidence that the plaintiff or his agent turned his cattle into the lot where plaintiff was keeping his fodder in shock.³⁶

§ 2321. **Cattle—Defects in Division Fence.** (a) The law of this state, requiring the owners of adjoining lands that are enclosed to each build and maintain his proportion of the division fence, is intended exclusively for the benefit of said adjoining owners; and in this case, if the jury believe, from the evidence, that the cattle of the defendant broke into, or went upon the lands of one A. B., adjoining the lands of the plaintiff, and from thence came in upon the lands of the plaintiff, and injured the crops there growing, then the defendant is liable for such injury, whether the fence between the plaintiff's land and that of the said A. B. was a good and sufficient fence or not.³⁷

(b) If the jury believe, from the evidence, that at the time in question, there was a line fence between the lands of plaintiff and defendant, that a portion of said fence was owned by each of the parties, then each was bound to keep in repair his own portion of the fence; and, if the jury further believe, from the evidence, that the plaintiff did not keep his portion in good and sufficient repair, and that by reason of such insufficiency, the animals in question came upon the plaintiff's land, and committed the trespasses complained of, then the defendant is not liable for any of the injuries occasioned by said stock.³⁸

(c) If the jury believe, from the evidence, that the division fence in question, before the time of the alleged trespasses had been divided between the adjoining owners by agreement, and the portion

35—1 Addi. on Torts, § 379; Bradbury v. Gilford, 53 Me. 99, 37 Am. Dec. 535; Aylesworth v. Herrington, 17 Mich. 417; Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206 (208), 98 Am. St. 977.

36—Ward v. Bass, 4 Ind. Ter. 291, 69 S. W. 879 (881).

37—Cooley on Torts, 339; Law-

rence v. Combs, 37 N. H. 331, 72 Am. Dec. 332; Lord v. Wormwood, 29 Me. 282; Lyons v. Merrick, 105 Mass. 71; Cook v. Morea, 33 Ind. 497; Aylesworth v. Herrington, 17 Mich. 417; McManus v. Finan, 4 Ia. 283.

38—Scott v. Buck, 85 Ill. 334.

of the fence to be kept in repair by each had been assigned to him, so that each had a designated portion of the fence to build and keep in repair, then it was the duty of the defendant to keep up such a fence on his portion of the line, as would turn his own stock, at all events. And, if the jury further believe, from the evidence, that the defendant did not do so, and that his stock got upon the plaintiff's land, as charged in the declaration, through that portion of the fence which the defendant was bound to build and repair, and then injured the plaintiff's crops, then the jury should find for the plaintiff.³⁹

§ 2322. **Cattle—Grazing on Government Land.** (a) The court instructs the jury that in this country there is no such thing as a right of common. The government of the United States has permitted and does still permit citizens, owners of stock, to graze their herds upon its unoccupied public domain; but there is no right conferred upon those who do so, that the government cannot rescind at any time, and whenever it parts with its title to any of its public domain, it gives to the parties who may acquire any such lands, the right to enjoy them without any rights reserved to others to graze thereon with their flocks and herds, notwithstanding that for some time prior, citizens may have grazed their flocks and herds thereon without molestation or refusal on the part of the government. It is the duty of all persons to take notice of the stones and marks of the government survey, and there was no necessity for plaintiff to place any other or different marks, monuments or designations on his lands.

(b) The court instructs the jury that if they find from the evidence that the defendants after receiving the notice or notices from the plaintiff, which have been read in evidence, drove or caused to be driven their sheep upon the lands of plaintiff mentioned in the petition and surrounding lands, without regard for the ownership of said lands, and that the defendants had placed an employe or employes of theirs, or herders, in charge of such sheep, who could and was to keep such sheep together in the flock or herd, and who was to have a general control over such sheep, and that such herder or employe did remain with such sheep, and did exercise a general control over them, and was with them on any of the plaintiff's lands named in the petition at the time or times the said sheep were grazing on such lands, or were regularly bedded or kept upon the same with the permission of such herder, and in pursuance of the intention of the defendants to have their sheep grazed and herded indiscriminately on the lands of plaintiff as well as other lands in that vicinity, then the jury must find for the plaintiff.

(c) The court instructs the jury that, after having received notice that the lands mentioned in the petition were leased by the plaintiff, it was the duty of the defendants to ascertain where these lands

were, and to prevent their sheep being driven thereon and depasturing the same.⁴⁰

§ 2323. **Cattle on Highway with Attendant Not "At Large."** The court instructs the jury that the words "at large" as used in the statutes of this state, making it unlawful for any animal of the species of horse, mule, cattle, sheep, goat, swine, or goose to run at large, means without restraint or confinement as to such animals. And in this case if the jury believe, from the evidence, that the cows of the defendant were upon the highway, and while their movements were being controlled by a person or persons in charge of said cows, then you are instructed that the cows of the defendant were not at large under the law of this state, and the jury are instructed to find the defendant not guilty.⁴¹

§ 2324. **Cattle—Failure to Furnish Attendant.** You are further instructed that if you believe from the evidence that plaintiff sold defendant certain feed stuff for his cattle and agreed that they should be fed on plaintiff's premises in a feed lot to be fenced off from the remainder of the place by plaintiff with a three-wire fence, and that defendant agreed that he would furnish a man to help hold cattle in said feed lot; and if you further find that the plaintiff constructed in a good and workmanlike manner a substantial, three-wire fence, sufficient to turn ordinary three year old steers, and defendant failed to furnish a man as agreed, or that the man so furnished failed to perform his duties as agreed, and that defendant's cattle were not ordinary three year old steers, but bad and breachy cattle, and by reason of the defendant's failure to carry out his part of the contract, and the bad and breachy character of his cattle, they broke over from said feed lot into other parts of plaintiff's premises, and destroyed the corn and fodder of plaintiff, then you should find for the plaintiff.⁴²

§ 2325. **Cattle—Party Taking Up, Must Care For.** You are instructed that where stock of any kind is taken up for trespass the owner thereof is not required to look after, feed, water or care for the same; and, if any portion thereof are milch cows, the owner is not required to milk the same, but is justified in leaving the feeding, watering and the caring of such stock and the milking of such cows to the party taking up the same. And you are instructed that in this case the plaintiff was under no obligations to feed, water or care for the stock or to milk her cows while in the possession of the defendant.⁴³

40—*Cosgriff v. Miller*, 10 Wyo. 190, 68 Pac. 206 (208), 98 Am. St. 977.

41—*Morgan v. People*, 103 Ill. 257 (259). Citing *Bertwhistle v. Goodrich*, 53 Mich. 457, 19 N. W. 143; *Parker v. Jones*, 1 Allen (83 Mass.) 270.

42—*Ward v. Bass*, 4 Ind. Ter. 291, 69 S. W. 879 (881).

43—"We think the instruction

was correct. The herd law (chapter 2, art. 3, Comp. St. Neb.) gives to the owner of cultivated lands a lien for his damages upon animals trespassing thereon, and authorizes him to take the stock into his possession."

Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077.

CHAPTER LXXXI.

TROVER.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2326. Plaintiff must prove general or special ownership.</p> <p>§ 2327. Maintainable by rightful possessor of property.</p> <p>§ 2328. Plaintiff must prove right to immediate possession—Possession of title.</p> <p>§ 2329. Not maintainable by servant or agent.</p> <p>§ 2330. When maintainable by buyer against seller.</p> <p>§ 2331. Against vendor who has resold the property.</p> <p>§ 2332. Plaintiff must prove conversion—What constitutes.</p> <p>§ 2333. Conversion—Wrongful intent must be proven.</p> <p>§ 2334. By bailee of property.</p> <p>§ 2335. Conversion—Property wrongfully taken and consumed.</p> | <p>§ 2336. Defendant rightfully in possession accidentally losing property before demand.</p> <p>§ 2337. Conversion by warehouseman.</p> <p>§ 2338. Demand—No particular form necessary—May be verbal.</p> <p>§ 2339. Demand and refusal—Evidence of conversion.</p> <p>§ 2340. Demand by agent—Evidence of agency.</p> <p>§ 2341. Demand not necessary where defendant converted the property.</p> <p>§ 2342. Tender—Effect same as payment—Not good if conditional.</p> <p>§ 2343. Tender—Waiver of production of money.</p> <p>§ 2344. Burden of proof.</p> <p>§ 2345. Alleged conversion of saw-mill machinery—Series.</p> |
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§ 2326. Plaintiff Must Prove General or Special Ownership. (a) That although the law is, that to entitle the plaintiff to recover in this form of action, he must show that at the time of the alleged conversion he was the general owner of the property, and entitled to the immediate possession, or that he had a special right or interest in the property, with an immediate right of possession, yet, in this case, if you find, from the evidence, that the general ownership of the property was in one A. B., but that the plaintiff had the actual possession, charge and control of the property at the time of the alleged conversion, not as the agent or servant of the said A. B., then the plaintiff had such a property in the (animal) as will enable him to recover in this suit; provided, you find the defendant guilty of the wrongful conversion of the property, as charged in the declaration.¹

(b) The court instructs the jury, that this is what is known in law as an action of trover, or trover and conversion, and, to entitle the plaintiff to recover, the jury must believe, from the evidence,

1—Cooley on Torts (3d ed.) 848; Dudley v. Abner, 52 Ala. 572; Stephenson v. Little, 10 Mich. 433; Staples v. Smith, 48 Me. 470. Owens v. Weedman, 82 Ill. 409;

that the plaintiff was the absolute owner of the property in question, or else that he had some special interest therein, which entitled him to the possession of the property at the time of the alleged conversion.²

(c) The jury are instructed, that to entitle the plaintiff to recover under the issues in this case, it is only necessary that he should prove, by a preponderance of the evidence, that he was the owner of the property in question. and entitled to the possession of the same when this suit was commenced, and that it had been wrongfully taken from his possession by the defendant, or that it was then wrongfully detained by him.³

§ 2327. Maintainable by Rightful Possessor of Property. (a) That when a person is in the rightful and peaceful possession of property, and a stranger, or person not the owner, wrongfully takes it from him, and converts it to the taker's own use, then the person in possession can recover the full value of the property in this form of action for the wrong done—his possession being sufficient evidence of title in him against a wrong-doer, or one showing no right or title to the property.⁴

(b) If the jury believe, from the evidence, that the (animal) in question was not the property of the defendant, but was the property of one A. B., and that the said A. B. had placed the same in the possession, and in the care and custody, and under the control, of the plaintiff, until he should call for the same, and that the plaintiff, at the time of the alleged conversion, was entitled to the possession of the (animal) then the plaintiff had such a property in it as will enable him to sustain this action; provided, the jury further find, from the evidence, that the defendant wrongfully took said property and converted the same to his own use, as charged in plaintiff's declaration.⁵

§ 2328. Plaintiff Must Prove Right to Immediate Possession—Possession Evidence of Title. (a) In order to sustain this action, the plaintiff must show, by a preponderance of evidence, that at the time he demanded the (animal) from the defendant, if such demand has been proved, he was the owner of the property, and entitled to the immediate possession thereof, or that he had some right or interest in the same, which entitled him to the possession of it at the time; and if you find, from the evidence, under the instruction of the

2—Cooley on Torts (3d ed.) 848; Moore v. Walker, 124 Ala. 199, 26 So. 984.

3—Esson v. Tarbell, 9 Cush. 407; Eggleston v. Mundy, 4 Mich. 295; Flatner v. Good, 35 Minn. 395, 29 N. W. 56; Moore v. Walker, 124 Ala. 199, 26 So. 984.

4—Cooley on Torts (3d ed.) 849,

850; 1 Hill. on Torts, 495; Craig v. Gilbreth, 47 Me. 416; Moorman v. Quick, 20 Ind. 67; Bowen v. Fenner, 40 Barb. (N. Y.) 383.

5—Cooley on Torts (3d ed.) 848; Dungan v. Mutual Benefit Life Ins. Co., 38 Md. 242; Atl. Coast Line R. R. Co. v. Baker, 118 Ga. 809, 45 S. E. 673.

court, that he has failed to prove either of these things, by a preponderance of evidence, then you should find for the defendant.⁶

(b) The court instructs the jury, that under the issues in this case, the burden of proving property in himself, so far as the right of property is concerned, is upon the plaintiff; and if possession of the property has been shown by the evidence to have been with the said A. B. at the time it is alleged to have been levied upon, then such possession is *prima facie* evidence of title in the said A. B.⁷

§ 2329. **Not Maintainable by Servant or Agent.** The jury are further instructed, that when a person has personal property in his care and custody, as the servant or agent of the owner, and the property is taken from the possession or premises of the owner (or strays away, and is taken up by a person not the owner), then the duty devolving upon the servant or agent, as such, will not entitle him to maintain an action of trover for the property.⁸

§ 2330. **When Maintainable by Buyer Against Seller.** The court instructs the jury, that in the case of a sale of personal property, at a stipulated price, and when no time of payment is agreed upon, the law presumes that payment is to be made at the time of delivery; and in such case, until the purchase price is paid, no such title passes to the purchaser as will enable him to maintain trover against the vendor for the conversion of the property, unless there has been a delivery of the property under the sale, or a tender of full payment has been made.⁹

§ 2331. **Against Vendor Who Has Resold the Property.** If you believe, from the evidence, that the defendant bargained and sold the (animal) in question to the plaintiff, at a given price, to be delivered when paid for, and that the plaintiff afterwards, and within a reasonable time thereafter, and before the commencement of this suit, paid the purchase price in full, or paid a part thereof, and tendered to the plaintiff the remainder, and then demanded the possession of the property, and that defendant, upon such demand, refused to deliver possession, and afterwards sold the (animal) to another person, without the consent of the plaintiff, then the plaintiff is entitled to recover in this suit.¹⁰

§ 2332. **Plaintiff Must Prove Conversion—What Constitutes.** (a) That to warrant a verdict, in this case, for the plaintiff, the jury must find, from the evidence, not only that the plaintiff was the general or special owner of the property, with the right to immediate possession at the time of the alleged conversion, but it must fur-

6—Forth v. Pursley, 82 Ill. 152.

7—Martin v. Ray, 1 Black. 291; Cooley on Torts (3d ed.) 852.

8—Cooley on Torts (3d ed.) 854; Farmers' Bk. v. McKee, 2 Pa. St. 318.

9—Benj. on Sales, § 677; Southwestern, etc., Co. v. Plant, 45 Mo. 517; Scudder v. Bradburry, 106 Mass. 422; Mich., etc., Rd. Co. v. Phillips, 60 Ill. 190.

10—Mechem on Sales, chap. 4.

ther appear, from the evidence, that the defendant wrongfully converted the property to his own use.¹¹

(b) The court instructs the jury that if they believe, from the evidence, that the plaintiff was the owner of the property in question, and entitled to the possession thereof, before and at the time of the commencement of this suit, and that while he was so entitled to such possession, and before the commencement of this suit he made a legal demand of the defendant for the property, and that the defendant then had the property in his possession, and refused and neglected to surrender the same to the plaintiff upon such demand, this would be evidence of the conversion of the property by the defendant, and the jury should find for the plaintiff.¹²

§ 2333. Conversion—Wrongful Intent Must be Proven. You are instructed that a wrongful taking and carrying away of the personal property of another does not alone constitute trover, or trover and conversion. To render the taker liable, it must further appear that the property was taken and carried away by the person taking it, with an intent to convert the same to his own use, or that he has since the taking actually converted it to his own use. And in this case, although you may believe, that the defendant wrongfully took and removed the property mentioned in the declaration, and placed the same in, etc., for safe keeping, intending to then store it for the use of the plaintiff, and to hold the same subject to his order, and so notified the plaintiff, then the defendant would not be guilty of a wrongful conversion of the property.¹³

§ 2334. By Bailee of Property. The jury are instructed as a matter of law, that when the property of one person comes rightfully into the possession of another, to be held by him temporarily for some specific purpose, and when that is accomplished, then to be returned to the owner, if the person so taking possession of the property willfully kills or destroys it, or sells it, or otherwise disposes of it, for his own use and benefit, and so as to deprive the owner of it without his consent, this, if proven, will amount to a wrongful conversion of the property, and no demand for the possession need be made by the owner before commencing suit to recover the value of the property.¹⁴

§ 2335. Conversion—Property Wrongfully Taken and Consumed. If you find, from the evidence, that before and at the time of the alleged conversion, the plaintiff was the owner of the property in question, and entitled to the immediate possession thereof, and that while the plaintiff was such owner and entitled to such possession, and before the commencement of this suit, the defendant wrongfully took the property into his possession, and that while the property was so

11—Greenl. on Ev., § 636, 642.

12—Puterbaugh's Com. Law, 497;
Cooley on Torts (3d ed.) 859, et seq.

13—Niemetz v. St. Louis, etc., 5
Mo. App. 59.

14—Cooley on Torts (3d ed.) 859,
et seq.

in his possession the (animal) was killed (or the goods were lost or stolen from his possession), before the commencement of this suit, this will constitute a wrongful conversion of the property, and you should find the defendant guilty; and, in such case, it is wholly immaterial whether the plaintiff made a demand for the property before commencing the suit or not.¹⁵

§ 2336. Defendant Rightfully in Possession Accidentally Losing Property Before Demand. If the jury believe, from the evidence, under the instructions of the court, that the defendant came rightfully into the possession of the property, and while he held it so in possession, and before any demand was made on him for it, the (animal) was accidentally killed, without any willful intention on the part of the defendant (or that the said goods were lost or stolen out of the possession of the defendant), though he may have been guilty of negligence in that behalf, then the plaintiff cannot recover in this suit, although the jury may believe, from the evidence, that a demand was made by the plaintiff upon the defendant for the property before the action was commenced.¹⁶

§ 2337. Conversion by Warehouseman. If you believe, from the evidence, that the property in controversy belonged to the plaintiffs, and that they were entitled to the possession of the same, at the time of the alleged conversion of the property, and, also, that the plaintiffs demanded the same of the defendants before the commencement of this suit, and at the same time offered to pay to them all the freight, storage and other charges which had accrued upon the property in question, then, if you further find, from the evidence, that the defendants refused, upon such demand, to deliver the property to the plaintiffs unless the freight and charges upon other goods, not received or stored by the defendants at the same time with the goods in question, were also paid, then these facts would amount to a wrongful conversion of the property by the defendants to their own use, and you should find the defendants guilty.¹⁷

§ 2338. Demand—No Particular Form Necessary—May be Verbal. (a) To constitute a legal demand of property, in this class of cases, it is not necessary for the demanding party to make use of the word "demand," or to specify, by name or particular description, the property demanded; but any language which makes known to the party on whom the demand is made that the demandant desires the possession of the property, and informs him, by reference or otherwise, what property he desires possession of, is sufficient to constitute a demand.¹⁸

(b) The court instructs the jury, that no particular form of words is necessary in making a demand for the possession of property

15—1 Addison on Torts, § 471; bourn v. Union National Bk., 58 Cooley on Torts (3d ed.) 874. Me. 273.

16—Cooley on Torts (3d ed.) 873; 17—Edwd. on Bail., § 350, 351.

Bowlin v. Nye, 10 Cush. 416; Dear- 18—Cooley on Torts (3d ed.) 872;

before bringing a suit. If the jury believe, from the evidence, that, before commencing this suit, the plaintiff had an interview with the defendant, and that, from the language then used by plaintiff, the defendant understood the plaintiff came for, and was asking to have the property in dispute given up to him, and that with that understanding, defendant said he would not give it, this in law would be equivalent to a demand and refusal.¹⁹

§ 2339. **Demand and Refusal—Evidence of Conversion.** The jury are instructed, that when one person has property of another, whether rightfully or wrongfully, in his possession, and the owner is entitled to the immediate possession of the property, then a demand for such possession by the owner and a refusal to deliver the property by the one so having it in possession, is *prima facie* evidence of a wrongful conversion of the property to his own use by the latter.²⁰

§ 2340. **Demand by Agent—Evidence of Agency.** When a demand is made by an agent, and the person from whom the demand is made has reasonable grounds for doubting the agent's authority, he may lawfully refuse to comply with the demand. The evidence of agency should be such as an ordinarily prudent man would feel justified in acting upon, knowing that he would be liable for the value of the property if he should deliver it to a person not authorized to receive it.²¹

§ 2341. **Demand not Necessary where Defendant Converted the Property.** The jury are further instructed, as a matter of law, that while, in some cases, a demand by the owner, for the possession of property in the hands of another, and a refusal to deliver the same by such other person, is *prima facie* evidence of a wrongful conversion of the property to his own use by the person so having it in his possession, still, such demand and refusal are never essential before commencing a suit to entitle the plaintiff to recover; provided, it appears, from the evidence, that, before the commencement of this suit, the defendant had actually converted the property to his own use, by intentionally killing or destroying it, or by selling or otherwise disposing of it for his own benefit, and so as to deprive the plaintiff of it without his consent.²²

§ 2342. **Tender—Effect Same as Payment—Not Good if Conditional.** (a) The jury are instructed, that a tender of any amount of money, if proved, in this case, has the same effect on the rights

Badger v. Batavia Paper Co., 70 Ill. 302.

19—Cooley on Torts (3d ed.) 872; Edmundson v. Bric, 136 Mass. 189.

20—Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Sturgis v. Keith, 57 Ill. 451, 11 Am. Rep. 28;

Towne v. St. Anthony & Dak. Elev. Co., 8 N. D. 200, 77 N. W. 608.

21—Ingalls v. Bulkley, 13 Ill. 315; Kime v. Dale, 14 Ill. App. 308.

22—Gottlieb v. Hartman, 3 Col. 53; Kenrick v. Rogers, 26 Minn. 344, 4 N. W. 46.

of the parties as a payment of the same amount would have had if made at the same time.²³

(b) The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against himself that he admits the payment to be only for a part, but he can go no further, and his tender will not be good if he adds a condition that the creditor shall acknowledge that no more is due.²⁴

§ 2343. **Tender—Waiver of Production of Money.** If the jury believe, from the evidence, that the plaintiffs were the owners of the property in question at the time of the alleged demand and tender, and that the defendants then had the same in their possession, as warehousemen, claiming the right to hold the property until certain charges thereon should be paid, and that while they so held the goods, and before the commencement of this suit, the plaintiffs, by their agent, made a demand on the defendants for the property, and then offered to pay the sum of \$—— upon defendants' claim upon said goods, and that the sum so offered covered all that was then due to defendants for storage and all other charges on said goods, and, if the jury further believe, from the evidence, that upon such demand and offer the defendants refused to surrender the property, and told the person making such demand that he need not trouble himself to take out the money so proposed to be paid, as it would not be accepted, nor would the goods be delivered, unless plaintiffs first paid the sum of \$—— in discharge of defendants' claim on the goods, then this was a waiver of the necessity for producing and exhibiting to the defendants the money so proposed to be paid in order to constitute a good tender of that amount for the purposes of this suit.²⁵

§ 2344. **Burden of Proof.** The court instructs the jury, that in order to maintain this action, the plaintiff must prove, by a preponderance of evidence, that he was either the general owner of the property in controversy, and lawfully entitled to the possession thereof at the time of the alleged conversion, or that he had some special interest in it at the time of the alleged conversion, which entitled him to the possession of the property; and if the jury believe, from the evidence, that at the time, etc., the plaintiff was not the general owner of the property, and had no special interest in it, but was holding it as the mere servant or agent of the owner, then they must find for the defendant.²⁶

§ 2345. **Alleged Conversion of Saw Mill Machinery—Series.** (a) I instruct you that if you believe that C. Bros. and the partner-

23—Benj. on Sales, § 712.

24—Bowen v. Owen, 11 Q. B. 131;
Hess v. Peck, 111 Ill. App. 111;
Mann v. Roberts, 126 Wis. 142, 105
N. W. 785.

25—Hazzard v. Loring, 10 Cush.
267; Birmingham Paint & Roofing
Co. v. Crampton, — Ala. —, 39 So.
1020.

26—2 Greenl. on Ev., § 636 and 642.

ship known as the S. Logging Co. entered into the contract marked "Defendants' Exhibit 1," and if you further believe that the boiler, engine, and fittings were furnished by the former to the latter subsequent to the date of the contract marked "Exhibit 1," then the title of the property in question would pass absolutely to the partnership, irrespective of any oral agreement in conflict with the terms of the written instrument, and would remain there until parted with by some act on the part of its members.

(b) The parties to such a contract, however, have the right to abrogate or rescind it by mutual consent. If you believe by a preponderance of the evidence that C. Bros. and the S. Logging Co. mutually agreed that the contract marked "Exhibit 1" should be abrogated, and all relations under it should be at an end, and that the property in question should be returned to the possession and ownership of C. Bros., and if you further believe that such an understanding was completed by the parties, then you may find that the title to the property revested in the plaintiffs; and if you should find from the preponderance of the evidence that the title to the property remained in that condition, and was never subsequently parted with by the plaintiffs, then your verdict should be in favor of the plaintiffs—that they are entitled to the possession of the property described in the complaint.

(c) If you find from the testimony that E. B. was the agent of A. H. in the transfer of the property mentioned in plaintiffs' complaint from the S. Logging Co. or from M. L. or from T. J. to A. H., and that said E. B. knew the terms and conditions upon which the S. Logging Co., M. L. or T. J. had possession of the property mentioned in plaintiff's complaint from the plaintiffs, and that the plaintiffs were the owners and entitled to the possession of such property at the time, and only consented that the S. L. Co., M. L. or T. J. should have the temporary use of the property in securing certain saw logs in Clallam county, Washington, then you are instructed that the knowledge of the agent, E. B., was the knowledge of A. H., and A. H. could not be an innocent purchaser of the property, and A. H. could not transfer a valid title to said property to the defendants, or either of them.

(d) If you find from a preponderance of the testimony that the property during all of the time belonged to the plaintiffs, and the S. Logging Co. on or about July 17, 1897, agreed to surrender the possession of the property to the plaintiffs, and that after such agreement of surrender M. L. and T. J. or either of them, secured from the plaintiffs the temporary right to use said property in securing saw logs in Clallam county, Washington, no title would pass to A. H., and he would have no right to sell or dispose of said property, and any sale by him of said property would be wrongful.

(e) But if you believe by a preponderance of the evidence that the ownership of the engine, boiler, and fittings vested in the S. Log-

ging Co., as outlined in instruction "a," and that the written contract between the logging company and C. Bros. was never abrogated by mutual agreement, and no return of the property in dispute was made by virtue of such an abrogation, and that subsequently the S. Logging Co., by its managing partner, transferred the property to A. H. in consideration of an antecedent debt, and that A. H., in his turn, transferred the property to the defendants upon their promise to pay therefor, then your verdict should be in favor of the defendants—that they are entitled to the possession of the property described in the complaint.²⁷

27—Approved in *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404(407).

CHAPTER LXXXII.

VICIOUS ANIMALS.

See Erroneous Instructions, same chapter head, Vol. III.

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| § 2346. Vicious dog—Necessary essentials to recover. | § 2349. Vicious steer—Plaintiff must prove due care—Knowledge of vicious disposition. |
| § 2347. Vicious dog—Knowledge of disposition. | § 2350. Vicious cow—Knowledge of disposition — Adopting means to prevent injury. |
| § 2348. Vicious dog—Dog's reputation not competent. | |

§ 2346. **Vicious Dog—Necessary Essentials to Recover.** If, therefore, you believe from the evidence and a preponderance thereof that the defendant, C. T., on or about the 5th day of July, 1899, had a vicious dog; that he knew said dog was vicious and ferocious, and liable to attack and bite persons coming in contact with it; that the defendant permitted said vicious and ferocious dog, if any, to run at large on the public streets of El Paso, and that while so running at large the said dog attacked and bit the plaintiff J. F.,—then you will find for the plaintiff such damages as you find from the evidence he has suffered.¹

§ 2347. **Vicious Dog—Knowledge of Disposition.** (a) In arriving at the fact of whether or not the defendant had knowledge of the vicious character of the dog in question, if any, you will consider all the facts in the case,—such as whether the defendant knew of any acts upon the part of the dog that would indicate to the defendant that the dog would bite if he had a chance, such as his running at people passing along the streets, attempting to bite any person in a public place without provocation, and such similar acts, if any, in proof on the part of the dog which came under the observation of the defendant.²

(b) If you find any actual damages for the plaintiff, then if you find and believe, from the evidence, that the defendant, B., with full knowledge of the ferocious and vicious habits of the dog, if it did have such habits, permitted the dog to run at large on the public streets of the city of D., being the owner, keeper, or harbinger of the dog, or that with such knowledge she permitted her servant and porter, J., to keep the dog on her premises, and from said premises to allow the dog to run at large on the streets of the city, without being guarded or confined, and further find that she did so with

1—Triolo v. Foster, — Tex. Civ. App. —, 57 S. W. 698 (698-9). 2—Triolo v. Foster, supra.

reckless disregard for the safety of the lives and persons of the public, and that no effort was made to restrain the dog or to protect the public from his vicious attacks, if any, then you may in your discretion find for plaintiff as exemplary damages such an amount as you believe will be proper and right.³

§ 2348. **Vicious Dog—Dog's Reputation Not Competent.** A dog cannot be known to be vicious, and liable to bite mankind, by evidence that the general reputation is that the dog is vicious and so liable. You will therefore not regard the evidence of the witness Q. that such is the reputation of the dog upon the issues of whether or no said dog was vicious, and liable to bite mankind.⁴

§ 2349. **Vicious Steer—Plaintiff Must Prove Due Care—Knowledge of Vicious Disposition.** (a) The plaintiff has alleged in each paragraph of his complaint, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action, and before the plaintiff can recover, he must have proved by a fair preponderance of the evidence that he did receive said injuries without fault or negligence on his part directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of defendant. He must also prove that he himself was free from such fault or negligence, and if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part, he can not recover.

(b) The plaintiff has alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking mankind and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition. To entitle the plaintiff to recover he must prove, by a fair pre-

3—*Barklow v. Avery*, — Tex. Civ. App. —, 89 S. W. 417.

"This paragraph of the charge, strictly construed, might possibly be subject to the criticism that it assumes that defendant was the owner, keeper, or harbinger of the dog; but, when considered in the light of the balance of the charge, the jury could not have been misled thereby. In the first paragraph of the charge the ownership, etc., of the dog is left for the jury's determination, and in the latter part of the charge the court placed the burden of proof on plaintiff to show that the dog was vicious, that defendant was the owner, keeper, or harbinger, or that she permitted her servant to keep the

dog on her premises, that she knew the dog was vicious and permitted it to run at large, and the plaintiff was bitten by said dog, and, if plaintiff failed to make such proof, to find for the defendant. The charge, when taken as a whole, evidently prevented the jury from being led astray by the defect, if any, complained of by plaintiff."

4—*Triolo v. Foster*, supra.

"The charge was a correct one, and properly explained and limited the effect of the said testimony. It was defendant's right to have it thus explained and limited, and the charge should have been given. *Mutual Life Insurance Co. v. Baker*, 10 Tex. Civ. App. 515, 31 S. W. 1073, and cases cited."

ponderance of the evidence, not only that the steer was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it.

(c) In order to charge the defendant with knowledge of the vicious propensities of the animal to attack mankind, it is not necessary that he have notice that the animal has frequently broken through the tameness of his nature into acts of aggression on man, or upon other animals in the dominion and ownership of man. It is unnecessary to prove more than that the owner has good cause for supposing that the animal so conducts itself. And if the jury find from the evidence in this case that the animal in question, before the injury complained of, made a vicious lunge or attack upon X. or Y., or either of them, in the presence of the defendant, then, upon such facts, if established, you would be authorized to find that the defendant had knowledge of the vicious propensities of said animal to attack mankind, although he may not have had knowledge of attacks of said animal upon other persons.⁵

§ 2350. **Vicious Cow—Knowledge of Disposition—Adopting Means to Prevent Injury.** (a) The court instructs the jury that, if you find and believe from the evidence, to your reasonable satisfaction, and by the greater weight of credibility of the testimony, that on or about the 1st day of June, 1900, the defendant, by and through his agent, servant or employe, undertook to carry the cow in question through the streets of the city of St. Louis, and along Broadway, at the place of the alleged injury to plaintiff, and that at such time the cow was of a vicious disposition, as defined by the court's instructions, and such disposition was known to defendant at and before the time of the alleged injury to plaintiff, and before the cow was taken into the streets on said occasion, then it was the duty of the defendant to adopt suitable measures for the carriage of the cow through the streets so as to prevent injury by her to persons on or near the streets upon or along which the cow was to be driven. And if you believe, under the circumstances, that by the exercise of the utmost care, prudence and caution, defendant might have adopted such means of carrying the cow as would have prevented injury to plaintiff by the cow, but you further find he failed to adopt such means, and that by reason of such failure the cow attacked and injured plaintiff, then your verdict must be for plaintiff.⁶

(b) The court instructs the jury that knowledge on the part of defendants that the cow in question was disposed to run away is not sufficient to support a finding in favor of plaintiff, but, that in order to entitle plaintiff to recover against defendant, he must prove to

5—*Todd v. Danner*, 17 Ind. App. 368, 46 N. E. 829 (830).

6—*O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764 (768), held that

the defendant could not complain of the phrase "reasonable satisfaction" in the above instruction.

the satisfaction of the jury that such defendant knew that the cow was disposed to attack persons, or was of a vicious disposition.⁷

7—O'Neill v. Blase, *supra*.

The court said: "Knowledge of the disposition of an animal is important in its bearing on the owner's obligation to restrain him. This is so not only by the immemorial common law of England, and of this country, but it was so even by the Mosaic law. Exodus xxi., 28-32. When the owner of an animal acquires knowledge, or where the facts reasonably warrant an inference that he has been advised of the vicious disposition of his animal, he is in duty bound to use those precautions for its restraint which the law requires for the protection of the public, already defined in this opinion. It is not

essential to the owner's liability that he should have notice of the particular sort of act which produces the injury by an animal in a case like this. He must not wait until his dog bites somebody before taking notice of his dog's conduct, where it has been such as to warn a man of ordinary prudence that the animal is ferocious or vicious in disposition. *Codeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600; *Worth v. Gilling*, L. R. 2 C. P. 1; *Mann v. Weiland*, 81 Pa. 243; *Robinson v. Marino*, 3 Wash. St. 434, 28 Pac. 752, 28 Am. St. 50; *Kennett v. Engle*, 105 Mich. 693, 63 N. W. 1009."

CHAPTER LXXXIII.

WATERCOURSES.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2351. Watercourse defined.</p> <p>§ 2352. No right to divert ancient watercourse.</p> <p>§ 2353. Diversion of surface water—Measure of damages—Elements of injury.</p> <p>§ 2354. Right to use water passing over land—Must restore it to original bed.</p> <p>§ 2355. The owner of the soil is the owner of the surface and subterranean water.</p> <p>§ 2356. Placing obstruction in natural watercourses and diverting water—Damages.</p> <p>§ 2357. Mill-race—Obstructions.</p> | <p>§ 2358. Embankment — Obstructions —Party acquiring interest after erection—Right of action.</p> <p>§ 2359. Use of banks of streams—Floatage of logs down navigable stream.</p> <p>§ 2360. Owner of land bordering on a navigable stream has right to build docks.</p> <p>§ 2361. Flooding of land—Changing of watercourse.</p> <p>§ 2362. Extraordinary freshet—Onus on defendant to prove absence of negligence—Act of God.</p> <p>§ 2363. Dams—Dedication.</p> |
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§ 2351. **Watercourse Defined.** To constitute a watercourse there must be a stream of water, including banks, bed and water. It is not necessary to prove that the water flows continuously. It may be dry at certain seasons of the year and yet be called a stream of water, but it must, at some period of the year, be a stream of water flowing in a well defined channel.¹

§ 2352. **No Right to Divert Ancient Watercourse.** (a) If the jury believe, from the evidence, that the nature of the country was such that after heavy rains or the melting of snows it naturally and necessarily collected together large quantities of water on defendant's land, and that such water was regularly discharged through a well defined channel which the force of the water had made for itself and that the water had been accustomed to flow through that channel from time immemorial, then such channel is an ancient watercourse, and the defendant would have no right to change the direction of such watercourse even on his own land, so as to discharge the water onto the plaintiff's land at a point different from what it had been accustomed to flow.²

(b) The court instructs the jury that if they believe, from the evidence, that the plaintiff has made out his case as set out in the second count of the amended declaration, then they should find for the plaintiff.³

1—Schlichter v. Philips, 67 Ind. 201; Peck v. Herrington, 109 Ill. 611.
 2—Schlichter v. Philips, 67 Ind. 201.

3—East St. L. & Carondelet Ry. Co. v. Eisentraut, 134 Ill. 96 (100), 24 N. E. 760.
 "There was no error in this in-

§ 2353. **Diversion of Surface Water—Measure of Damages—Elements of Injury.** (a) Under the issues in this case, as made by the pleadings, before the plaintiff can recover, the following material facts must be proved by a preponderance of the evidence: (1) That defendant by artificial drains or ditches so changed the natural flow of the waters from defendant's land, above, to, and upon, or over, the lower land of plaintiff, as to cause the water to flow in larger quantities, or more rapidly, than it would have done but for such changes, to the injury of plaintiff's land. (2) The amount of damage sustained by plaintiff by reason of such wrongful act or acts of defendant. (2½) If the plaintiff has failed by a preponderance of the evidence to show that defendant did change the course of the water-flow, so as to cause the same to injure plaintiff, either by increasing the quantity of water flowing on the latter's land, or by increasing its velocity, your verdict must be for the defendant. But if the evidence, by a preponderance, shows that the defendant changed or caused to be changed the flow, and increased the quantity or velocity of water discharged on plaintiff's land, defendant is liable to plaintiff in such sum as the evidence shows his lands were injured by the greater quantity or velocity of the water; or if the evidence fails to satisfy you what sum he is entitled to, then to nominal damages at least.⁴

(b) The court instructs the jury that if you find that the natural watercourse for the water from Behan's land, in a state of nature, was to the west, and not to the east, then I charge you that the plaintiff had no right by any artificial means to change the course of such water so as to throw it upon the lands of the defendant, unless he has acquired such right by user or prescription, as above set forth, and that if the plaintiff did flow upon the lands of the defendant waters from the Behan land which did not naturally flow upon defendant's land, if you find such to be the case, without having acquired the right so to do by user or prescription, then the defendant would have the right to obstruct the flow of such waters, either by erecting dams or otherwise, even if in so doing it would obstruct the flow of waters upon his land that naturally flowed in that direction, and if in so doing the plaintiff's crops were

struction. The sufficiency of said count follows from the rules of law which have received repeated recognition by this court. Thus in *C. & A. R. R. Co. v. Glenney*, 118 Ill. 487, 9 N. E. 203, we held that where a railroad company diverts the flow of surface water from its natural channel and conducts it through a ditch to a point where it overflows the land of another, it will be held liable for such damages as result therefrom. See also

J. N. W. & S. E. R. Co. v. Cox, 91 Ill. 500; *T. W. & W. Ry. Co. v. Morrison*, 71 id. 616."

4—*Dorr v. Simerson*, 73 Iowa 89, 34 N. W. 752 (753).

"It will be observed that these instructions correctly state what it was necessary for the plaintiff to prove under the issues to entitle him to recover. This was as full a statement of the issues as was required."

injured, and would by so doing not subject himself to any liability for damages to said plaintiff.

(c) The court instructs the jury that the plaintiff had the right, in the interest of good husbandry, and in the good faith improvement and tillage of his farm, to fill up the sag-holes so that no water would accumulate or stay on him, even if the water arising from rainfall or melting snow should thereby, in natural process find its way in the natural watercourse upon the land of the defendant, and incidentally increase the flow thereon; but he cannot by artificial drains or ditches, cast the water from sag-holes, basins, and ponds on his own lands over upon the proprietor below, to his injury; that is, where the natural flow does not go in that direction.

(d) If you believe from the evidence that the water from the plaintiff's land did not naturally drain from his land by a flowing upon the land of the defendant, but that he, by drains and artificial means did drain the water from his own lands, and caused it to flow in unnatural quantities upon defendant's land, and that the defendant only stopped such unnatural flow by stopping the lower end of such ditches, or other means of drainage, to the extent of setting back this excess of water, then he is justified in so doing, and is not liable for such acts, provided you believe from the evidence that such drain had not existed before the acts complained of, and for this space of time that I have named—upwards of (15) fifteen years.⁵

(e) The jury are instructed that one whose lands are overflowed and injured by reason of sand, timber and trees uprooted and carried thereon in consequence of the manner in which a railroad company builds a bridge across a natural stream or river, whereby the waters of the stream are contracted and diverted from their natural channel or course, and made to flow in the different direction from that which they were accustomed to do before the building the bridge and the obstruction of the stream by the piers thereof, and by allowing and permitting other obstructions built for temporary purposes to remain in the river and further obstruct the flow of the waters, may maintain an action against such railroad company for the injuries which he has sustained, as the company is presumed to know the habits of the stream on extraordinary occasions as well as ordinary occasions.⁶

5—O'Connor v. Hogan, 140 Mich. 613, 104 N. W. 29 (32).

6—Jones v. Seaboard Air L. Co., 67 S. C. 181, 45 S. E. 188 (195).

"It is important to bear in mind that there were only two charges of negligence to which all the evidence on the subject was directed. These were negligent construction of the bridge, and negligently allowing the cribs to remain in the river. The jury, therefore, must

necessarily have applied all that was said by the court on the subject of negligence to these charges. The instructions on this subject were free from error full and explicit. After stating clearly the only issues of negligence, the circuit judge said: 'So your business is to determine from the evidence whether or not the defendant is guilty of the acts of negligence complained of; and whether or not

§ 2354. Right to Use Water Passing Over Land—Must Restore It to Original Bed. The owner of land through which a watercourse passes, has a right to receive the water, when the water in its natural channel enters his land, and to use it while it is passing over or through his land, but he must restore the water to its original natural channel whenever it leaves his land, to enter that of an adjoining owner.⁷

§ 2355. The Owner of the Soil Is the Owner of the Surface and Subterranean Water. The court instructs the jury, as a matter of law, that water that percolates through the soil, beneath the surface, with a known channel—water which temporarily flows upon, or over the surface from falling rains or melting snows, without a channel, but simply as the natural and artificial elevations and depressions of the surface may guide it, is regarded as a part of the land and belongs to the owner thereof, and he makes such use of the water as he sees fit, while it remains on his land.⁸

§ 2356. Placing Obstruction in Natural Watercourses and Diverting Water—Damages. A railroad company in constructing its road over a natural stream, natural watercourse, should have openings sufficient to afford a free outlet or passage for all water, as well in times of ordinary freshets or floods and freshets as at other times; and the railroad company is not only liable in damages to persons injured by obstructions placed in a natural water course, and there maintained, or there negligently allowed to remain, but also for damages resulting from diverting the natural course of the stream.⁹

§ 2357. Mill Race—Obstructions. (a) If the jury find from the evidence in this case that the defendant, —, its agents or servants, during the campaigns (so called) of said company from — to —, have deposited into B. Creek, and from thence into the pond, race, flume, and water wheel, of the water power and mill of the plaintiff, such quantities of beets, beet roots, lime mud, lime, sand and dirt, and other refuse from its sugar plant as to materially and unreasonably lessen, diminish, injure and damage such pond, race and mill property, then such use and such acts of the defendant with the said waters of B. Creek would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any.¹⁰

these acts of negligence—if you find that said acts were negligent acts, and that the defendant was guilty of said acts of negligence, from the evidence—were the proximate causes of the injuries of which the plaintiffs complain.' The jury were also charged that the plaintiffs could not have a verdict unless they had satisfied the minds of the jury by the preponderance of the evidence on all the material issues raised by the pleadings."

7—Gould on Waters, § 213; Angell on Watercourses, § 108.

8—Taylor v. Fickas, 54 Ind. 167, 23 Am. Rep. 639.

9—Jones v. Seaboard Air L. Ry. Co., 67 S. S. C. 181, 45 S. E. 188 (195).

10—Neely v. Detroit Sugar Co., 138 Mich. 469, 101 N. W. 664 (666-670).

"This charge was a fair, full and impartial statement of the law as applicable to the case as presented.

(b) The plaintiff cannot recover for any damages sustained by him by reason of beets or other substances which escaped into B. Creek from the defendant's premises, and which passed into the flume between the penstock and the water wheels of the plaintiff, and into said water wheels, before he had placed in the raceway a suitable rack, if such rack would have prevented the passage of such beets and substances into said flume and water wheels. Now, I was asked orally by counsel for plaintiff to modify that or add to it by saying that he could recover nothing for the obstruction to his wheel by beets for a reasonable time, and I am willing to add those words; but I feel obliged to say to you in that connection, that it does seem to me that a man who was skilled in the operation of the mill, and was familiar with the flowage of water that constitutes mill power, would have known very quickly after he discovered that beets were in his wheel that a rack was essential in order to keep them away, so that if one day if he knew beets were going in there, to my mind, would give him notice—any brief time. Perhaps one day might be a little too short a time, but, if he knew that they were passing in and obstructing it, it would, to my mind, oblige him to erect a suitable rack to stop their passage into the wheel. Now, that request has no bearing whatever upon the question of whether the beets were brought down there which obstructed the flow of water at the rack itself. That refers only to the passage of beets into the wheel from the fact that no rack was there.¹¹

§ 2358. Embankments—Obstructions—Party Acquiring Interest After Erection—Right of Action. The court further instructs the jury that this duty (to construct and maintain his road across streams and natural watercourses which it intersects as to inflict no injury upon adjacent lands) is a continuing one, and that each overflow caused by the negligence or want of skill of the company creates a new cause of action for damages to the crops or other property of the rightful possessor of the lands overflowed, although the plaintiff acquired his interest after the creation of the obstruction; and if the jury believe, under the evidence, that a portion of the waters in the Little Canteen Creek naturally flowed south across the right of way of defendant prior to the filling up of the trestle, and would still continue to do so except for the obstruction of the embankment complained of, then they must find for the plaintiff, giving such damages as the jury can say from the evidence he has sustained, if they further believe, from the evidence, he has sustained damage by

See the following cases: *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Buchanan v. Log Co.*, 48 Mich. 367, 12 N. W. 490; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; 106 Mich. 412, 64 N. W. 329; *Stock v. Township of Jefferson*, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355; *People v. Hulbert*, 131 Mich. 156, 91 N. W. 211, 64 L. R. A. 265, and the many cases cited therein."

11—*Neely v. Detroit Sugar Co.*, supra.

reason of such embankment and partial obstruction of the flow of the water as aforesaid.¹²

§ 2359. Use of Banks of Streams—Floatage of Logs Down Navigable Stream. You are further instructed that the right of floatage of logs or timber down a navigable or floating stream refers only to the right of floatage, and does not carry with it the right to use the banks of such navigable stream or streams above the line of mean high tide. The fact that the waters in such river or slough at times rise above the line of mean high tide, and in consequence the logs in such river or slough were raised to an elevation above the line of mean high tide, and the waters and logs for such time held within the banks above the line of mean high tide, would not be such a use of the banks of the stream as would entitle the adjoining landowner to collect rents or damages from the boom company.¹³

§ 2360. Owner of Land Bordering on a Navigable Stream Has Right to Build Docks. The jury are further instructed that the owner of lands or lots fronting upon a navigable stream, and of which lands or lots such stream forms one of the boundary lines, has a lawful right to erect docks and wharves conforming to such boundary line in and along said river, conforming, however, to the regulations of the proper public authorities for the protection of the public rights in such stream; and such owner may so place such docks and wharves as to have the benefit of the navigable part of such stream, but not interfering with the public rights of navigation.¹⁴

§ 2361. Flooding of Land—Changing of Watercourse. (a) Notwithstanding the jury may believe, from the evidence, that the plaintiff's property was lost, injured or damaged by the overflow of the stream in question, as alleged in plaintiff's declaration, yet if they shall further believe, from the evidence, that any part or portion of such property would have been equally damaged or lost to the plaintiff by said overflow if the defendant company had not, prior thereto, done any of the acts changing the watercourse in

12—*Ohio & Miss. Ry. Co. v. Thillman*, 143 Ill. 127 (132), 32 N. E. 529, 36 Am. St. 359.

"We see no objection to this instruction. It announces the doctrine that the duty of the railroad in this regard is a continuing one, and that every continuance of a nuisance is in judgment of law a fresh nuisance. Each overflow upon the land of an adjoining owner caused by the negligence or want of skill of the railroad company in its mode of constructing or maintaining a bridge or embankment over a running watercourse, creates a new cause of ac-

tion against the company for injury thereby occasioned to the crops upon such land (p. 136). *C. R. I. & P. R. R. Co. v. Moffitt*, 75 Ill. 524, 7 Am. St. 342; *Groff v. Arkenbrandt*, 124 Ill. 51, 15 N. E. 40; *C. B. & Q. R. R. Co. v. Schaeffer*, 124 Ill. 24, 16 N. E. 239; *Drake v. C. R. I. & P. Ry. Co.*, 63 Ia. 302, 19 N. W. 215; *Dorman v. Ames*, 12 Minn. 451."

13—*Lowndsdales et ux. v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904 (907).

14—*R. & I. P. Ry. Co. v. Lelsy Brewing Co.*, 174 Ill. 547 (550), 51 N. E. 572.

question charged against it in the plaintiff's declaration, then the jury are instructed that the plaintiff cannot recover herein against the defendant company for the loss of or injury or damage to any such part or portion of said property.

(b) Notwithstanding the jury may believe, from the evidence, that the plaintiff's property was injured and damaged by the overflow of the stream in question, as alleged in plaintiff's declaration, yet if they shall further believe, from the evidence, that the same loss and damage would have occurred from said overflow if the defendant company had not, prior thereto, done any of the acts changing the watercourse in question charged against it in the plaintiff's declaration, then the jury will find the defendant guilty.¹⁵

§ 2362. **Extraordinary Freshet—Onus on Defendant to Prove Absence of Negligence—Act of God.** (a) The jury are instructed that the onus, then, is upon the defendant to prove the absence of negligence, unless, as I have charged you, that the proof satisfies your minds, that the act of God in sending an extraordinary freshet was the entire cause of injury to the plaintiff's lands, which if so, would of course in itself show the absence of negligence.

(b) If the injury here complained of was caused by an extraordinary freshet, which could not be foreseen and provided against—in other words was the act of God, and such act was the sole cause of the injury—then the proof of the fact would be a perfect shield, and the plaintiffs could not recover.¹⁶

(c) A railroad company is bound to provide in the construction of its road against all injury and damages arising from ordinary floods and freshets. It is only relieved from its liability when it is shown that the flood or freshet was an unusual or extraordinary one—in other words, that it was the act of God—an act which could not have been anticipated and provided against.¹⁷

(d) The jury are instructed that although the railroad company constructed its piers and bridge prudently and in a scientific manner, yet if the testimony satisfies your minds that it subsequently appeared that the construction was such that damages would result from the bridge and piers, and the railroad company could have

15—R. I. & P. Ry. Co. v. Krapp, 173 Ill. 219 (222), 50 N. E. 663.

16—Jones v. Seaboard Air Line Ry. Co., 67 S. C. 181, 45 S. E. 188 (195).

"The charge to the effect that, if the damage was produced by extraordinary freshets, but if it would not have occurred, notwithstanding the unprecedented floods, but for the negligence of the defendant, the defendant would still be liable, is supported by reason and by an unbroken line of authority. In addition to the familiar decisions in this state, the charge on this point

was in accordance with the doctrine laid down in Thompson's Commentaries on the Law of Negligence and other authorities relied on by defendant. There is no intimation in the charge that the railroad should be held to be a warrantor against injury arising from placing structures for its bridge in the river. On the contrary, the jury were distinctly told only reasonable care and diligence should be required."

17—Jones v. Seaboard Air L. Ry. Co., supra.

averted this damage by reasonable effort, nevertheless failed to do so, it would be liable.¹⁸

§ 2363. **Dams—Dedication.** The jury on the question of dedication, might take into consideration the condition of the lake, and the public work upon the dam, and all other facts and circumstances as disclosed by the evidence; that all acts done by the defendant, so far as they were for the improvement or maintenance of the highway over the dam, would not be acts which could be considered by the jury in connection with the question of dedication, but that such facts as were done by the public upon the dam itself, and not upon the highway, for the purpose of maintaining the water in the lake, might be so considered.¹⁹

18—*Jones v. Seaboard Air Line Ry. Co.*, supra.

The court in comment said: "It is further submitted the circuit judge was in error in charging that the burden of proof was on the defendant to establish its defense that the damage, if any, was due solely to unprecedented floods. It will be observed that in the charge the court had already laid upon the plaintiffs the burden of proving their case, as alleged by a preponderance of the evidence. The third paragraph of the answer alleging as a cause of damage 'frequent and unusual high freshets'

was regarded by the defendant, without objection by plaintiffs, as setting up the affirmative defense of floods so extraordinary that the prudent and careful could not be expected to anticipate them or provide against them. This being an affirmative defense, the burden was on the defendant to establish it. The plaintiffs could not be required to overthrow it until it had been made out. *Frost v. Berkeley*, 42 S. C. 402, 20 S. E. 280, 26 L. R. A. 693, 46 Am. St. Rep. 736; *Ellis v. R. R. Co.*, 24 N. C. 138."

19—*Boye v. City of Albert Lea*, 93 Minn. 121, 100 N. W. 642 (643).

CHAPTER LXXXIV.

WILLS.

See Erroneous Instructions, same chapter head, Vol. III.

NATURE OF WILLS AND GENERAL REQUISITES FOR EXERCISING TESTAMENTARY POWER.

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NATURE OF WILLS AND GENERAL REQUISITES FOR EXERCISING TESTAMENTARY POWER.

§ 2364. Power of Testator to Exclude Relatives From a Share in His Estate. (a) The jury are instructed, that no next of kin, no matter how near they may be, can be said to have any legal or natural rights to their kinsman's estate, which can be asserted against the will of said kinsman. The law of the land has placed every person's estate wholly under the control of the owner, subject to such final disposition of it as he may choose to make by his last will and testament, limited only by the statutory rights of his widow.

(b) Children have no natural or legal rights to the estate of their father which can be asserted against his disposition of it by will.

(c) All parents have a right to judge as to who are the proper objects of their bounty; and, if free from undue influence and insane delusions, and of sufficient mental capacity, may give their property to any person whomsoever. A child has no legal or natural right to the estate of its father which courts or juries can recognize against the will of the father.¹

§ 2365. Witnessing Will—What Is Sufficient. (a) The court instructs the jury, that if they believe, from the evidence (given by the subscribing witnesses), that the deceased signed the paper, purporting to be his will, in the presence of one of the subscribing witnesses, and acknowledged it to be his act and deed to the other, and that they subscribed the same as such witnesses, at his request and in his presence, and if the jury further believe, that the deceased was of sound mind and memory at the time, then this is a compliance with the law, and is *prima facie* evidence of the due execution of the will.

(b) The court instructs the jury, that it is not necessary that the subscribing witnesses should know at the time of attesting it that it is the will, or that they should know the contents of it.

(c) If the witnesses to a will, while signing their names thereto, as such witnesses, are in such a place that the testator can see them, if he chooses to, they are to be regarded as in his presence, within the meaning of the statute, and it is not necessary that they shall

¹—Brace v. Black, 125 Ill. 33, 17 N. E. 66.

be in the same room with the testator, or that he shall actually see them sign.²

(d) The court instructs the jury that the issue in this case is, is the paper offered in evidence purporting to be the last will and testament of J., in fact the last will and testament of J.

(e) The court instructs the jury that it devolves on the defendants to show by a preponderance of the evidence that the following facts are true, before the jury are authorized to find the paper writing offered in evidence to be the last will of J.:—First, it must be attested by two or more credible witnesses; second, two of the witnesses must testify that they saw testator sign the will in their presence, or that he acknowledged same to be his act and deed, and that they signed the same as witnesses thereto at his request.³

(f) To make a legal attestation the test is, was there an uninterrupted view between the alleged testator and the subscribing witnesses, and were the witnesses within the range of the alleged testator's vision his condition as to health and posture being considered when the alleged attesting was done. Was the alleged will then present, and could the alleged testator in his then condition and posture have seen, if he had wished to and had looked in the proper direction, enough of the persons of the alleged witnesses, and enough of the act then being done by them, to know on his part from what he could so have seen if he had wished to, and from what he knew of the then surrounding circumstances that the alleged witnesses were then signing their names as witnesses to the alleged testator's proposed will?

(g) You are further instructed that, if you believe, from the evidence, that at the time of the alleged attestation of D.'s alleged will now in dispute, that the alleged witnesses were in the same room with said D. and only a few feet from him, that the view between him and them was uninterrupted and they were within the range of his vision; and if you further believe, from the evidence, and the then surrounding circumstances proved upon the trial in connection with the alleged attestation of said alleged will, that said D., taking into account his then condition or state of health and his then position as shown by the evidence, either saw, or could have seen if he had wished to and had looked in the proper direction, the alleged witnesses themselves, and enough of the act then being done by them to know on his part, from what he so saw or might have seen if he had wished, and from what he knew of the then surrounding circumstances, that the alleged witnesses were then signing their names as witnesses to his, D.'s, proposed will, then upon that question you should find the alleged will in question to have been properly attested.

2—*Ambre v. Weishaar*, 74 Ill. 109.
The statutes of the state where the will is executed or the property located should be consulted as to

the requirements as to witnessing wills.

3—*Campbell v. Campbell*, 138 Ill. 612 (618), 28 N. E. 1080.

(h) Relative to the witnessing or attestation of the alleged will in question, the court instructs the jury that the statute of Illinois provides that all wills shall be attested, in the presence of the testator, by two or more credible witnesses; and if you believe, from the evidence, that D. signed the alleged will in question in the presence of ——— and ———, and after he so signed the same they took said will to a writing desk a short distance from the foot of the bed, and within the range of testator's vision, and that the said D. was sitting on said bed, and they there subscribed their names to the attestation clause of said alleged will in full and uninterrupted view of the said testator, then this is a sufficient attestation of the will in question and full compliance with the law on that subject.

(i) While the presumption of the law is, that where the will is signed by the attesting witnesses in the same room with the testator that it is signed in his presence, yet that is only a presumption; and where the evidence shows that the witnesses were in such position that the testator could not see the paper nor see the witnesses when signing it, the presumption of the law is overcome.⁴

§ 2366. **Change of Domicile.** If you believe from the evidence that A. went to Kentucky, and it was her avowed purpose—her expressed intention—to make that her home, or if she went there on a visit, and, after she arrived there, if she then decided to make that her domicile, and there so expressed her avowal of intention to make it her residence, then that would constitute a good change of residence, provided you believe from the evidence that she had sufficient mental capacity to form an intention of changing her residence.⁵

CAPACITY TO MAKE WILLS.

§ 2367. **Insanity—Issue to be Tried.** (a) The jury are instructed, that the only question in this case for them to try is this: Is the writing offered the will of A. B., deceased? And your verdict will be, either that it is his will, or that it is not.

(b) The question to be passed upon by the jury is this: Was the mind and memory of the deceased, at the time of the making of the alleged will, sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will, judging his competence of mind by the nature of the act to be done, and from a consideration of all the circumstances in the case.⁶

4—The above instructions were approved in *Drury v. Connell*, 177 Ill. 43 (48), 52 N. E. 368.

5—*Whedon v. Knight*, 112 Ga. 639, 37 S. E. 972 (973).

For other instructions on domicile, see chapter on Domicile and Residence.

6—*Trisk v. Newell*, 62 Ill. 196.

§ 2368. **Sanity is Presumed.** (a) The court instructs the jury, that in all cases involving questions of sanity and insanity, *prima facie* the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When a will or other instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established, by a preponderance of evidence.⁷

(b) Reason being the common gift of God to man, every man is presumed to be sane, and insanity can only be proved by clear and unexceptionable evidence.⁸

(c) The court instructs the jury that the law presumes, and it is your duty to presume, that every man who has arrived at the years of discretion is of sound mind and memory and capable of transacting ordinary business and capable of disposing of his property by will or otherwise, until the contrary is shown, and the court instructs you that it is your duty to hold that C. at the time he executed the will offered in evidence was of sound mind and memory, and to so hold until you believe by the preponderance of the evidence that he was otherwise.⁹

§ 2369. **Burden of Proof in Case of Insanity—Rule Supported by Weight of Authority—Burden of Proof on Contestant, Where Due Execution Proved.** The jury are instructed, that when a will is proved, including soundness of mind and memory, on the part of the testator, by the testimony of two subscribing witnesses, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity, or of unsoundness of mind, must be established with reasonable certainty; the evidence of insanity should preponderate, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only, of the sanity of the tes-

7—Wyatt v. Walker, 44 Ill. 485.

8—Dominick v. Randolph, 124 Ala. 557, 27 So. 481 (485).

"This charge asserted a correct legal proposition. Cotton v. Ulmer, 45 Ala. 378."

The court instructs you that every person is presumed to be of sound mind until the contrary is shown. Blough v. Parry, 144 Ind. 95, 463, 40 N. E. 71, 43 N. E. 560.

9—Craig v. Southard, 162 Ill. 209, 44 N. E. 393.

The Supreme Court, in its opinion, said: "The court had already instructed the jury that it was incumbent upon the proponents of the will to make out a *prima facie* case in the first instance by proper proof of the due execution of the will by the testator, and of his

mental capacity, as required by the statute, and there was no question in the case that such proof was not made. The burden of proof was then upon the contestants to prove the allegations of their bill by a preponderance of the evidence that the testator was mentally incompetent, and that the proponents were entitled to the legal presumption of sanity as stated in the instruction. As said in Carpenter v. Calvert, 83 Ill. 62, 'In weighing the conflicting proofs, the party supporting the will is entitled to the benefit of this presumption.' See also Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076, where the same question was considered. The instruction was not erroneous."

tator, the presumption in favor of sanity, if proved as above stated, must turn the scale in favor of the sanity of the testator.¹⁰

§ 2370. Same Subject—Rule that Burden of Proof Is on Proponent.

(a) When the party insisting on the probate of the will has established the sanity of the testator, at the making of the will, by the oath or affirmation of two of the subscribing witnesses, and that the will was legally executed, acknowledged and witnessed, as explained in these instructions, then a *prima facie* case is made out; and in such a case, the party seeking to contest the will, on the ground of insanity, fraud, compulsion, or for any other cause, takes upon himself the burden of proving the ground relied upon; and the cause relied upon must be proved by a preponderance of evidence; and if the question is left evenly balanced, the verdict should be in favor of the validity of the will.

(b) The jury are instructed, that the burden of proof is upon the party asserting the sufficiency of the will to prove that, at the time of its execution, the testator was of sound mind and memory, within the meaning of the law, as explained in these instructions, and this is to be determined by the jury, not alone from the statements or evidence of any one or more persons, or class of witnesses, but from a consideration of the whole evidence in the case.

(c) The burden of proving testamentary capacity is on the party alleging it, to the end of the trial, and such person must produce evidence sufficient to outweigh that which is opposed to sanity, or else sanity is not proved—and if the jury find that the evidence relating to the testator's mental soundness is equally balanced, then they must not allow the presumption of sanity to decide the question in favor of soundness. The burden of proof is upon the party alleging it to establish mental capacity by other evidence than the presumption of sanity.¹¹

(d) The court declares the law to be that the burden of proof is upon the defendants in this case to prove the proper execution and

10—Perkins v. Perkins, 39 N. H. 163; Brooks v. Barrett, 7 Pick. 91; Turner v. Cook, 36 Ind. 129; Terry v. Buffington, 11 Ga. 337; In re Coffman, 12 Ia. 491; Cotton v. Ulmer, 45 Ala. 378.

In Henning v. Stevenson, 26 Ky. L. 159, 80 S. W. 1135 (1136), the court said of this rule:

"In Milton v. Hunter, 13 Bush (Ky.) 163, this court in a well considered opinion by Chief Justice Lindsay, condemned an instruction which placed the burden of proof as to testamentary capacity upon the propounders, and laid down the rule that when they have proved the due execution of a paper, not irrational in its provisions, nor inconsistent in its structure, language

or details with the sanity of the testator, the presumption of law makes out for them a *prima facie* case, and the burden of showing incapacity on the part of the testator is shifted to the contestants. This rule has since been followed in Flood v. Pragoff, 79 Ky. 611; Fee v. Taylor, 83 Ky. 259; Branel v. Branel, 101 Ky. 72, 39 S. W. 520; Howat v. Howat, 19 Ky. Law 756, 41 S. W. 771; Boone v. Ritchie, 21 Ky. L. 864, 53 S. W. 518; King v. King, 19 Ky. L. 868, 42 S. W. 347; Woodford v. Buckner, 23 Ky. L. 628, 63 S. W. 617; Dunaway v. Smoot, 23 Ky. L. 2291, 67 S. W. 62."

11—Frazer v. Jennison, 42 Mich. 206, 3 N. W. 882.

attestation of the will in question, and that the testatrix was of sound mind at the time of the execution of said will; and, unless the defendants or proponents of said will, have shown such facts by a preponderance of the testimony, the issues will be found for the plaintiffs.¹²

§ 2371. Same Subject—Rule as to Burden of Proof in Illinois.

(a) You are instructed that the burden of proof is upon the proponent to show that the will offered by him was signed by E. on ———, and unless he has proven such execution by a preponderance of the evidence, you should find for the contestants. But if you believe, from the evidence, that E. did execute the instrument offered as a will, and that the same was attested by two credible witnesses in her presence, and that the two subscribing witnesses have sworn that at the time she executed it she was of sound mind, then the burden shifts, and the contestants assume the burden of proving the testatrix was not of sound mind as defined in these instructions.¹³

(b) The jury are instructed that, where an instrument purporting to be a will is proved, including soundness of mind and memory on the part of the testator by the testimony of the subscribing witnesses and other witnesses, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity or of unsoundness of mind must be established by a preponderance of the evidence. The

¹²—*Lorts v. Wash*, 175 Mo. 487, 75 S. W. 95.

¹³—*Egbers v. Egbers*, 177 Ill. 82 (87), 52 N. E. 285.

"As said by the learned author of the article entitled 'Burden of Proof' in 5 Am. & Eng. Ency. of Law, 2d ed., the term 'burden of proof' has two distinct meanings; by one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as a case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end. This court has

repeatedly said that the law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity. (*Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. 86; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Menkins v. Leightner*, 18 Ill. 282.) But it is incumbent upon the proponents of the will to make out a prima facie case in the first instance by proof of the due execution of the will by the testator and of his mental capacity, as required by the statute. The burden of proof is then upon contestants to prove the allegations of their bill by a preponderance of all the evidence that the testator was mentally incompetent. The law throws the weight of the legal presumption in favor of sanity into the scale in favor of the proponents, from which it necessarily results that, upon the whole case, the burden of proof rests upon the contestants to prove the insanity of the testator. (*Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; same v. same, 148 Ill. 37, 35 N. E. 361; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Carpenter v. Calvert*, 83 Ill. 362)."

evidence of insanity should preponderate, or the will must be taken as valid. If the evidence is evenly balanced as to the sanity of the testator, the presumption in favor of sanity, if proved, as above stated, must turn the scale in favor of the sanity of the testator.¹⁴

§ 2372. **Sound and Disposing Mind and Memory.** (a) The law is, that to be of sound and disposing mind and memory, so as to be capable of making a valid will, it is sufficient if the testator has an understanding of the nature of the business in which he is engaged—a recollection of the property he means to dispose of—of the persons who are the objects of his bounty, and the manner in which it is to be distributed among them. It is not necessary that he should comprehend the provisions of his will in their legal form. It is sufficient if he understands the actual disposition which he is making of his property at the time.

(b) If the mind and memory of a testator are sufficiently sound to enable him to know and understand the extent and amount of his property, and his just relations to the natural objects of his bounty, and the business in which he is engaged, at the time of executing his will, then he is of sound mind and memory within the meaning of the law.¹⁵

(c) The court instructs the jury for contestants that in determining the issue in this case as to whether N. had sufficient mind and memory to make the will offered in evidence, the inquiry is to be made in view of the circumstances of this case as shown by the evidence, and a determination reached by a consideration of the nature and character of the business about to be performed in the making of said will as shown by the evidence. He must have had at the time an intelligent comprehension of the surrounding circumstances, and of their direct consequences and probable results. To constitute a sound disposing mind, the testator must have been able not only to understand that he is by will disposing of his property, but he also must have capacity sufficient to comprehend the extent of the property devised, and the claims of others upon him; and if the jury believe, from the evidence, that at the time of making the will in controversy, N. did not possess such sound and disposing mind as described in these instructions, then they should find that the paper purporting to be the last will of N. is not his last will.¹⁶

14—Hollenbeck v. Cook, 180 Ill. 65 (70), 34 N. E. 154.

"The instruction in its material parts is sustained by Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076, where it was held that, in the contest of a will upon the question of testamentary capacity, the law throws the burden of proving the sanity of the testator, in the first instance, on the party asserting the validity of the will; but, after a prima facie case has been made out by the testimony of the sub-

scribing witnesses, the weight of the legal presumption in favor of sanity is in favor of the proponent, from which it necessarily results that upon the whole case the burden of proof rests upon the contestants. See also Graybeal v. Gardiner, 146 Ill. 337, 34 N. E. 528, where the same doctrine is announced."

15—Freeman v. Easley, 117 Ill. 317, 7 N. E. 656.

16—Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080.

(d) By sound mind or testamentary capacity, as used in these instructions, is meant such capacity on the part of the decedent as to enable him to know his estate, the extent and value, his children and heirs at law, and their natural claims on his bounty, and to take a rational survey of his estate and dispose of the same according to a fixed purpose of his own.¹⁷

§ 2373. **Test of Testamentary Capacity.** (a) The jury are instructed, that a testator, not affected with any morbid or insane delusion as to any of the natural objects of his bounty, possesses testamentary capacity, within the meaning of the law, if he has a clear understanding of the nature of the business in which he is engaged, of the kind and value of the property devised, and of the persons who are the natural objects of his bounty, and of the manner in which he desires his property to be distributed.¹⁸

(b) The will in question in this case is not a valid will unless the jury believe, from the evidence, that the testator, A. B., not only intended to make such a disposition of his property, as is here made, of his own free will, but was also capable of knowing what he was doing, of understanding to whom he was giving his property and in what proportions, and whom he was depriving of it as his heirs who would otherwise have inherited it; and was also capable of understanding the reasons for giving or withholding his bounty as to them.¹⁹

§ 2374. **Testamentary Capacity.** (a) The jury are instructed, that what is meant by testamentary capacity, as used in these instructions, is a rational understanding on the part of the testator at the time of the making of his will, of the business he was engaged in, of the kind and value of the property devised, of the persons who were the natural objects of his bounty, and of the manner in which he wished to dispose of his property, unaffected by any morbid and insane delusion regarding any of these subjects.

(b) The jury are instructed, that in order to make a valid will the law requires that a person shall be of sound and disposing mind and memory, as defined in these instructions—and testamentary incapacity does not necessarily require that a person shall be technically insane. Weakness of intellect, whether it arise from extreme old age, from disease or great bodily infirmity or suffering, or from intemperance, or from all of these combined, may render the testator incapable of making a valid will, provided, such weakness really disqualifies him from knowing or appreciating the nature, effects or consequences of the act he is engaged in.²⁰

(c) The court further instructs the jury before they can find the

17—*Oberdorfer v. Newberger*, 23 Ky. L. 2323, 67 S. W. 267 (268).

18—*Frazer v. Jennison*, 42 Mich. 206, 3 N. W. 882.

19—*McGinnis v. Kempsey*, 27

Mich. 363; *Frazer v. Jennison*, 42 Mich. 206, 3 N. W. 882.

20—*McGinnis v. Kempsey*, 27 Mich. 363.

respondent, S., is a distracted person, they must believe, from the evidence, that she is so far incapable of acting rationally in the ordinary affairs of life and of comprehending the nature and value of property, as to be incapable of transacting or procuring to be transacted ordinary business. And if upon the question as to whether or not respondent is capable or not of transacting ordinary business or procuring it to be transacted, the jury believe the evidence to be equally balanced or that the evidence preponderates in favor of the respondent, the jury must find in favor of the respondent, and that she is not a distracted person.²¹

(d) The jury are instructed that testamentary capacity, or possession of sufficient mind to make his will, is like the capacity to attend to his own affairs, if the bodily health would permit his attention to them; and no man who is incompetent mentally to transact his ordinary business can be pronounced capable of making his will. It is also necessary that the testator should have a recollection of his property, as well as the natural relations of family and blood, and, if he did not himself write the will or read it, that the same should have been read and explained to him, so as to be fully understood and comprehended by him.²²

§ 2375. **Letters as Evidence of Testamentary Capacity.** The court further instructs you that in arriving at your verdict it is right and proper for you to consider the eleven letters offered in evidence by proponent as the letters of S., deceased. There has been no attempt on the part of contestant to disprove the evidence that they were the letters of the deceased, and were written and mailed at times detailed in the testimony; and if you believe that they were respectively, the letters of said deceased, then they are important for you to consider in arriving at your verdict on the following points: First, as to the ability of the deceased to write; second, as to the ability of the deceased to compose; third, as to the ability of the deceased to see; fourth, as to the mental capacity of said S., deceased; fifth, as to the feelings entertained by the deceased toward his son, —, at the time said letters were written, respectively.²³

§ 2376. **Partial Insanity—Monomania.** (a) The court instructs the jury, that "a man who is very sober and of right understanding in all other things, may, in some one or more particulars," be insane; that there is a partial insanity, and a total insanity; and that such partial insanity may exist as it respects particular persons, things or subjects, while, as to others, the person may not be desti-

21—Snyder v. Snyder, 142 Ill. 60 (66), 31 N. E. 303.

22—Kischman v. Scott, 166 Mo. 214, 65 S. W. 1031 (1034), citing McBride v. Banguss, 65 Tex. 174; Adams v. Eddy, — Tex. Civ. App. —, 29 S. W. 180; Cabell v. Menczer, — Tex. Civ. App. —, 35 S. W. 206.

In the majority of states, this in-

struction would probably be held to require too great a degree of mental capacity in the testator, as a person might be unable to transact ordinary business and still have testamentary capacity.

23—Stull v. Stull, 1 Neb. (unof.) 380 (389), 96 N. W. 196.

tute of the use of reason. And, although a testator has some insane delusion upon some subjects, yet, if he has mind enough to know and appreciate his relation to the natural objects of his bounty, and the character and effect of the dispositions of his property, then he has a mind sufficiently sound to make a valid will.

(b) The court instructs the jury, that the law recognizes the difference between general and partial insanity, and if the jury believe, from the evidence, that the will here offered was made at a time when the testator was laboring under the influence of partial insanity, and is the product of such partial insanity, then it is as invalid as if made under the effects of an insanity ever so general.

(c) A person may have, upon some subjects, and even generally, mind and memory, and sense to know and comprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty, and of a reasonable and proper disposition as to them of his estate, he may be of unsound mind.²⁴

(d) A man may have sufficient mind to know and comprehend that he is making a will and thereby disposing of his property, giving it to some of the natural objects of his bounty, to the exclusion of others, and have an object in so doing which he fully comprehends, and yet be prompted to so dispose of his property by some form of monomania. And if the monomania affected in any way or entered into the making of the will, such will would be invalid and should be set aside.²⁵

(e) Under our statutes all persons except infants and persons of unsound mind may dispose of their property by will, and the words "persons of unsound mind" shall be taken to mean any idiot, non-compos, lunatic, monomaniac, or distracted person. And thus the term "unsound mind" includes every species of unsoundness of mind. A monomaniac is a person who is deranged in a single faculty of his mind, or with regard to a particular subject only. And it is a fact that persons possessed of monomania may, and often do, on all subjects foreign to the subject of mania, act rationally and with ordinary prudence and judgment. While therefore, monomania is embraced within our statutory definition of what constitutes unsoundness of mind, yet it does not follow that every one possessed of monomania is incompetent to make a valid will. You may find that the testator in this case was afflicted with monomania, or with delusions or any form of mental unsoundness; but it must further

24—1 Red. on Wills, 63; Jarman on Wills, 5th Am. ed. 77, 113; Page on Wills, § 108.

25—Swigart v. Willard, 166 Ind. 25, 76 N. E. 760.

"This instruction is criticised by counsel as inconsistent and contradictory in its terms. We cannot concur in the view of counsel in this regard. The instruction cor-

rectly advises the jury that if the testator is suffering from monomania which prompts his action and affects his purpose, and object in making a will, such will would be invalid. The instruction was tacitly admitted to be correct in the case of Young v. Miller, 145 Ind. 652, 44 N. E. 757."

appear by a preponderance of the evidence in this case that such unsoundness of mind entered into and affected the provisions of the will in controversy before you can find that the testator was of unsound mind with reference to the will in controversy. If the monomania or unsoundness of mind does not in any degree influence or affect the provisions of the will, it may be valid; but, if such monomania or unsoundness of mind does influence or affect any of the provisions of the will, it is invalid.²⁶

§ 2377. Time at Which Unsoundness of Mind Must Exist to Defeat Will. (a) If the jury believe from a preponderance of the evidence in this case, that at the time of executing the paper in evidence, B. was not of sound mind and memory, then the jury should find the paper in question is not his will.²⁷

(b) You are instructed that the material question for you to determine is whether, at the time the will in controversy was executed, the testator was of sound mind and understood the business he was doing at that time. If the testator was of sound and disposing mind and memory, and acted voluntarily at the time he executed the will in controversy, it is immaterial what the condition of his mind was before and after that time.²⁸

§ 2378. Settled Insanity Presumed to Continue. (a) The jury are instructed, that when settled insanity is once shown to exist, it is presumed to continue until restoration to reason is shown; but such presumption arises only in cases of settled insanity, and if complete restoration of reason is shown, then no more presumption of insanity arises in the case of the execution of a will than if the testator's mind had never been affected.²⁹

(b) While it is true that, in the absence of any evidence, the law always presumes that a man is sane, yet if settled insanity, either partial or total, be proved to exist at any time before the making of a will, it will be presumed to have continued, unless the contrary be shown, by a preponderance of the evidence.³⁰

§ 2379. Intoxication. The jury are instructed, that neither intoxication, nor the actual stimulus of intoxicating liquor at the time of executing a will, incapacitates the testator, unless the excitement be such as to disorder his faculties and pervert his judgment.³¹

26—Swigart v. Willard, *supra*.

"The next instruction (e) complained of was given at the request of appellants, except so much of it as defines 'monomania.' The modification made by the court was proper in itself and pertinent. The instruction as given was favorable to appellants, and affords no just cause for complaint."

27—Petefish v. Becker, 176 Ill. 448 (453), 52 N. E. 71. "This instruction is substantially in the language of the statute,

and it was not error to give it. (Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740; Town of Fox v. T. of Kendall, 97 Ill. 72.)

28—Stull v. Stull, 1 Neb. (unof.) 380 (389), 96 N. W. 196.

29—1 Redfield on Wills, 112.

30—Menkins v. Lightner, 18 Ill. 282.

31—Gore v. Gibson, 13 M. & W. 623; Gardner v. Gardner, 22 Wend. 526; Thompson v. Kyner, 65 Pa. St. 368; in re Convey's Will, 52 Iowa 197.

§ 2380. **Drunkenness Insanity, When.** The court instructs the jury, that drunkenness itself is a species of insanity, and may invalidate a will made during the drunken fit; and long-continued habit of intemperance may gradually impair the mind and destroy its faculties, so as to produce insanity of another kind; drunkenness long continued, or much indulged in, may produce on some minds, and with some temperaments, permanent derangement and fixed insanity. Whether in this case intemperate habits or drunkenness on the part of the deceased have been proved, and whether his mind was thereby affected, and at to what extent, if any, are questions of fact to be determined by the jury, from a consideration of all the evidence.³²

§ 2381. **Intoxication May Produce Insanity.** The court instructs the jury, that while it is not the law, that a dissipated man cannot execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such an act; yet, if fixed mental disease has supervened upon intemperate habits, the man is as incompetent to execute a valid will as though such mental disorder resulted from any other cause.³³

§ 2382. **Old Age Does not Necessarily Incapacitate.** (a) The jury are instructed, that a man may freely make his last will and testament, no matter how old he may be; provided, he has the requisite mental capacity, and is a free agent in making it. The control which the law gives a man over the disposal of his property may be one of the most efficient means he has in old age of commanding the attentions usually required by his infirmities.³⁴

(b) You are instructed that the mere fact that a person is of great age creates no presumption against the ability of such person to dispose of property by deed or will, and in this case, although you may believe from the evidence that the testatrix, P., at the time of executing the paper in question, was of about the age of eighty-six years, and suffering, to some extent, from weakness or bodily infirmity, yet such circumstances would not alone render her incapable of disposing of her property by will as she saw fit.³⁵

§ 2383. **Insane Delusions—Groundless Suspicion not Necessarily an Insane Delusion.** You are further instructed that to sustain the allegation that B. was laboring under an insane delusion in regard to the legitimacy of his son, it is not sufficient to show that he had a suspicion to that effect, or that his suspicion was not well founded. Although he may have had groundless and unjust distrust of his wife's fidelity, yet such doubt does not establish a condition of

32—1 Red. on Wills, 160-162; 1 Jarm. on Wills, 5 Am. Ed., 97; Wharton & Stille, § 36 et seq.; Ray Med. Jur., § 390.

33—1 Redfield on Wills, 92 et seq.

34—1 Red. on Wills, 95 et seq.

See Ames' Will v. Blades, 51 Iowa 596, 2 N. W. 408.

35—Pooler v. Cristman, 45 Ill. App. 334, 338, aff'd 145 Ill. 405, 34 N. E. 57.

lunacy or a lack of testamentary capacity, unless it appears, from a preponderance of the evidence, that such distrust caused him to execute a will he would not otherwise have made. The right of the testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and if there is no defect of testamentary capacity, the law gives effect to his will, though its provisions are unreasonable or unjust.³⁶

§ 2384. Delusion Regarding Wife or Child's Property. The court instructs the jury, that if they believe, from the evidence in this case, that at the time the will in controversy was executed, the testator was laboring under an insane delusion in regard to the value of his wife's property, and that he was influenced or controlled in the making of said will by said delusion, or that the said testator was laboring under an insane delusion in regard to what amount of property he had already given to his daughter, and that in making said will he was influenced or controlled by such delusion, then the said testator was not of sound mind and memory, as is contemplated and required by the law, and any paper purporting to be a will executed by him under such circumstances, is not a valid and legal will, and the jury should find the issues for the contestants.³⁷

§ 2385. Right of Testator to Dispose of Property as He Pleases.

(a) The jury are instructed that, a person competent to make a will may disinherit all of his children, and bestow all of his property upon strangers; or he may give his property to one or more of his children, and disinherit the others; or he may bequeath more of his property to some than to others of his children,—and the motive for so doing cannot be questioned, and the hardship of the case can have no other weight further than a circumstance tending, with other testimony, to show the insanity of the testator. It is a question of fact for the jury, from the evidence in this case, whether B. made an unequal or unnatural disposition of his estate. If he did so, the weight to be given to that fact must be determined from a consideration of the circumstances in the case. In determining the true character of the will in question in reference to the parties to this suit, it will be proper for you to consider the pecuniary circumstances of the respective parties at the time the will was made. If, upon full consideration of all the circumstances connected with the making of this will, you find that the testator has made a rational and reasonable disposition of his property, no presumption of unsoundness of mind can be drawn from the fact that he bestowed a larger share of his property upon the defendants than upon the plaintiffs. It is proper for the jury to consider, with this part of the case, any declaration which may have been made by the testator prior to the

³⁶—*Petefish v. Becker*, 176 Ill. Jarm. on Wills, 100 et seq.; Am. 448 (453), 51 N. E. 71. Bible Soc. v. Price, 115 Ill. 623, 5

³⁷—1 Red. on Wills, 72, 90; 1 N. E. 126.

making of the will in regard to the disposition he intended to make of his property. And if it should be found that when he was in good health, in writing or otherwise, he declared his intention to dispose of his property substantially in the same manner it is disposed of in the will in suit, it is an important fact to be considered in determining the validity of this will, and as tending to its support.³⁸

(b) You are instructed that the testatrix had the right to dispose of her property as she saw fit, and it is in itself not an indication of mental incapacity to leave the bulk of her property to a charitable or public institution, to the partial or total exclusion of her relatives.

(c) A testatrix may dispose of her property as she pleases, and it is not an indication of mental incapacity that she distributes it partially among her relatives, and leaves the balance to some one else.³⁹

§ 2386. **Previously Expressed Purposes.** (a) The court instructs the jury, that in determining whether the paper in question offered as a will is entitled to be so regarded, the paper itself may be considered in connection with all the other evidence in the case in determining the question of sanity or unsoundness of mind. And if the jury believe, from the evidence, that the deceased, before executing the will, had expressed any fixed purposes and intentions regarding the disposition of his property, at variance with the provisions of the alleged will, then the jury should consider whether or not the provisions of the will are inconsistent with sanity itself, and with his previously expressed and fixed purposes, and if the jury find that they are so, then these facts also should be weighed by the jury in determining the question of sanity or unsoundness of mind of the deceased at the time of its execution.⁴⁰

(b) The court instructs the jury that in determining whether the paper in question, offered as a will, is entitled to be so regarded, the paper itself may be considered in connection with all the other evidence in the case. And if the jury believe from the evidence that the deceased had expressed any fixed purposes and intentions regarding the disposition of his property at variance with the provisions of the alleged will, then the jury should consider whether or not the provisions of the will are inconsistent with his previously expressed and fixed purposes; and if the jury find that they are so, or that deceased was unfriendly to the beneficiaries under the will, then these facts should also be weighed by the jury in determining whether the paper offered is the will of the deceased.⁴¹

38—Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171 (173).

"This instruction asserts the law correctly, and is in strict conformity to the rule declared in Bundy v. McKnight, 48 Ind. 502. See page 509."

39—Spencer v. Terry's Estate, 133 Mich. 39, 94 N. W. 372.

40—Dye v. Young, 55 Iowa 423, 7 N. W. 678; Stephensen v. Stephensen, 62 Iowa 163, 17 N. W. 595.

41—Flowers v. Flowers, 74 Ark. 212 (216), 85 S. W. 242 (244).

"It was held by this court in Leslie v. McMurtry, 60 Ark. 301, 30 S. W. 33, that 'declarations of a deviser, made after the will was

§ 2387. **Will as Evidence of Insanity.** (a) The jury are instructed, that while the provisions of the will may be considered by the jury, in connection with all the other evidence in the case, for the purpose of determining the mental condition of the testator at the time of its execution, still, in order to defeat the will upon the ground alone of the character of such dispositions, they must not only be in some degree extravagant, and apparently unreasonable, but they must depart so far from what should be regarded as natural and apparently reasonable, as to appear fairly attributable to no other cause than that of a disordered intellect or unsound mind.

(b) The jury are instructed, that the unequal distribution of his property, by will, is not of itself any evidence of the insanity of the testator.

(c) In determining the question of the validity of this will the jury have a right, and it is their duty, to take into consideration the provisions of the will itself, in connection with all the other evidence that has been offered in reference to the question whether the deceased was, or was not, of unsound mind and memory at the time of its execution.⁴²

§ 2388. **Jury Must Determine Question of Soundness of Mind and Memory From Whole Evidence.** The jury are instructed that if upon the whole evidence you believe J. E. was not of sound mind and memory, as defined in these instructions, then you should find that the purported will is not the will of J. E., deceased.⁴³

§ 2389. **Expert Testimony.** (a) The testimony of medical men of large experience in their profession, upon the question of the existence or non-existence of soundness of mind, is, as a general rule, entitled to more consideration than the testimony of unprofessional witnesses, who have not devoted their attention to the same class of studies.

(b) The jury are instructed, that while it is true that the testimony of medical men of large experience, as a general rule, in this

executed, to the effect that he made no will, are inadmissible to prove that the will was forged.'

"That decision seems in line with the decided weight of authority, as shown by the collation of authorities in the note to the recent case of *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. But the authorities are equally uniform in holding that such declarations are admissible to show the mental capacity of the testator; when that issue is raised. *Leslie v. McMurtry*, supra; *Throckmorton v. Holt*, supra; 1 *Redfield Wills* 557, 559; *Schooler Wills*, 242, 243; *Gardner Wills*, p. 137; *Meeker v. Boylan*, 28 N. J. L. 282. The pe-

tition of contestants B. P. and K., contesting the will, directly raised the question of mental capacity or incapacity of the testator; and this instruction was given upon their request, and not upon the request of appellee. The giving of the instruction was not therefore erroneous, as it was competent, upon that issue, for the jury to consider whether or not the provisions of the will were inconsistent with the previously expressed purpose of the testator as to the disposition of his property."

42—*In re Convey's Will*, 52 Iowa 197, 2 N. W. 1084.

43—*Entwistle v. Meikle*, 180 Ill. 9 (28), 54 N. E. 217.

class of cases, is entitled to more consideration or weight in the minds of the jury than that of unprofessional men, still, whether the testimony of the medical men, who have testified in this case, is entitled to more weight than that of other witnesses, is a question entirely for the jury, to be determined by them from a careful consideration of all the evidence in the case.⁴⁴

(c) The jury are instructed that the law recognizes and receives the testimony of duly qualified medical expert witnesses. Such an expert must of course be qualified according to law. A mere opportunity afforded for observation will not constitute a person an expert. He must have been educated in the business about which he testifies or it must be first shown that he has acquired actual skill and scientific knowledge concerning the subject matter involved. When such experts, however, are duly qualified, the law recognizes and receives their testimony; and in arriving at a conclusion concerning the issues involved in this cause, you may take into consideration their testimony and award to it such value as in your judgment it deserves.⁴⁵

§ 2390. When Want of Sufficient Mental Capacity is Proven, Jury Need Not Consider Questions of Fraud or Undue Influence.

(a) The court charges the jury on behalf of contestant that if the jury are reasonably satisfied from the evidence that at the time of the making of the mark to the instrument propounded for probate in this case, S. did not have testamentary capacity to make a will, the verdict must be for contestant, and in this event they should disregard and not consider the charges on the subject of undue influence and fraud, and what it takes to constitute undue influence and fraud, as in such event they are immaterial inquiries.

(b) If the jury believe from the evidence to their reasonable satisfaction that the deceased at the time of making the mark to the paper propounded for probate did not have testamentary capacity, then they need go no further in their consideration to ascertain whether there was fraud or undue influence; and it would be the duty of the jury under the law, for this reason alone, to find a verdict for the contestant and against the validity of the said paper propounded for probate.⁴⁶

§ 2391. On Appeal from Probate Court—Series. (a) Gentlemen of the jury: you are called upon, in this case, to determine whether F., on the 17th day of May, —, possessed sufficient mental capacity to make a will.

(b) A paper has been offered in evidence, which the proponents claim to be his last will and testament. If you believe the testimony of the subscribing witnesses, the paper was executed in accordance with the laws of this state; but conceding this to be true, it is claimed

44—Meeker v. Meeker, 74 Iowa 352, 37 N. W. 773; Blake v. Rourke, 74 Iowa 519, 38 N. W. 392.

45—In re Blake's Estate, 136 Cal. 306, 68 Pac. 827, 89 Am. St. 135.

46—Schieffelin v. Schieffelin, 127 Ala. 14, 28 So. 687 (692).

on behalf of the contestants that the paper is void, because Mr. F., at the time of its execution, did not possess sufficient mental vigor or capacity to comprehend and realize what he was doing. This is the question of fact, or the principal question of fact, you must determine from the evidence that has been admitted. You must be careful, gentlemen of the jury, to confine your attention to the evidence introduced and not permit your minds to be influenced by any statements made in your presence or hearing by the counsel in this case, as to matters that were not permitted to go in evidence.

(c) The rule, gentlemen, stated by the weight of authority, undoubtedly is, that a less degree of mind is required to execute a will than a contract. Although the testator must understand substantially the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in reference to them, yet he need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of body and mind would have, nor is he required to know the precise legal effect of every provision contained in his will.

(d) To use still another form of expression, gentlemen, the will is not valid unless the person making it not only intends, of his own free will, to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and who he is depriving of it, as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural object of his bounty, and the character and effect of the disposition of the will, then he has mind sufficiently sound to enable him to make a valid will.

(e) With these instructions in your mind, weigh the testimony of all the witnesses. Many of these were persons who spoke from actual knowledge of the deceased. Consider the testimony of those as well as that of the experts, and give to each and every one of them such weight as you may deem proper. This question of capacity is entirely and exclusively for your disposition and decision.

(f) It rests upon the proponents to satisfy you, by a preponderance of proofs, that the deceased was of sound mind when the paper was executed. As bearing upon the state of Mr. F.'s mind, his declarations—that is, what he said to persons—have been admitted, and are to be construed by you for this purpose only, not as proving any facts stated in the declaration.

(g) If, under these instructions, you reach the conclusion that F. possessed sufficient mental capacity on the 17th of May, —, to

make his will, your verdict should be for the proponents. If, on the other hand, you determine he did not possess this mental capacity, your verdict should be for the contestants.⁴⁷

§ 2392. **On Contest In Chancery—Series.** (a) The court instructs the jury, that if they believe, from the evidence, that F., at the time he signed the paper in dispute, had mind and memory sufficient to transact his ordinary business, and that, when he made the will, he knew and understood the business he was engaged in, then the jury should find said paper writing to be the will of said F.

(b) The court instructs the jury, that the owner of property who has capacity to attend to his ordinary business, has the lawful right to dispose of it, either by deed or by will, as he may choose, and it requires no greater mental capacity to make a valid will than to make a valid deed. And if such an owner chooses to disinherit his heir, or leave his property to some charitable object, he has a legal right to do so, and such disposition of his property is valid, whether it be reasonable or unreasonable, just or unjust; and the reasonableness or justice or propriety of the will are not questions for the jury to pass upon. If, therefore, the jury believe, from the evidence, that when he executed the paper in dispute, F. had capacity enough to attend to his ordinary business, and to know and understand the business he was engaged in, then he had the right and the capacity to make such a will, and the jury should find for the paper in dispute to be the will of said F. The court instructs the jury that even if they find, from the evidence, that F. had, during some portion of his life, eccentricities or peculiarities, or even an insane delusion or partial insanity on the subject of religion, or masonry, or education, or any other subject, yet if they find, from the evidence, that at the time he made the will in question, he had sufficient mind and memory to understand his ordinary business, and that he knew and understood the business he was engaged in, and intended to make such a will, the jury should find such will to be the will of said F.

(c) The court instructs the jury, that eccentricities or peculiarities, or radical or extreme notions or opinions upon religion, colleges, education, or masonry and secret societies, will not necessarily render a man incapable of making a will, and if the jury find that, in making the will in dispute, F. had sufficient mind and memory to understand the business he was engaged in when he made the will, then the jury should find in favor of said will, though said F. may have had eccentricities and peculiarities, or extreme notions and opinions upon religion, colleges, education, or masonry or secret societies.

(d) The court instructs the jury, that, in order to make a valid

47—The above series of instructions, given on the trial of an appeal from the probate court, were approved in *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 576.

will, it is only necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and possessing this, though he may be feeble in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases, without consulting either his family or his acquaintances. And if the jury believe, from the evidence, that when he executed the paper in dispute, F. knew what he was doing, and executed it as his will, understanding its nature and effect, and that, at the time, he had sufficient mind and memory to transact his ordinary business, such as buying or selling or renting property, or collecting or paying out money or settling accounts, then the jury should find the paper in dispute to be the last will and testament of said F.

(e) If the jury believe, from the evidence, that, although F. had sufficient capacity to attend to the ordinary business affairs of life, yet that, with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty, he was insane, and that while laboring under such insanity he made the will in question, and that in making it he was so far influenced or controlled by such insanity as to be unable rationally to comprehend the nature and effect of the provisions of the will, and was thereby led to make the will as he did, then the jury must find the will not to be the will of the said F.

(f) An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe; such delusion may sometimes exist as to one or more subjects; and if the jury believe, from the evidence in this case, that F. was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property, and the natural objects of his bounty, when he made the will in question, and was, thereby, rendered incompetent to comprehend, rationally, the nature and effects of the act, and that but for such delusion he would not have made the will as he did, then the jury should find against the validity of the will.⁴⁸

UNDUE INFLUENCE.

§ 2393. **Issue to be Tried.** (a) The jury are instructed, as a matter of law, the only question, in this case, for them to try, is this: Is the writing here offered the will of B., deceased? And your verdict will be, that it is his will or that it is not.

(b) And the real inquiry to be determined is: Did the said B., deceased, make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own

48—The above series of instructions, as to testamentary capacity, were approved in Am. Bible Soc. v. Price, 115 Ill. 623, 5 N. E. 126;

(a), (h), (c) and (d) were given for the proponents, and (e) and (f) were given for the contestants.

wishes and intention, or was he constrained or coerced, through the undue influence, restraint or coercion of others, in making his will, to act against his own desire and intention, as regards the disposition of his property, or any part of it?⁴⁹

(c) The jury are instructed that if the testator was not of sound mind when she wrote the said papers or one or more of them, they should find the paper or papers written by her when she was not of sound mind not to be her last will. If she wrote the said papers, or any part or either of them under the undue influence of any other person or persons as defined in instruction No. —, the jury should find the paper or papers, or the parts thereof written under such undue influence, not to be the last will of the said F. S.⁵⁰

(d) If the jury believe from the evidence that the will was not obtained by the exercise of an influence amounting to coercion, by a motive tantamount to force or fear, such was not an undue influence.⁵¹

(e) But if the jury believe from the evidence that at the time said papers were executed, or either, the decedent was not of sound mind, as hereinafter defined, or that said papers, or either of them, were procured by the undue influence, if any, of any person or per-

49—Webster v. Sullivan, 58 Iowa 260, 12 N. E. 319.

Nearly the identical instruction was approved in England v. Fairbush, 204 Ill. 384 (396), 68 N. E. 526. It is as follows: The court instructs the jury that, when undue influence is alleged, the real inquiry is this: Did the testator make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own wishes and intentions; or was the testator constrained or induced, through the undue influence, restraint, coercion, or improper conduct of others, to act contrary to his own desires and intentions as regards the dispositions of his property or any part of it.

The following instruction was given in Surber v. Mayfield, 156 Ind. 375, 60 N. E. 7: The court instructs the jury that the law presumes in favor of honesty and fair dealing, and whoever asserts the contrary must prove it to your satisfaction by a preponderance of the evidence.

The court said: "The instruction required of appellants only 'a preponderance of the evidence.' The phrase 'to your satisfaction' informed the jurors that they were the judges as to where the preponderance lay."

50—Henning v. Stevensen, 26 Ky. L. 159, 80 S. W. 1135 (1136).

51—Schieffelin v. Schieffelin, 127 Ala. 14, 28 So. 687 (694).

The above charge, "requested by plaintiff and given, is a copy of charge 2 in the case of Eastis v. Montgomery, 95 Ala. 486, 11 So. 204, 36 Am. St. 227, which was there held to be good on the authority of the same case on another appeal (93 Ala. 293, 9 So. 311), and the authorities in the last case cited. Of course the terms coercion, force or fear, when applied to undue influence and its results are relative terms, owing to the character and condition of the party at the time upon whom such influence was exerted, and what would amount to such a degree of undue influence in one case might not have the same result in another. Strength of will, age, infirmity, loss of mental power—not amounting to deprivation of testamentary capacity in the testator, are elements entering into the consideration of every will contested on the ground of undue influence exercised over him in procuring him to make it different from what he otherwise would have done. Burney v. Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. 33; Knox v. Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. 235."

sons, then the jury should find such paper or papers, so executed by him, if any, when he was not of sound mind, if they so find or such paper or papers as was obtained by undue influence, if any such there was, of any person or persons, not to be his codicils or codicil to his last will and testament.

- ✓ (f) By undue influence as used in these instructions is meant such an influence as to obtain dominion over the mind of the decedent to such an extent as to destroy free agency and to constrain him to do against his will what he would otherwise refuse to do.⁵²

§ 2394. Burden of Proof. The burden of proof is upon the contestants to show that the making of the will was obtained by undue influence; and in order to defeat the probate of the will on this account, it must appear to your satisfaction, by a preponderance of the evidence, that undue influence was employed; and, to constitute undue influence, it must appear to be such influence or restraint as caused the execution of the will by the decedent, against his own preference or desire in the matter. Mere advice or persuasion to induce a testator to make a will or influence the disposition of his property by will, is not undue influence.⁵³

§ 2395. What Must Appear. (a) The jury are instructed, that no general rule can be laid down as to what constitutes undue influence in this class of cases, further than this, that in order to make a good will a man must be a free agent, and feel at liberty to carry out his own wishes and desires; and any restraint, threats or intimidations brought to bear upon the testator, which he has not the strength of mind or will to resist, if exerted so as to coerce him against his desire and purpose into the making of his will, or any of its provisions, is undue influence within the meaning of the law. And whether such undue influence existed in this case must be determined by the jury, from a consideration of all the evidence, in view of the law as given you by the court.⁵⁴

(b) To avoid a will on the ground of undue influence, it must be made to appear, by the evidence, that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, and which influence he was unable to withstand, or too weak to resist.⁵⁵

(c) The jury are instructed as a matter of law that it is not sufficient that the circumstances appearing in evidence attending the execution of the instrument in evidence in this case, purporting to be the last will and testament of the said C. M., are consistent with the hypothesis of its having been obtained by undue influence; it

52—Oberdorfer v. Newberger, 23 Ky. L. 2323, 67 S. W. 267 (268).

53—Webster v. Sullivan, 58 Iowa 260, 12 N. E. 319.

54—Maynard & Bradford v. Vin-ton, 59 Mich. 139, 26 N. W. 401.

55—Brick v. Brick, 66 N. Y. 144; Barnes v. Barnes, 66 Me. 285.

must be shown that they are inconsistent with a contrary hypothesis. Circumstances which should avail for the proof of fraud are only such as are inconsistent with a contrary view of the transaction.⁵⁶

§ 2396. **Destruction of Free Agency of Testator.** Whether the free agency of the testator is destroyed or mastered by physical force or mental coercion, by threats which occasion fear or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial. In considering the question, therefore, it is essential to ascertain, as far as practicable, the power of coercion, upon the one hand, and the liability to its influence on the other. And wherever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment, undue influence exists.⁵⁷

✓ § 2397. **Undue Influence may be Inferred from Circumstances.** The exercise of undue influence need not be shown by direct proof; it may be inferred from circumstances; but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator.⁵⁸

§ 2398. **Circumstances Showing Undue Influence.** The court instructs the jury that, if you believe, from the evidence in this case, that M. was a person so illiterate that she could not read and understand the instrument offered in evidence, and that at the time she signed the same O. was her agent, and that she reposed special trust and confidence in him, and that said O. caused said instrument to be written by an attorney, who was a stranger to Mrs. M., and out of her presence, and that said O. dictated to said attorney each and every provision of said will, and that said O. solicited and procured the attesting witnesses to the said instrument, and that one of said attesting witnesses was his co-partner in the banking business, and that the other of said witnesses was very little acquainted with Mrs. M., and that O. received a beneficial interest in the alleged will, then, in making up your verdict in this case, you have a right to take

56—Compher v. Browning, 219 Ill 429 (447, 448), 76 N. E. 678.

"The language of this instruction is the same as that which appears in section 239 of Schouler on Wills, (2d ed.) and in the case of Boyse v. Rossborough, 6 H. L. Cas. 6. In Schouler on Wills, sec. 239, it is said: 'In order to set aside the will of a person of sound mind,' observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown

that they are inconsistent with a contrary hypothesis.' And the same holds true where positive fraud or force is the ground of objection. Hence is it that isolated and disconnected circumstances are not permitted to outweigh the usual presumption of the law, that a person of intelligence and capacity, who executes a will, does so without imposition or undue influence."

57—Coghill v. Kennedy, 119 Ala. 641, 24 So. 459.

58—In re Smith's Will, 22 Wis. 543; Samson v. Samson, 67 Iowa 253, 25 N. W. 233 (237 note).

into consideration all these facts, if proven, together with the testimony of witnesses and all the other facts and circumstances in evidence in this case, in determining whether the instrument in question was procured by undue influence, as explained in these instructions.⁵⁹

§ 2399. Undue Influence Shown Rather by Means Employed, than by Effect Produced. It is not the means employed, so much as the effect produced, which must be considered in determining whether undue influence has contributed to the making of a will; for though the influence exerted over the testator was such as if applied under ordinary circumstances, or exercise over persons of ordinary powers of resistance, would be regarded as innocent, yet if, in the particular case, it resulted in a disposition of property contrary to the testator's desire, the influence was undue.⁶⁰

§ 2400. Time at which Undue Influence Must be Exercised to Defeat the Will. The court instructs you that the fraud and undue influence which would render a will invalid must be connected with the execution of the will and operating at the time the will is made; and the fact that the beneficiaries of a will are those by whom the testatrix was surrounded and with whom she stood in confidential relations at the time of the execution of the will, or the fact that the principal beneficiaries had for years control of her estate, or the fact that the provisions of the will were for the benefit of such persons, or may seem unreasonable, are not grounds for inferring undue influence; and, in this case, if you believe, from the evidence, that the testatrix, P., had sufficient mind and memory at the time of the execution of the will in question to know and understand the business in which she was engaged at the time she executed the will, and a recollection of the property she meant to bequeath and of the persons to whom she meant to bequeath it, and that she executed the said instrument voluntarily and of her own free will, then you should find by your verdict that the paper produced is the will of P.⁶¹

§ 2401. Testator May Dispose of Property as He Pleases. (a) The court instructs the jury that a man has a right to dispose of his own

59—*Compher v. Browning*, 219 Ill. 429 (450, 451), 76 N. E. 678.

"This instruction submitted to the jury all the facts and circumstances insisted upon by the contestants as showing undue influence over the testatrix by McKenney. The jury found against the contestants upon the question of undue influence, as thus submitted to them. We have held that, where the evidence is conflicting, as it is in the case at bar, upon the question whether the execution of a will was brought about by undue influence, a court of review will not disturb the verdict of a jury, which has been approved by a trial court, unless the verdict is

clearly against the weight of the evidence. *French v. French*, 215 Ill. 470, 74 N. E. 403; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621; *Kinnah v. Kinnah*, 184 Ill. 284, 56 N. E. 376; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056. Here the verdict of the jury is not, in our opinion, clearly against the weight of the evidence."

60—*Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Leverett v. Carlisle*, 19 Ala. 80.

61—*Pooler v. Cristman*, 45, Ill. App. 334, *aff'd* 145 Ill. 405, 34 N. E. 57.

property by will as he may choose, even to the entire exclusion of those who, but for the will, would be the heirs of his estate; and the jury are not to consider whether or not the disposition made by the testator is appropriate, or, in the opinion of the jury, just, but simply whether the paper propounded as his will be or be not his last will and testament.⁶²

(b) There is some evidence in this case tending to show that testator was at one time engaged in some litigation with the mother of the contestant, and bore some ill will or dislike towards her; and you are instructed that if the testator was influenced thereby to make his will as he did, and at the time was of sound mind, if he did so by his own free choice and agency, his will would be valid, and should be recognized by you, even if he did it unjustly and with mistaken opinion as to the matters involved, yet that would not invalidate his will, but would rather tend to explain why he made his will as he did.⁶³

§ 2402. **Same Subject—But Jury May Consider Inequality of Distribution.** The court instructs the jury that inequality in the distribution of property among those who would inherit it if no will had been made, is not of itself evidence of undue influence or unsoundness of mind, yet it may be considered as a circumstance by the jury, together with all the other facts and circumstances shown by the evidence as tending to establish undue influence or unsoundness of mind.⁶⁴

§ 2403. **Undue Influence Must Affect the Will, etc.** That to invalidate a will, on the ground of undue influence, it must appear, by a preponderance of the evidence, that such undue influence was practiced with respect to the will, or as to some matter or circumstance

62—Barkley v. Barkley Cemetery Ass'n, 153 Mo. 300, 54 S. W. 482 (483).

"We recognize the well-settled rule which indulges the presumption that undue influence has been used where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where other close, confidential, or fiduciary relationships exist. This rule has for its basis some pecuniary benefit to be derived, directly or indirectly, under the will, by the person, or church, or charity represented by the person by whose influence the testator is influenced to make the will, and the cases chiefly relied upon by plaintiffs, namely, Garvin's Adm'r v. Williams, 44 Mo. 465; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Cadwallader v.

West, 48 Mo. 502; Garvin's Adm'r v. Williams, 50 Mo. 206; Street v. Goss, 62 Mo. 226; Bradshaw v. Yates, 67 Mo. 228; Bridwell v. Swank, 84 Mo. 455; Guy v. Gillilan, 92 Mo. 250, 5 S. W. 7; Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. 734; Carl v. Gobel, 120 Mo. 283, 25 S. W. 214, are of that character. As a general rule, those who execute wills employ persons to draft them in whose ability to do so correctly they have confidence, and especially is this so when lawyers are employed; and it has never been held, from that fact alone, that the presumption arises that the will was obtained by undue influence of the draftsman."

63—Townsend v. Townsend, 122 Iowa 246, 97 N. W. 1108.

64—England v. Fairbush, 204 Ill. 384, 68 N. E. 526.

so connected with it, as to raise a presumption that such undue influence affected the provisions of the will; any degree of influence exercised over the testator which does not affect the making of the will or any of its provisions can not invalidate it.⁶⁵

§ 2404. **Legitimate Influence.** (a) The court instructs the jury, that any degree of influence over another, acquired by kindness and attention, can never constitute undue influence within the meaning of the law, and although the jury may believe, from the evidence, that the deceased, in making his will, was influenced by the said A. B.; still, if the jury further believe, from the evidence, that the influence which was so exerted was only such as was gained over the deceased by kindness and friendly attentions to him, then, such influence cannot be regarded, in law, as undue influence, and the verdict should be in favor of the validity of the will.⁶⁶

(b) It is not unlawful for one, by honest advice or persuasion, to induce a testator to make a will, or to influence him in the disposition of his property by will. To vitiate a will on account of undue influence it must appear, from the evidence, that there was something wrongfully done amounting to a species of fraud, compulsion or other improper conduct.⁶⁷

(c) It is not unlawful for a person, by honest intercession and persuasion, to induce a will in favor of himself or any other person; neither is it unlawful to induce the testator to make a will in one's favor by fair speeches and kind conduct, for this does not amount to that kind of compulsion, improper conduct or undue influence, which, in a legal sense, would render invalid the will. To have such an effect it must amount to a moral force and coercion, destroying free agency. It must not be the influence of affection and attachment, nor be the mere desire to gratify the wishes of another, but the compulsion in this case, in order to render the will invalid, must be of such a degree and character as to prevent the exercise of that discretion which is essential to a sound, disposing mind.⁶⁸

(d) The court instructs the jury that, if they find, from the evidence, that the deceased, in making the will in question, was influenced by affection, or attachment, or a disposition to gratify the wishes of the defendant, ———, or by her advice or entreaty, that would not be sufficient cause for setting aside the will. The court instructs the jury that testamentary capacity exists where the testator has an understanding of the nature of the business he is engaged in, and the kind and value of the property devised, and of the persons who were the natural objects of his bounty, and of the manner in which he desires it to be distributed.⁶⁹

65—1 Red. on Wills 525; Samson v. Samson, 67 Iowa 253, 25 N. W. 233 (237 note).

66—1 Red. on Wills, 522 et seq.; in re Carroll's Will, 50 Wis. 437.

67—Yoe v. McCord, 74 Ill. 33; Pierce v. Pierce, 38 Mich. 412.

68—Dickie v. Carter, 42 Ill. 376.

69—Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698.

§ 2405. **Legitimate Advice or Persuasion.** (a) That, in this case, though the jury may believe, from the evidence, that the said A. B. did use arguments and importunities to influence the deceased in the making of the will in question, still this fact will, in no manner, affect the validity of the will, if the jury further believe, from the evidence, that such arguments and importunities did not deprive the deceased of his free agency or prevent him from doing as he pleased with his property, even though the will might not have been made in all of its provisions as it is, but for such argument and persuasion.

(b) Though the jury may believe, from the evidence, that the testator, in making the will in question, acted upon the suggestions and advice, or under the influence, of the said A. B., this will not, in any manner, affect the validity of the will; provided he acted freely and from his own conviction in the disposition of his property, though the provisions of the will are not the same as they would have been but for such suggestions, advice or influence.⁷⁰

§ 2406. **Instilling False Beliefs in Testator's Mind.** If a testator is given a false impression concerning persons who are the natural objects of his bounty, so that when he comes to make his will he acts upon unfounded beliefs, and gives or withholds his bounty in a manner entirely different from what his action would have been had it not been based on false beliefs and opinions deliberately instilled into his mind for the purpose of influencing his will, and if in such case the testator is not in position, from any cause, as sickness, age, debility, concealment of the true facts, or other reasons, to judge for himself, and to deliberate or resist the influences, and the will is the result of them, it is invalid from undue influence.⁷¹

§ 2407. **Parent and Child.** If W. had by his love, kindness and dutiful conduct to his mother and obedience to her so won her affection as to influence and cause her to give the bulk of her property to him, then this would be a legitimate and lawful influence.⁷²

§ 2408. **Husband and Wife.** (a) The fact that the testator by his will, devised nearly all of his property to his wife, is of itself, and in the absence of other testimony, no evidence that the testator lacked mental capacity to make the will.⁷³

(b) Evidence has been introduced tending to show that the wife of testator was accustomed to accompanying him when he went away from home, and also that she participated to some extent in his business affairs, and was familiar therewith, and was connected with her husband in relation thereto. You are hereby instructed that such facts, if proven, do not raise any presumption of undue influence on her part upon her husband, or that she influenced him to execute said will; and even though she advised him to make the will as he did,

70—In re Carrol's Will, 50 Wis. 437, 7 N. W. 434.

71—Coghill v. Kennedy, 119 Ala. 641, 24 So. 459.

72—Schieffelin v. Schieffelin, 127 Ala. 14, 28 So. 687 (694).

73—Paxton v. Knox, 122 Iowa 24, 98 N. W. 463 (470).

there would be no presumption therefrom that her influence was undue. If the wife in her faithfulness and good qualities has secured the respect and esteem of her husband even to such an extent that her wishes satisfy him, it would not amount to undue influence should he make a will in accordance with her request. The law will not presume that a wife would exert undue influence upon her husband, nor would it presume that a will made in harmony with her request or preference would be the result of undue influence on her part. No presumption of undue influence arises from the fact that the wife advised her husband in his business affairs or even guided him in said matters.⁷⁴

§ 2409. Influence in Bringing About the Marriage not to be Considered. The jury have no right to consider for the purpose of affecting the legal standing of the widow after the death of her husband, any questions as to what or which of the parties was most influential in bringing about the marriage; you are to consider the question whether the will was procured by undue influence in reference to the relations existing when the will was made; that in the eye of the law her position at the time when the codicil was made, in reference to her relation to her husband, was precisely the same as that of the most honored wife in the land.⁷⁵

§ 2410. Unlawful Cohabitation. (a) The jury are instructed, that illicit sexual intercourse between a testator and his devisee, however immoral or illegal it may be, does not necessarily render the will of the testator invalid; nor could that circumstance, in any manner, affect the validity of the will if it was made by him with a sound and disposing mind and memory, and as a free agent.⁷⁶

(b) The jury are instructed, that if they believe, from the evidence, that the testator and the said Mrs. P., before and at the time the will was made, were living in unlawful cohabitation, then the law will presume that undue influence was used by her over the deceased in the making of the will in question, and the burden of the proof is upon her to show that no such undue influence was used.⁷⁷

§ 2411. Undue Influence of Attorney. Where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject-matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence. But this is by no means a conclusive presumption, but it is one that may be overcome by evidence; and it is not necessary that that evidence shall in all cases be a positive denial of parties who are personally acquainted with the facts, but it must be such evidence as will lead the jury to

74—Townsend v. Townsend, 122 Iowa 246, 97 N. W. 1108 (1111).

75—Maynard v. Tyler, 168 Mass. 107, 46 N. E. 413 (414).

76—Dean v. Negley, 41 Pa. St.

312; Eckert v. Flowry, 43 Pa. St. 46.

77—Leighton v. Orr, 44 Iowa 679; 1 Red. on Wills, 531-533; Wallace v. Harris, 32 Mich. 380.

believe that no undue influence was exerted. And if such evidence be found from the facts and circumstances surrounding the making of this will as will lead you to believe that the will was made by the testatrix of her own free will, uninfluenced by any other person, then the fact that S. was her attorney would not in any way invalidate the will. That should simply be taken into consideration, with all the other facts, to determine whether or not the will was, as a matter of fact, the will of the testatrix.⁷⁸

§ 2412. **Physical Condition of Testator.** (a) The jury are instructed that in order to make a valid will the law requires that a person shall be of sound and disposing mind and memory, as defined in these instructions; and want of testamentary capacity does not necessarily require that a person shall be insane; weakness of intellect, arising from old age or great bodily infirmity or suffering, or from all these combined, may render the testatrix incapable of making a valid will, when such weakness disqualifies her from knowing or apprehending the nature, effect or consequence of the act she is engaged in.

(b) The court further instructs you that, if you believe, from the evidence in this case, that P., at the time of the execution of the will, was so diseased mentally that she was incapacitated by reason of mental weakness caused by disease, old age or other derangement, of acting rationally in the ordinary affairs of life, and of intelligently comprehending the disposition she was making of her property, and the nature and effect of the provisions of said alleged will, then they should find that the writing produced is not the will of P., deceased.⁷⁹

(c) The court declares the law to be that if it appears, from the evidence, that, at the time the will in question was made, A. was on her deathbed, racked with pain and disease, and feeble in mind and body from such sickness, and had not sufficient understanding and intelligence to transact her ordinary business affairs, and to compre-

78—Donovan v. Bromley, 113 Mich. 53, 71 N. W. 523.

"We think these instructions fairly embodied the law of the case. While a bequest in favor of an attorney who draws a will is a circumstance arresting suspicion, and raises a presumption more or less strong, that undue influence has been exerted, yet, as was very properly charged at the request of the contestants themselves, the presumption of the invalidity of a will made by a client to her attorney may be rebutted by showing that she made her will after receiving independent legal advice. In the present case the will was not drawn by S., but was prepared in the handwriting of the deceased herself after conferring with S. It is also true that the presumption

of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely, and under circumstances which rebut the inference of undue influence; and, where the proof of execution is such as to convince the jury that the testator was not at that time under the control of the legatee, it is certainly not error to at least permit the jury to draw the inference in favor of the validity of the will from the circumstances. See Waddington v. Buzby, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. 706; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689."

79—Pooler v. Cristman, 145 Ill. 405, 34 N. E. 57.

hend the transaction then in question, the nature and extent of her property, and to whom she was giving the same, then she had not sufficient capacity to make a will, and the issues will be found for the plaintiff.⁸⁰

(d) The jury are instructed that if you believe, from the evidence, the said Y., at the time he executed the will now in question, was feeble in body and mind from sickness, old age or otherwise, and that while in this condition his son, X, unduly influenced him to make said purported will, and that at said time the said Y was not a free agent, but was under the undue influence of said X, then you should so find by your verdict.⁸¹

§ 2413. **Declarations and Previously Expressed Purposes of Testator.** (a) The court instructs the jury that in determining whether the paper in question, offered as a will, is entitled to be so regarded, the paper itself may be considered in connection with all the other evidence in the case. And if the jury believe, from the evidence, that the deceased had expressed any fixed purposes and intentions regarding the disposition of his property at variance with the provisions of the alleged will, then the jury should consider whether or not the provisions of the will are inconsistent with his previously expressed and fixed purposes; and if the jury find that they are so, or that deceased was unfriendly to the beneficiaries under the will, then these facts should also be weighed by the jury in determining whether the paper offered is the will of the deceased.⁸²

(b) In order that contestant may recover in this case there are two facts that must be proven by her: First, that undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. Both of these facts must be proven by the contestant by the weight of the evidence in order to defeat the will. Upon the latter question evidence of the statements of the testator, made either before the will was made or after, and which tend to throw light on the question of mind are admissible; but as to the first question the evidence of such statements is hearsay and incompetent, and should not be considered by you. Such declarations have been admitted only for the purpose of proving the condition of the testator. They afford no substantive proof of undue influence, and cannot be admitted for such purpose; and before contestant can recover, it is necessary that she should prove that undue influence was in fact, and actually exerted upon the testator by other evidence than his own declarations.⁸³

§ 2414. **Conduct of Beneficiaries—Undue Influence of One Affects All.** (a) The existence of confidential relations between the testator and principal or large beneficiaries under the will, coupled with ac-

80—Torts v. Wash, 175 Mo. 487, 75 S. W. 95.

81—England v. Fairbush, 204 Ill. 384, 68 N. E. 526.

82—Flowers v. Flowers, 74 Ark. 212, 85 S. W. 242 (244).

83—Townsend v. Townsend, 122 Iowa 246, 97 N. W. 1108.

tivity on the part of the latter in and about the execution of the will, such as initiation of proceedings for the preparation of the will, or participation in such preparation, employing the draftsman, selecting the witnesses, excluding persons from the testator at or about the time of the execution of the will, concealing the making of the will after it was made, and the like, will raise a presumption of undue influence, and cast on them the burden of showing that it was not induced by coercion or fraud on their part, directly or indirectly.⁸⁴

(b) It is not necessary that there should be confidential relations between all the beneficiaries and the testator. If there is such relation with one of a family, and the will is found to have been procured through his undue influence, it operates against all the family.⁸⁵

§ 2415. **Undue Influence—Series.** (a) The court instructs the jury that the plaintiffs allege that the paper read in evidence, dated, and purporting to be the last will and testament of B, deceased, is not his will, and the defendants deny this allegation, and say said paper is his will, and the issue for the jury to determine in this case is whether said paper is in reality the will of said deceased, B; and upon this issue the court instructs the jury that, to entitle a man to make a testamentary disposition of his property, he must possess a sound and disposing memory; and by this is meant such mind and memory as would enable him to comprehend and understand the nature of the transaction in which he was about to engage,—that is, the nature and effect of the will he was undertaking to make,—to recollect the amount and character of his property which he meant to dispose of, and to call to mind and appreciate the relation existing between himself and those persons who were related to him by the ties of blood and affection, as well as those who were to be named in his will as the objects of his bounty; and if the jury believe, from the evidence in the case, that the said B was, at the time of signing and attestation of said paper in question, possessed of a sound mind and disposing memory, as above defined, and that he signed his paper as and for his last will, then you will find that said paper is his will, unless you believe, from the evidence in the case, that an undue influence was exerted by W to induce said B to make the will as it was written. By the term “undue influence,” as used in these instructions, is meant the exercise

84—*Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459 (464, 471).

“The part of the general charge of the court to which an exception was reserved states a correct proposition of law. It asserts the doctrine laid down in *Bancroft v. Otis*, 91 Ala. 279, 8 So. 286, and many subsequent cases, that the existence of confidential relations between the testator and principal or large beneficiaries thereunder, coupled with activity on the part of the latter in and about the preparation or execution of the

will, raises a presumption of undue influence, and casts upon the latter the burden of showing that it was not induced by coercion or fraud on their part, directly or indirectly.”

85—*Coghill v. Kennedy*, *supra*.

“This charge, taken in its entirety, asserts no more than the proposition that if the fraud or undue influence on the part of one or more of the legatees or devisees affects the whole will, then no portion of it can stand. *Florey's Ex'rs v. Florey*, 24 Ala. 248.”

of such power and influence by one person over the mind of another as would result in the subjugation of the mind of the one to that of the other, and complete substitution of the will of one for the will of the other in the matter in which they were engaged; and if the jury believe, from the evidence in the case, that by reason of old age and physical ailments, or by reason of his friendship for and confidence in W, said W was enabled to and did exert such an influence over the mind of said B in the disposition of his property by will, and if the signing of said paper by said B was induced and brought about by the exercise of that influence, then the jury will find that said paper is not the will of said deceased, B, notwithstanding they may further believe, from the evidence in the case, that said B was, at the time said paper was signed and attested, of sound mind and disposing memory, as this term has been defined in these instructions.

(b) To establish undue influence on the part of W over the mind of said B, and that the signing of the paper in controversy was induced and brought about by such influence, it is not necessary that it should be shown that the said W purposely practiced a fraud on said B, or purposely and intentionally sought to acquire and exert an undue or improper influence over the mind of said B, but if the jury believe, from the evidence in the case, that an undue influence (as the same is defined in these instructions) on the part of said W over the mind of said B did exist, and that the signing of the paper in controversy by B was induced and brought about by the exercise of such undue influence, then the jury must find a verdict in favor of the plaintiffs, and against the validity of said will, regardless of how such influence was acquired, or the manner in which it was exercised.

(c) The court instructs the jury that it is not necessary that undue influence should be proven by direct and positive testimony, but the same may be proven by facts and circumstances; and in passing on the question as to whether the signing of the paper in question by B was induced by undue influence on the part of W it is proper for the jury to take into consideration the terms of the will itself; the relations of said B to plaintiffs, as shown by the evidence; his relations to and connection with the B. C. Ass'n, as shown by the evidence; his age and mental and physical condition, as shown by the evidence; his relations with and feelings toward said W, as shown by the evidence; his sentiments towards and opinions of McC., as shown by the evidence; the relations to and connection of said W with said C. Ass'n and the preparation of said will, as shown by the evidence, as well as other facts and circumstances disclosed by the evidence in the case; and if, from all such facts and circumstances, the jury believe that the signing of the paper in controversy by said B was induced and brought about by an undue influence which has been defined in these instructions, then it is the duty of the jury to find that the said paper is not the will of said B.

(d) If the jury find, from the evidence in the cause, that the said

B signed his name to the instrument of writing alleged to be his last will and testament, and that at the time he so declared he requested said D and H to sign the same as witnesses thereto, and that said D and H signed said will in the presence of said B as witnesses thereto at such request, and that said B was at the time of the execution of said will, as aforesaid, of sound mind, then the jury should find that said instrument is the last will of said B, unless the jury should find that said will was the result of undue influence, as explained in other instructions herein.

(e) The court instructs the jury that it was not necessary that said instrument should have been read to said subscribing witnesses, or that they should know what was in said instrument, at the time they signed said will as witnesses.

(f) The court instructs the jury that in the attestation of the instrument in controversy it was not necessary for the witnesses H and D to sign it as witnesses in the presence of each other, but it was only necessary that they should sign it in the presence of the deceased, and at the request of the deceased. Nor was it necessary that the deceased, B, should have in fact signed his name to said instrument in the actual presence of either of the witnesses, provided the jury find, from the evidence, that at the time of the witnesses D and H so signing and attesting said instrument it had been signed at any time prior thereto by said B, and the deceased acknowledged or made known to them at the time or just before they signed as witnesses, if they did so, by word, act, or sign, that he had signed or executed the same as his last will and testament.

(g) The court instructs the jury that, to constitute a sound and disposing mind, it is sufficient that B, at the time of making his will, had sufficient understanding and intelligence to transact his ordinary business, and understand what disposition he was making of his property, what property he owned, and to whom he was giving it.

(h) The jury are instructed that "undue influence," as used in these instructions, means that such influence as amounts to over-persuasion, coercion, or force, overpowering and destroying the free agency and will power of the person upon whom it is used, and no amount of influence or advice or persuasion which comes short of such effect will amount to undue influence; and the burden of proving, by the greater weight of the evidence in the cause, that such undue influence was exerted and exercised, rests upon the plaintiffs.⁸⁶

§ 2416. Undue Influence—What Must Appear—Series. (a) To avoid a will on the ground of undue influence, it must be made to appear by a preponderance of the evidence that the will was obtained by means of an influence which the testator was unable to withstand,

⁸⁶—*Barkley v. Barkley Cem. Ass'n*, 153 Mo. 300, 54 S. W. 482 and from (d) to (h) inclusive for (483); (a), (b) and (c) were given the proponents.

or too weak to resist, and amounting to moral coercion, and destroying the free agency of the testator, or by importunity so persistent and forcible that it could not be resisted by the testator, so that the testator was constrained to do that which was against her own inclination and will, in order to secure peace, and be relieved of its annoyance; and such influence must have been exerted upon and controlling her during all the time she was engaged in making and executing her will.

(b) Unless the jury find, from the evidence, that B, at the time she made and executed the will, was unduly influenced and coerced, as these terms are defined in these instructions, then the jury have no right to inquire into or speculate upon the motives which caused her to dispose of her property, as set forth in the will. If she had capacity to make a will, and was not unduly influenced in making it, she had the right to dispose of her property in accordance with any whim or caprice which may have led her.

(c) The court instructs the jury that the issue in this case is whether the instrument offered in evidence and read to the jury is the last will and testament of the deceased, B. The burden is on defendants to show that said instrument was executed and signed by B as and for her last will; that the signatures of the attesting witnesses were placed on such paper in her presence, and at her request, or with her consent; and that at the time she executed the same she was of sound and disposing mind and memory. If the defendants have, by a preponderance of the evidence, established and proven these facts, then the will would have to be adjudged the last will of B, unless the jury should find that it is invalid because undue influence was exerted over her by her husband, sons, or some of them, which destroyed her free will, and forced her to adopt as her will an instrument which she did not approve, and which she would not have adopted except for such undue influence operating on her at the very time she was making the will, and which undue influence overcame and destroyed her free will, and compelled her to do as another dictated. The burden is on the plaintiff to prove the existence of this undue influence, and its operation on the mind of B at the time, and while she was engaged in making her will; and unless plaintiff has, by a preponderance of the evidence in the case, established the fact that such undue influence, and its operation on the mind of B at the time, and while she was engaged in making her will; and unless plaintiff has, by a preponderance of the evidence in the case, established the fact that such undue influence was exerted over B by her husband or son or sons, and acted upon her so as to cause her to sign a will that she did not want or approve, then the finding of the jury must be that said instrument is her last will and testament, provided they find it was executed and attested as above described.

(d) Mere advice or persuasion, although intended to induce a testator to make a will in a particular or in a different way from what

the testator had been thinking of and intending is not undue influence, and will not invalidate the will, and unless more is shown than that someone begged, persuaded, or solicited B to make the will as she did, the jury must find the will is valid. Persuasion and solicitation, to be undue influence, must be so persistent and so forceful as to overcome the will power of the testator, and to induce her to accept as her will an instrument which does not express her wishes and desires in the disposition of her property, but the will and wishes of another, whose powers she can no longer resist.

(e) The court instructs the jury that B, in making her will, had the right to dispose of her property as she pleased, and to give all or so much thereof to any one of her relatives or descendants, to the exclusion of the others, as she saw fit or deemed proper; and although the jury may believe, from the evidence, that she made an unequal distribution of her property by her will, and cut off some with nothing, or but little, who seemed to have as strong claim on her generosity as others, who fared better, such facts are no evidence of undue influence, and raise no presumption of the invalidity of the will; provided the jury find that while making the will she had a sound and disposing mind and memory.

(f) The court instructs the jury that the words "undue influence," used in these instructions, do not mean mere coaxing or persuasion, which may cause the person coaxed to alter or change the mind so as to act differently from what they would if there had been no coaxing, but do mean an influence exercised by one person over the mind of another, which destroys the free will of the latter, and renders it incapable of carrying out its own purposes and desires, and compels and forces it to adopt and accept the will and purposes of the person exercising such power as his own, which he would not have done if he had not been constrained by such influence. Now, unless the jury shall find, from a preponderance of the evidence in the case, that, at the time or prior to the time when B executed the will in question, her sons, husband, or some one of them, had acquired such undue influence over her that she was incapable of making her will as she wanted it, but was constrained by such influence to make it according to the dictation of the person or persons exercising such influence, and further find that because of such undue influence her will power was destroyed, and she registered the will of another, and not her own, your finding must be for the defendants; provided you further find, from the evidence, that in all other respects B had capacity to make a valid will.

(g) The court instructs the jury that the issue in this cause is this: Is the writing produced in evidence the will of B or not?

(h) The court instructs the jury that you must find that the instrument purporting to be the last will and testament of B, in evidence in this case, was not the last will and testament of said B, unless you find, from the evidence, that at the time the same was executed she was of sound and disposing memory.

(i) The jury are instructed that, as a matter of law, the one question in this case for them to try is this: Is the writing offered the will of B, deceased? And your verdict will be that it is her will, or that it is not. And did B, deceased, make and execute the alleged will, in all its provisions, of her own free will and volition, so that it now expresses her own wishes and intentions, or was she constrained or coerced, through the undue influence, restraint, or coercion of others, in making her will, to act against her own desire and intention as regards the disposition of her property, or any part of it?

(j) The words "sound and disposing mind and memory," as used in these instructions, mean a mind sufficient to enable a testatrix to understand what business she was engaged in while she was making and executing a will; also, to enable her to know who were the natural objects of her bounty, and her relation to them, and what property she had, and the disposition she desired to make of it. And if the jury shall find, from the evidence, that B, at the time she executed the instrument in evidence, had sufficient mind and memory to understand that she was engaged in making a will, and knew what property she had, knew who her relatives were, and comprehended the claims that they had on her bounty, and understood what disposition she wanted to make of her property, then she possessed a sound and disposing mind and memory, and sufficient capacity to make a valid will.

(k) The court instructs the jury that B, in making her will, had the right to dispose of her property as she pleased, and to give all or so much thereof to any one of her relatives or descendants, to the exclusion of the others, as she saw fit, or deemed proper; although the jury may believe, from the evidence, that she made an unequal distribution of her property by her will, and cut off some with nothing, or but little, who seemed to have as strong claim on her generosity as others who fared better, such facts are no evidence of undue influence, and raise no presumption of the invalidity of the will, provided the jury find that while making the will she had a sound and disposing mind and memory.

(l) The court declares the law to be that, if the will in question was the result of undue influence exercised by the defendants, or either of them, over the mind and will of B, that alone is sufficient to impeach and set aside said will.

(m) If the jury believe, from the evidence, that the will in question was produced by undue influence of the defendants, or either of them, and that J, to aid the defendant in producing the execution of said will, and to quiet the testatrix's fears that plaintiff might not be provided for, promised the testatrix that he would provide for plaintiff in his will, then said will was not the will of said B, and the jury will so find.

(n) The jury, in determining whether the will in controversy is the will of B, may take into consideration the relation of the parties

to the deceased; the unequal distribution of the testatrix's property; the presence of the parties, or any of them, at the time the will was made, if any of them were present; the testimony as to what took place at the time the will was made, and any testimony as to any statements made by the testatrix, either before or after the will was made, as to her feelings toward her grandchild, the plaintiff; and if from all the facts and circumstances in evidence in the case, the jury shall find the will was procured by the undue influence of defendants, or either of them, then you will find for the plaintiff, provided, however, that any statements B may have made, before or after the will was made, as to her feelings for said grandchild, or expressing a desire to provide for her, should only be considered by the jury as an evidence of the feelings of said B toward her said grandchild, and for no other purpose.

(o) The court instructs the jury that "undue influence," as used in the instructions, is defined as that which compels the testator to do that which is against his will from fear, the desire of peace or some feeling which he is unable to resist.

(p) The court instructs the jury that, if you believe, from the evidence, that the mind or will of deceased, B, either from sickness, disease, and bodily decay was subject to the domination and control of the defendants, or either of them, and that they or either of them exercised such power and influence over her mind and will in the disposition of her property by such will as to destroy her liberty and free agency, and to cause such disposition of her property to be made by such will to suit the purpose and wishes of the defendants, or either of them, and not her own, then such will in law is not the will of said B, and the jury will find the issue submitted to it for plaintiff, and against her will.⁸⁷

87—Gordon v. Burris, 153 Mo. 223, 54 S. W. 546. Instructions from (a) to (f) inclusive were given for the proponents, and the instructions from (g) to (p) inclusive for the contestants.

In its opinion, the court said concerning this whole series: "Read together as these instructions must be, they declared the true law to the jury, and whatever omissions those given for the plaintiff may contain are fully supplied by those given for the defendants. Harris v. Hays, 53 Mo. 90; Benoist v. Murrin, 58 Mo. 322; Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; Farmer v. Farmer, 129 Mo. 530, 31 S. W. 926; Berberet v. Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. 634; McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Cash v. Lust, 142 Mo. 630, 44 S. W. 724, 64 Am. St. 576; Riley v. Sherwood, 144 Mo. 354, 45 S. W. 1077; Fulbright v.

Perry Co., 145 Mo. 432, 46 S. W. 955; Sehr v. Lindeman, 153 Mo. 276, 54 S. W. 537. When these instructions are read in connection with the instructions given for defendants on the same subject there can be no doubt that the jury was properly, fully, and explicitly instructed as to the meaning of undue influence as it has been defined by this court from Jackson v. Hardin, 83 Mo. 175, to Sehr v. Lindemann, supra, which in short is that it is such influence as amounts to force, coercion, or over persuasion, which destroys the free agency and will power of the testator and that the influence of affection or desire to gratify the wishes of one who is near and dear to the testator is not within the meaning of the rule." Note: The last part of the comment refers to the last two instructions only.

CHAPTER LXXXV.

MISCELLANEOUS—CIVIL.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2417. Members and officers of the corporation in same position as other creditors.</p> <p>§ 2418. Liability of persons holding themselves out as officers of a corporation.</p> <p>§ 2419. No individual liability for contracts made as officers of corporation.</p> <p>§ 2420. Corporations—Purchase of capital stock—Ownership of—Burden of proof.</p> <p>§ 2421. Salary of vice-president—Period of contract.</p> <p>§ 2422. Notice to corporation—Estoppel.</p> <p>§ 2423. Estoppel, doctrine of.</p> <p>§ 2424. Sale by sheriff and payment of proceeds to the creditor after appointment of trustees—Good faith—Burden of proof.</p> <p>§ 2425. Wrongful levy—Interest.</p> <p>§ 2426. Keeping of prisoner under strict guard—Escape of prisoner.</p> | <p>§ 2427. Value of accounts—When good and collectible, are presumed to continue so.</p> <p>§ 2428. What words necessary to create a trust—Repudiation—Limitations.</p> <p>§ 2429. Filing papers—What constitutes.</p> <p>§ 2430. What constitutes a quartz mining claim.</p> <p>§ 2431. Forest products—Whether in transit—Transit defined—Taxation.</p> <p>§ 2432. Right to dismiss school teacher—When reviewable by the court—Ground for dismissal.</p> <p>§ 2433. Discharge of school teacher—Grounds for—What may be demanded in the absence of special contract—Excess in social pleasures and indulgences.</p> |
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§ 2417. **Members and Officers of the Corporation in Same Position as Other Creditors.** Under the law of this state I. C. and his sister, A. C., would occupy no different position as creditors than any other creditors of the C. Lumber Co. The fact that they were members and officers of the company did not affect their legal rights in that respect.¹

§ 2418. **Liability of Persons Holding Themselves Out as Officers of a Corporation.** (a) The court instructs the jury that if they believe from the evidence that W., C. and H. represented or held themselves out as officers of a corporation named W.-H. M. Company, and the jury further believe from the evidence that there was no such corporation as the W.-H. M. Company, then in such case all of the parties who represented themselves to be officers of such corporation or allowed their names to be so used as to lead parties dealing with said concern to believe that said concern was a corporation, then in such case such parties so making representations or so allowing their names

1—Crossette v. Jordan, 132 Mich. 78, 92 N. W. 782 (783).

to be used as to lead parties to believe said concern was incorporated, would be liable for all contracts made in the name of said W.-H. M. Company.²

(b) The jury are instructed that if you believe from the evidence that the defendants, C. and W. did not take part in creating the indebtedness sued on in this cause, then the jury are instructed to find the issues for the defendants, C. and W.³

(c) The court instructs the jury that a president of a corporation, by virtue of his office, has no authority to guarantee the payment, in the name of the corporation of a promissory note executed by a third person.⁴

§ 2419. No Individual Liability for Contracts Made as Officers of Corporation. The court instructs the jury that if you believe, from the evidence, that the defendant, E, [in all his dealings with plaintiff, appearing in evidence,] was, [to plaintiff's knowledge,] acting in the capacity of president of the company, and not as an individual, and that no services were rendered to the said E as an individual by the plaintiff nor any agreement to pay therefor by him, then you will find for the defendant.⁵

§ 2420. Corporations—Purchase of Capital Stock—Ownership of—Burden of Proof. (a) The question for your determination in this case is as to whether the plaintiff company, at the time of the transfer of the 200 shares of its capital stock from D to M, trustee, paid what

2—Churchill v. Thompson Elec. Co., 119 Ill. App. 430 (434).

3—Churchill v. Thompson Elec. Co., supra. The court said: "The instruction refused was the one it was held error to refuse in Edwards v. Dettenmaier, 88 Ill. App. 366."

4—Lloyd & Co. v. Matthews, 119 Ill. App. 546 (553). The court said: "This instruction is correct as an abstract proposition of law. But there was evidence tending to prove that appellant's president guaranteed the note merely as a means of procuring money for the Columbia Telephone Manufacturing Company, its debtor, with which to pay appellant, and that the discount of the note was in fact for appellant, though indirectly so. The instruction ignores this evidence, and also ignores the evidence of ratification, name, appellant's letter of July 29, 1902. The court modified the instruction and gave it as modified, to which appellant excepted. The instruction as modified and given by the court is as follows: 'The court instructs the jury that a president of a corporation by virtue of his office, as such president, has no

authority to guarantee the payment in the name of the corporation of a promissory note, executed by a third person; but if the president of a corporation makes such guarantee and the corporation thereafter receives the benefit thereof, it would thereby ratify the act of its president. What the facts are you must determine from the evidence.' The only objection of appellant's counsel to the modified instruction is: There is no evidence tending to prove that the guaranty was made for the purpose of enabling the maker of the note to pay its debt to appellant, and that, when the note was discounted, and the proceeds placed to the credit of the Columbia Telephone Manufacturing Company, that company gave to appellant a check for the money so credited to it, and this evidence is not contradicted by any of appellant's witnesses. The objection to the modified instruction is untenable."

5—Evans v. Marden, 154 Ill. 443 (447), aff'g 54 Ill. App. 291, 40 N. E. 446.

The bracketed words are suggested by the editor.

it did pay for the same because it had purchased said stock to be held as its own or like treasury stock, and to be disposed of as its board of directors should order, or whether the stock was purchased by the defendant, S, and the other stockholders in the proportion of their then holdings; each being entitled to dispose of his own share as he saw fit, the plaintiff corporation paying for the same at the request of the purchasers and for their accommodation.

(b) The burden of proof is on plaintiff to show that it did not buy or own the D stock, and that when it paid for the same it was not paying its own obligation or indebtedness, but advanced the money as an accommodation to the defendants, P, M and J, who were purchasers of the same; and the plaintiff must satisfy you by a preponderance of the evidence that it did not buy said stock, but simply advanced to the persons last named, at their request, the money to buy the same; and if you believe the weight of the evidence is against the contention of the plaintiff in that regard, or if you believe the evidence in respect to the matter to be evenly balanced, or if you are unable to say from the evidence what the truth of the matter is, your verdict should be for the defendant.⁶

§ 2421. **Salary of Vice President—Period of Contract.** If you believe that there was no compensation attached to the office of vice president, he can recover nothing on that score. But if you believe the election of vice president placed him in a position to manage and conduct the business, and for that he was to receive a salary while vice president, you may take that into consideration in determining whether that was a matter which fixed the period of his contract. That is to say, if he was employed as vice president, for which he received no emolument, but by reason of his vice presidency he was assigned to another position, for which he was to receive \$2,400 per annum, you can take that fact into consideration in determining whether it was understood between the parties that he was to receive \$2,400 a year or \$200 per month.⁷

6—Donovan-McCormick Co. v. Sparr, — Mont. —, 85 Pac. 1029, (1930). "These instructions would seem to indicate that the trial court understood that the theory of the defendant was that the shares of stock had been purchased by the plaintiff for its own use and benefit and not for S.'s account.

"It is also argued that the second instruction imposes upon the plaintiff the burden of proving a negative; that is, that the plaintiff did not purchase the shares of stock for its own use and benefit. While this manner of presenting a question in controversy to the

jury is not to be commended, we cannot say, in the absence of the evidence, that the instruction is erroneous. Confessedly, the burden was upon the plaintiff to show that the shares of stock were purchased for S., and that S. either requested that they be purchased for him, or knowing that they had been purchased for his use, agreed to pay for them. Smith v. Perham, 33 Mont. 309, 83 Pac. 492. If the second instruction does not impose upon the plaintiff any additional burden, it cannot complain."

7—Arkadelphia Lumber Co. v. Asman, 68 Ark. 526, 60 S. W. 238 (239).

§ 2422. **Notice to Corporation—Estoppel.** The court instructs the jury, that notice to a corporation can only be given by giving it to some officer authorized to represent the corporation in the particular matter to which the notice relates; or else to some person whose situation and relation to the corporation imply authority to represent the corporation in such matter.⁸

§ 2423. **Estoppel, Doctrine of.** It is a principle of law that a man who takes an active part in leading others into error cannot ask that the consequences of his mistake be thrown on others. It is also a well-settled principle of law that, when an act is done, or a statement made, by a person, which if denied by him would work an injury to others whose conduct had been influenced by the act or statement, the character of an estoppel attaches, and he will not be allowed to make such denial.⁹

§ 2424. **Sale by Sheriff and Payment of Proceeds to the Creditor After Appointment of Trustee—Good Faith—Burden of Proof.** In this case the burden rests upon the plaintiff to prove, by a fair preponderance of evidence, that the allegations of his complaint are true; and, first, that P was, at the date of his assignment, the owner of the articles in question. It is conceded that he was the owner, unless the claimed sale of them to C is valid against the plaintiff. If you find upon the evidence that the sale in question was merely colorable, and not made in good faith, or was not accompanied or followed by any change of possession or use, then you will find that issue for the plaintiff. If you find that it was made in good faith, and was accompanied and followed by an actual change of possession, then you will find that issue for defendant, for the law is so that if a man sells personal property like this, and continues to possess and use it as before, so that there was none of the usual *indicia* of a change of ownership apparent, his creditors may treat it as never sold, and this right inures to his assignee in insolvency. Now, under our statute, it is the duty of an officer to deliver property of an assigning debtor which has been attached by him to the trustee in insolvency, and if you find that the property in question was the property of the assigning debtor, within the instructions which I have given you, it became the duty of the defendant to deliver it to the trustee immediately upon his appointment and qualification; and if, knowing of such assignment, and of the appointment of the trustee, he did not so deliver the property, but sold the same afterwards under the execution, and paid the proceeds over to the creditor, then the plaintiff must prevail in this action. But if he had no knowledge of the assignment or of the appointment of the trustee, until after he had

8—Keenan v. Dubuque, etc., 13 Ia. 375; Fulton Bk. v. New York, etc., 4 Paige 127; Housatonic Bk. v. Martin, 1 Met. 294; Bk. of the U. S. v. Davis, 2 Hill 451; Farm-

ers', etc., Bk. v. Payne, 25 Conn. 444.

9—Hutchins v. Weldin, 114 Ind. 80, 15 N. E. '804.

sold the property, under the execution, and in good faith paid the avails to the judgment creditor, and no notice had been given to, and no demand had been made upon him before this last-mentioned act, then the plaintiff cannot recover upon the allegations of this complaint, and the conceded facts in the case. If the defendant is to prevail, however, because he had no knowledge of the assignment, the burden of proving this lack of knowledge rests upon him.¹⁰

§ 2425. **Wrongful Levy—Interest.** The court instructs the jury that if you find for the plaintiff you should return a verdict for the amount of the balance due on the note held by K, read in evidence, not exceeding the value of the stock of goods, furniture and fixtures levied upon by the sheriff under the execution referred to in the evidence, on the — day of —, to which you may add — per cent. interest from that date to the present time.¹¹

§ 2426. **Keeping Prisoner Under Strict Guard—Escape of Prisoner.** (a) If the jury find from the evidence that the defendant was the acting sheriff of the county of —, and keeper of the common jail thereof, at the time when the execution or capias against the body of A. was placed in the hands of said defendant or any deputy sheriff of his to execute, if the same was so placed in his hands, or that of any of his deputies, and that said defendant as such sheriff or any of his deputies arrested said A. under and by virtue of said execution or capias, and that said plaintiff or his mother as his next friend on his behalf paid said defendant, as such sheriff, or his deputy or turnkey, said defendant's fees as such sheriff for receiving and committing said A. to said jail, and his board at the time of such commitment at the commencement of each week for two weeks, and that during any part of said time said defendant, or his deputy or jailer or turnkey, suffered, permitted or allowed said A. to go outside of said jail for ever so short a time for his own ease or comfort, or to do chores, then the plaintiff is entitled to recover in this cause, and it will be your duty to return a verdict in his favor; and it makes no difference as to the plaintiff's right to recover, even if A. voluntarily returned to or was taken into custody again by said defendant or his deputy or turnkey.

10—*Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242 (243).

11—*State ex rel. Kennen v. Fidelity & Deposit Co.*, 94 Mo. 184, 67 S. W. 958 (962).

"The admitted facts are that the levy was made on August 27, 1900. This is therefore the date on which the goods were taken and converted, and their value on that date, with six per cent interest per annum, is the proper measure of respondent's damages. (*Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806; *Carter v. Feland*, 17

Mo. 383); to be allowed in the discretion of the jury (section 2869 Rev. St. 1899; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855). The instruction is not as definite and full as it should have been, in calling the attention of the jury to the fact that the allowance of interest was in their discretion. But it did in fact leave the allowance of interest to the discretion of the jury, and if the defendants were not satisfied with the instruction, they should have asked for a more definite direction."

(b) If the jury believe from the evidence that said A, at any time after he was committed to jail under the writ read in evidence, if he was so committed, and during the time for which his board had been paid, if it had been paid, was allowed to go outside of said jail at any one time or more when he was not under strict guard, then the plaintiff is entitled to recover in this case, and you should find a verdict for the plaintiff.

(c) If the jury believe from the evidence in this case that said A at any time after he was committed to jail under the writ read in evidence, if he was so committed, and during the time for which his board had been paid, if it had been paid, was allowed to and did sleep with the jailer in the debtors' room, without the same being locked or guarded, or was allowed to go into a room or rooms not a part of the jail—to wash dishes or peel potatoes, or for any other purpose—when not strictly under guard, then the defendant is liable in this case and you should find a verdict for the plaintiff.¹²

§ 2427. Value of Accounts—When Good and Collectible, Are Presumed to Continue So. You are instructed that accounts having once been shown to be good and collectible are presumed to have continued so, and that the fact that the accounts appear upon the books of the company and are testified to have been good and collectible is evidence for your consideration of the value of those accounts.¹³

§ 2428. What Words Necessary to Create a Trust—Repudiation—Limitations. (a) The court instructs the jury that no particular form of words is necessary to create a trust or to make the person declaring the trust himself a trustee. The word "trust" need not be used. Any expression which shows unequivocally the intention to create a trust will have that effect. When a person accepts personal property to be held in trust for another and orally or in writing, expressly or implied, declares that he holds such property for such other person, then such possession and declaration constitute him a trustee, in an express trust for such other, of the property, and in such case the beneficial interest in the property is considered as vested in the *cestui que* trust.

(b) In this case if you believe from a preponderance of the evi-

12—Comer v. Huston, 55 Ill. App. 153.

13—Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10 (16).

"This presumption is recognized in the Code of Civil Procedure 'All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind: . . . That a thing once proved to exist continues as long as is usual with things of that nature.' Section 3266,

cl. 32. Mr. Abbott, in his Trial Brief (2d ed.), p. 433, says: 'In the absence of evidence, solvency is presumed. Solvency or insolvency at a given time having been shown, it is presumed to continue within reasonable limits of time.' It is also asserted that the instruction does not inform the jury that some of said accounts and bills receivable were taken possession of under a writ of attachment in the suit of C. & Bro. against the company to satisfy its indebtedness. Section 4334, Civ. Code, covers this objection."

dence that A. D. received money from his father in England to be by him held in trust for J. D., and that he, the said A. D., further declared that he intended to keep and use the money himself and pay interest upon the same until J. D. attained the age of twenty-one years, for the benefit of the said J. D., and did so keep and use the money, then you are instructed that, in law, such a state of facts constitutes an express trust in the hands of A. D. for the benefit of J. D., and the Statute of Limitations has no application to this case, unless you believe from a preponderance of the evidence, that A. D. openly and expressly disavowed such express trust, if any, and that such a disavowal and repudiation, if any, was brought to the personal knowledge of the said J. D., and that after receiving such personal knowledge, if any, he failed to use due diligence in prosecuting his claim.¹⁴

§ 2429. Filing Papers—What Constitutes. To illustrate what I mean, an attorney cannot put a paper among a lot of papers, and carry the whole bundle to the clerk's office and hand them to the clerk, and expect the clerk to seek out from that bundle, papers that have not been filed, and enter the fact that they were filed upon them. That does not constitute, in law, a legal filing.¹⁵

§ 2430. What Constitutes a Quartz Mining Claim. The court instructs the jury that, to constitute a quartz mining claim, certain things are absolutely necessary: First, that a vein or lode of rock in place bearing minerals exists within the boundary lines of the mining claim; second, that the person purporting to locate the said claim has discovered this vein or lode before the location can be made.¹⁶

14—*Dawes v. Dawes*, 116 Ill. App. 36 (39).

"These instructions considered in connection with the evidence and with all the other instructions given in the case, state the law correctly and were not, in our opinion, in any respect misleading."

15—*Cooper v. Nisbet*, 119 Ga. 752, 47 S. E. 173 (174).

"The true rule, we think, is that stated by the Illinois Court in the case of *Hamilton v. Beardslee*, 51 Ill. 478, that, to constitute a legal filing, the paper must pass into the custody of the clerk, 'and that the object be communicated to him in some manner capable of being understood.' See, also, *Pfirrmann v. Henkel*, 1 Ill. App. 145; *Boyd v. Desmond*, 79 Cal. 250, 21 Pac. 755; *Phillips v. Beene*, 38 Ala. 248. And in the case of *Jolley v. Rutherford*, 112 Ga. 342, 37 S. E. 358, it was held that where papers were left on the clerk's desk, and his atten-

tion was not called to the fact that they were so left or that there was any intention to file them, there was no legal filing. That, it is true, is not this case; but the following language of Mr. Presiding Justice Lumpkin, 112 Ga. 344, 37 S. E. 359, bears closely upon the question now under discussion: 'It is scarcely reasonable to expect a clerk to duly file papers left upon his desk or elsewhere in his office when his attention is not in some way directed to the fact that the person depositing them in or upon his office furniture wishes him to assume charge thereof and file the same.'"

16—*La Grande Inv. Co. v. Shaw*, 44 Or. 416, 72 Pac. 795 (797).

"This is technically correct. A discovery after an attempted location may, however, take effect and validate the location by relation, providing no valid discovery and location by a third person has intervened. *Crown P. Min. Co. v.*

§ 2431. Forest Products—Whether in Transit—Transit Defined—Taxation. The court instructs you that the logs in question are what is classed in our tax laws as “forest products,” and we have a recent statute in this state which provides that property of that class, owned by residents or non-residents, shall be assessed to the owner, or to the person having control thereof, in the township or ward where the same may be, except that where such property is in transit to some place within the state it is to be assessed in such place. All forest products in transit on the second Monday in April and thereafter, found in the waters or streams of this state, shall be held to have a place of destination at the sorting grounds nearest the mouth of such stream, unless the contrary is made to appear. The law also provides that logs, lumber, pickets, telegraph poles, ties and other forest products, if piled or left in any yard, railroad, reserve, shed, or any other place, shall not be deemed to be in transit, but are to be assessed to the owner in the township where they are found. Therefore it becomes an important question in this case whether or not the logs were in transit. If they were, they were not liable to taxation in ——— township, and the plaintiffs are entitled to your verdict. If they were not in transit, they would, under the undisputed evidence, be liable to taxation there. When we speak of goods in transit, we mean on the way or passage, while going from one place or person to another, in the course of business or commercial dealing. So if you find that on the ——— of ———, the plaintiffs were driving the logs of which the logs in this suit formed a part, towards their destination, or were breaking the rollways and jams for that purpose, or were working upon them in the ordinary way, with a view of driving them towards their destination, or as many of them as the stage of water in the river would permit, then the logs would be in transit, and not liable to assessment in the township of ——— for that year, and your verdict will be for the plaintiff. But if you find from the evidence that the logs in question were not in the waters or stream in question; were not actually started on their way or passage down it, but in unbroken piles, awaiting the breaking up of the river or rise of waters, or some future event, before starting,—the mere intent of the owners, unaccompanied by any acts showing their present purpose to drive the logs, would not justify you in regarding the property in transit. What was the condition of these logs on the ——— of ———, and what, if anything, was being done with them at that time, are disputed questions of fact, for you to decide from the evidence. If you find that the logs were in transit, your verdict will be for the plaintiffs, that they are entitled, and were at the time of the commencement of this suit, to their property. If you find that defendant did not unlawfully detain the prop-

Crimson, 39 Or. 364, 65 Pac. 87; The North Noonday Min. Co. v. Jupiter Min. Co. v. Bodie Consol. The Orient Min. Co. (C. C.), 1 Fed. Min. Co. (C. C.), 11 Fed. 666, 675; 522, 531.”

erty replevined, then, by virtue of his seizure, he had a lien to the amount of the tax against the logs, to-wit, ——— dollars, and, having waived a return of the property, would in such case be entitled to a verdict for the amount of his lien.¹⁷

§ 2432. Right to Dismiss School Teacher—When Reviewable by the Court—Ground for Dismissal. If the jury find from the evidence that the school board of the defendant district met, in conjunction with the county superintendent of public instruction, to consider the matter of complaints made against the plaintiff as teacher of the school of the district, and at such meeting such board and superintendent gave full and fair consideration to the facts of the matter as known to them personally, and also used reasonable diligence to inform themselves upon the subject from such sources as were available, and gave full and fair consideration to such information, and then, in good faith, reached the unanimous conclusion that plaintiff had been so negligent of his duties as teacher, that the interest of the school required his discharge, and therefore made an order discharging him as such teacher on the — day of —, then plaintiff is not entitled to recover in this action.¹⁸

§ 2433. Discharge of School Teacher—Grounds for—What May Be Demanded in the Absence of Special Contract—Excess in Social Pleasures and Indulgences. (a) Unless the contract so provided, the board of trustees would not have the right and power to adopt a rule or by-law prescribing that the plaintiff, as one of the teachers, should not receive callers or have company during the school days,—say from Monday morning to Friday afternoon,—nor to adopt a rule prescribing that she should not have company in the parlor, of evenings, later than 10:30 or 11 o'clock. Such a rule or regulation or by-law as either of these would be regarded, in law, as arbitrary, unreasonable and oppressive, and could not be upheld or enforced, and the plaintiff would have the legal right to ignore them or refuse compliance with them. The board of trustees would not have the right to discharge the plaintiff for her refusal to obey or comply with such rules as these, and if they did so discharge her for this reason alone, the defendant would be guilty of a breach of its contract, and would be liable to the plaintiff therefor.

17—Hill v. Graham, 72 Mich. 659, 40 N. W. 779 (782), 16 Am. St. 552. "This charge fully covered the ground, and was as favorable to the plaintiff, at least, as they had a right to expect."

18—School Dist. of Kearny Co. v. Davies, 69 Kan. 162, 76 Pac. 409 (409).

"Section 6184, Gen. St. 1901, provides for the employment of teachers, and the manner of employing them in the district schools of the state. It also provides for the dismissal of teachers, the causes for

which they may be dismissed, and the manner in which they may be dismissed. Said section reads: 'The district board in each district shall contract with and hire qualified teachers, for and in the name of the district, which contract shall be in writing, and shall specify the wages per week or month as agreed upon by the parties, and such contract shall be filed in the district clerk's office; and in conjunction with the county superintendent may dismiss for incompetency, cruelty, negligence or im-

(b) While this is true, yet the plaintiff, under her contract, owed to the defendant, as a teacher, her loyal support, her faithful service, her most efficient work; and she could not lawfully and rightfully engage in such social functions, or devote so much of her time and attention to social pleasures, or engage in such other work, conduct or practices, as would impair her usefulness and efficiency as a teach-

morality.' In the case of *School Dist. v. McCoy*, 30 Kan. 268, 1 Pac. 97, 46 Am. Rep. 92, it was held that the school district board acting in conjunction with the county superintendent, as provided by said section, was not a court; that this tribunal so constituted could act without pleading and without process, and that the proceedings to dismiss a teacher could be conducted by it in an informal manner. We are now called upon to determine the legal effect of the acts of this tribunal. The Legislature must have had a purpose in uniting the county superintendent with the school district board. In doing so it constituted a special tribunal, which may fairly be said to be outside and independent of the employing board—a tribunal unknown to the common law, and given power to dismiss the teacher for negligence, incompetency, cruelty or immorality. In the case of *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, the board of medical registration and examination was classed with such boards as the county board of equalization, boards for the examination of applications for teachers' certificates, city councils in granting and refusing a business or occupation license, and numerous other boards of similar character. It was there said that such boards performed no judicial functions, were not judicial tribunals, and had never been classified as such. It was held however that in the absence of fraud, corruption or oppression the findings of the medical board were conclusive upon this court. The school law of New Jersey clothes the board of education with power to employ teachers and to remove them for cause. There is given the right of appeal to the county superintendent. From that official is given the right of appeal to the State Superintendent, and thence to the State Board of Education. There is no statutory provision constituting the acts of the State B. of Education final. In

the case of *Draper v. Com'rs of Pub. Instruction*, 66 N. J. Law 54, 48 Atl. 566, it was held that the board had exclusive jurisdiction over such controversies and that its determinations were final. The school law of Iowa, in the matter of the dismissal of teachers is quite similar to that of N. J. The Sup. C. of Iowa in the case of *Park v. School Dist.*, 65 Iowa 209, 21 N. W. 567, held that the finding of the Co. Supt. sustained by the State Supt. on appeal was final; that the proceeding is statutory, unknown to the common law, and the courts therefore have no authority to examine or retry the questions of fact. In the case of *McCrea v. School Dist.*, 145 Pa. 550, 22 Atl. 1040, it was held that under a statute giving a board of directors power to dismiss a teacher for incompetency, cruelty, negligence or immorality, the board was held merely to the observance of good faith, and its acts were not reviewable. To like effect is the case of *Whitehead v. School Dist.*, 145 Pa. 418, 22 Atl. 991. In *Gillan v. Board of Regents*, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336, it was held that the power to remove a teacher given to the board of regents, when exercised in a given case cannot be inquired into by the courts; that this power of removal becomes a part of every contract made by the board with the teacher; that when the board has exercised this power and the teacher has received notice thereof, the right to further salary or compensation is terminated. In the case of *P. v. B. of Education*, 52 N. Y. Super. Ct. 620, under a statute providing that 'any teacher may be removed by the board of education upon the recommendation of the city superintendent,' it was held that the order of removal might be made without cause asserted or shown, and was not reviewable. It is manifest that the intention of the Legislature in enacting section 6184 was to provide a speedy and inexpensive

er, or as, when properly understood and interpreted, would injure the school, or interfere with the discipline of its pupils or tend to damage its reputation and character as an institution of learning.

(c) The defendant would have the right, under the law, to discharge the plaintiff and terminate her connection with said school for any reasonable cause, but not arbitrarily and without good cause. It had the right to discharge her for incompetency as a teacher, if the fact existed, or for her insubordination or refusal to carry out or comply with or conform to any reasonable by-laws or regulations made and adopted by the board of trustees, or by the president of the faculty under and by the direction of said board, or it would have the right to dismiss her from the school and terminate her connection therewith, for immorality, immodest or unladylike conduct and behavior, or for any improper, immodest, and unbecoming conduct, such as would be likely to be hurtful or injurious to the reputation or standing of the school, or to impede and prevent or interfere with the proper progress of its pupils, or their proper discipline and training. But under these principles the board of trustees would not have the right to interfere with her social relations, or her right to receive and entertain her friends, or with the time at which she would dismiss them of evenings, so long as her actions and conduct in these particulars were usual, chaste, proper, ladylike, and becoming a lady in her position in life, and not hurtful nor injurious to the school, nor incompatible with her duties as a teacher in said school.

(d) If she was guilty of going into society or of keeping late hours in company of young men, or going with them to such questionable places as was likely to cause her reputation as a lady to be called into question, or as would impair her ability and efficiency as a teacher, or disqualify her to perform her duties as well as she might otherwise have done her duties as a teacher, then the board of trustees would have the right to dismiss her and terminate its contract with her for these reasons.

(e) Again, if she was guilty of habitually counselling or encouraging the pupils of said school, or any of them, to disobey and violate the proper and reasonable regulations and rules of the school, which had been adopted by the board of trustees or by the president of said school under the authority of said board,—such as a rule for-

mode for the dismissal of teachers from the district schools. We believe that the Legislature established this tribunal clothed with the power to dismiss with the intention that its acts should be final. The teacher takes his employment with the knowledge of this power, and it enters into his contract of hire however made or formulated. We can see no purpose or object of the Legislature in joining the county superintendent

with the district board, and giving the tribunal thus created the power to dismiss teachers, unless it was intended that in the absence of fraud, corruption, or oppression, its acts should be final and conclusive. It would tend greatly to impair the government and efficiency of the public schools if the honest judgment and discretion of this tribunal so exercised was subject to review."

bidding and prohibiting the boys and girls to visit each other without permission,—then, under these circumstances, the board would have the right to dismiss her from the school and terminate her connection with it.

(f) If you find that when the original contract was made there was no express stipulation that she was to keep the study hall, but that she was afterwards assigned to the position and work, and that the disorder and confusion, if any there were, in the study hall, was not due to her neglect or inattention to her duties, but that it was due to the fact that she was a lady, and a young lady, and that many of the pupils were young men or large boys, and that they were unruly, and could not be restrained by plaintiff, as a young lady, without fault on her part, then, under these circumstances, she would not be liable for such disorder.¹⁹

19—The above series of instructions approved in *Hall-Moody Institute v. Copass*, 108 Tenn. 582, 69 S. W. 327 (329).

PART III.

FORMS OF INSTRUCTIONS—CRIMINAL.

CHAPTER LXXXVI.

CRIMINAL—IN GENERAL.

ALIBI—IDENTITY OF ACCUSED—ARREST—ATTEMPT TO ESCAPE—FLIGHT.

See Erroneous Instructions, same chapter head, Vol. III.

ALIBI.

- § 2434. Defendant not present when crime committed.
- § 2435. An alibi is the completest defense that can be devised.
- § 2436. The alibi must show that the defendant could not have been at the place of the crime at that time.
- § 2437. Evidence must account for the whereabouts of defendant during the whole period—Benefit of a doubt given defendant.
- § 2438. That the defendant was at another place but not so far away but that he could with ordinary exertion have reached it may be considered.
- § 2439. Evidence of an alibi should be subjected to rigid scrutiny.
- § 2440. An alibi characterized as being easily proven and hard to disprove—Caution and care in examining evidence of.
- § 2441. A simulated, false and fraudulent alibi is a discrediting circumstance.
- § 2442. Burden of proof on state of whereabouts of defendant.
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IDENTITY OF ACCUSED.

- § 2446. Identity of accused—Homicide—Larceny.
- § 2447. Identification of defendant.
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ARREST.

- § 2449. When officer may arrest without warrant—Right of private individual to do so.
- § 2450. Unnecessary violence in making arrest.
- § 2451. Deputy sheriff making arrest for misdemeanor can kill only in self defense.
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ATTEMPT TO ESCAPE—FLIGHT.

- § 2456. Attempt to escape—How considered.
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- § 2460. Flight as evidence of guilt—Explained by defendant.
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§ 2462. Attempt to escape—Inference to be drawn therefrom—May be either strong or slight—Terms explained.

§ 2463. Failure to flee or voluntary surrender no evidence of innocence.

§ 2464. Attempt to release prisoner from jail by delivering tools to prisoner.

ALIBI.

§ 2434. **Defendant Not Present When Crime Committed.** If you believe from the evidence that the defendant was not present at the time it is alleged that the crime was committed, you must acquit him.¹

§ 2435. **An Alibi Is the Completest Defense That Can Be Devised.** Something has been said here about an alibi. The books say that an alibi is a dangerous defense, yet, when there are no circumstances showing any lack of completion in the chain, it is as complete a defense as can be devised, because the law says a man cannot be in two places at one and the same time, and we all know that. He cannot be in A. and B. the same day, at precisely the same time.²

§ 2436. **The Alibi Must Show That the Defendant Could Not Have Been at the Place of the Crime at That Time.** (a) An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such a time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi. Of course if it appears that the respondent was at W. at such a time that he could not have been in the R bank between the hours of two and three in the morning of November 6th, the alibi is made out, and the defense is complete.³

(b) The defense interposed by the defendant in this case is what is known in law as an alibi—that is, that the defendant claims that he was at another place at the time of the commission of the crime; and the court instructs the jury that such defense is as proper and legitimate, if proved, as any other, and all the evidence bearing upon that point should be carefully considered by the jury. Such defense, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place so far away and under such circumstances that he could not, with any ordinary exertion, have reached the place where the crime was committed, so as to have participated in the

1—People v. Feliz, 136 Cal. 19, 69 Pac. 220.

2—State v. Rhodes, 44 S. C. 325, 22 S. E. 306 (308).

3—State v. Powers, 72 Vt. 168, 47 Atl. 830 (833).

commission thereof. But the court instructs the jury, also, as a matter of law, that the burden to prove that the defendant was at another place at the time of the commission of the crime, must be by preponderance of evidence; that is, by the greater and superior evidence.⁴

(c) The court instructs the jury that the testimony in support of this defense, to be entitled to weight, must be such as to show that, at the very time of the commission of the crime, the defendant was at another place so far away, or under such circumstances, that he could not have been at the place where the crime was committed.⁵

(d) The court instructs the jury that the defense of an alibi, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof.⁶

§ 2437. Evidence Must Account for the Whereabouts of Defendant During the Whole Period—Benefit of a Doubt Given Defendant. The jury are instructed that when a defendant undertakes to establish an alibi, the evidence which he offers, taken with the other evidence in the case, must account for him during the whole period. But if you entertain a reasonable doubt as to his guilt, or as to his whereabouts when his presence is material, you should give him the benefit of that doubt.⁷

§ 2438. That the Defendant Was at Another Place but Not So Far Away but That He Could with Ordinary Exertion Have Reached It, May Be Considered. One of the defenses interposed by the defendant in this case is an alibi; that is, that the defendant was at an-

4—Glover v. U. S., — I. T. —, 91 S. W. 41.

5—State v. McGarry, 111 Va. 709, 83 N. W. 719.

6—State v. Maher, 74 Ia. 82, 37 N. W. 2; Mullins v. The People, 110 Ill. 45.

In the first case the court said that the defendants were claiming "what is known in law as an alibi; that is, at the time the robbery with which they are charged was being committed they were at a different place, so that they could not have participated in its commission," and defines the nature of the proof required.

An instruction in substantially the same form was approved by the Supreme Court of Nebraska in Nightingale v. State, 62 Neb. 371, 87 N. W. 158 (159). The court said that this instruction was not "subject to any just criticism. It did not say to the jury, as it was as-

sumed the instruction in Peyton v. State, 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47, did, that, to entitle the defense of alibi to consideration it must appear that the place where the defendant claimed to have been was so great a distance from the place where the crime was committed as to preclude the possibility of participation therein."

7—People v. Worden, 113 Cal. 569, 45 Pac. 844 (846).

In Barr v. People, 30 Colo. 522, 71 Pac. 392 (394), a similar instruction was given to the effect that:

The court instructs the jury that to render an alibi satisfactory, the evidence must cover the whole of the time of the transaction in question. If you have any reasonable doubt whether the defendant was present or absent from the place where the crime was committed and participated in the commission thereof, it is your duty to acquit.

other place at the identical time that the crime was committed, if committed at all. If, in view of all the evidence, you have any reasonable doubt as to whether the defendant was at another place from where the crime was committed at the time of its commission, then you should acquit; but if you believe from the evidence that the accused was not so far away from the place where the offense was committed but that he could, with ordinary exertion, have reached the place where the offense was committed, then you will consider that fact as a circumstance tending to prove or disprove the alibi.⁸

§ 2439. Evidence of an Alibi Should Be Subjected to Rigid Scrutiny. The defense claimed in this case is that of an alibi; that is, that the defendant was elsewhere when the offense was committed. The testimony offered to prove this defense should be subjected, like all the evidence in the case, to rigid scrutiny, for the reason that witnesses, even when truthful, may be honestly mistaken in, or forgetful of, times and places.⁹

§ 2440. An Alibi Characterized as Being Easily Proven and Hard to Disprove—Caution and Care in Examining Evidence of. The defense in this case, gentlemen—one of the defenses introduced here, or a train of circumstances that has been presented here—tends to show an alibi of the defendant here, as claimed by the defendant. That is a defense which is legitimate. If it is true that this defendant was not in a condition so that he could have committed the crime, that should, and would be a perfect defense; but in the consideration of that class of defenses, gentlemen, it is necessary for you to take into consideration the facts, and it is your duty as jurors to examine carefully the evidence given on that point—scrutinize any evidence in relation to the alibi. An alibi is a defense that is easily proven and hard to disprove; therefore you will be careful and cautious in examining the evidence bearing upon the question of alibi. I say, if it is established, and you believe the evidence—in other words, if you believe this party was in a position so that he couldn't have committed the crime—of course that would be an absolute defense.¹⁰

§ 2441. A Simulated, False and Fraudulent Alibi Is a Discrediting Circumstance. (a) If you believe from the evidence in this case that the plea of an alibi was not interposed in good faith, or that the evidence to sustain it is simulated, false and fraudulent, then this is a discrediting circumstance to which you may look, in connection with all the other evidence, in determining the guilt or innocence of the defendant.¹¹

8—State v. Burton, 27 Wash. 528, 67 Pac. 1097 (1099).

9—Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113 (115).

10—People v. Portenga, 134 Mich. 247, 96 N. W. 17, 12 Am. Crim. Rep. 30.

11—Tatum v. State, 131 Ala. 32, 31 So. 369.

"This instruction must have meant and been understood as hav-

ing reference to that phase of the defense where an alibi was sought to be proven under the general issue. So taken the charge was in line with the principle asserted in Albritton v. State, 94 Ala. 76, 10 So. 426, where it was said: 'A fraudulent attempt to prove an alibi, sustained by perjury, will, when detected, be a circumstance of great weight against the prisoner.' "

(b) If the defendant attempted to prove an alibi and failed, it is a circumstance that may be weighed against him.¹²

(c) If the jury believe from the evidence, beyond a reasonable doubt, that the alibi set up in this case is simulated, false, and fraudulent, they may consider this as a circumstance against the defendant, in connection with all the other evidence in the case.¹³

§ 2442. Burden of Proof on State of Whereabouts of Defendant. The court instructs the jury that the burden of proving the presence of the defendants, or either of them, at the time and place of the alleged burglary, devolves upon the state, and the state must prove beyond a reasonable doubt that they were present at the time of the alleged commission of the offense. It does not devolve upon the defendants to prove that they were not present. So that after a full and fair consideration of all the facts and circumstances in evidence, or that adduced by the defendants, you have a reasonable doubt as to whether defendants were at the place of the alleged crime at the time of its commission, or were at another place, you are bound to give the defendants the benefit of such doubt, and acquit them.¹⁴

12—*Jackson v. State*, 117 Ala. 155, 23 So. 47 (48).

The court said in comment that "the law recognizes no distinction between the consequent weight of an unsuccessful attempt to establish an alibi as a defense, and an unsuccessful attempt to prove any other material fact in defense; and it is a well-recognized principle that an attempt to prove any material fact in defense, followed by a failure, is a circumstance to be weighed against the party making it. There was no reversible error, therefore, in giving the first charge requested by the state. If the defendant apprehended the charge singled out and laid stress upon a single phase of the evidence, he should have asked an explanatory charge. *Albritton v. State*, 94 Ala. 76, 10 So. 426; *Kilgore v. State*, 74 Ala. 1; *Pellum v. State*, 89 Ala. 28, 8 So. 83."

13—*Crittenden v. State*, 134 Ala. 145, 32 So. 273 (275).

14—*State v. Hale*, 156 Mo. 102, 56 S. W. 881 (882).

But see the instruction approved by the court in *State v. Howell*, 100 Mo. 628, 14 S. W. 4, where that court quotes with approval.

"Whart. Cr. Ev. (8th Ed.) par. 333. The part material to the question we are now considering reads as follows: 'Undoubtedly, if the prosecution makes out a case sufficient to secure a verdict of conviction, then the burden is on the

defendant to prove his defense. But, when his proof is in, then the final question is, are the essential averments of the indictment proved beyond a reasonable doubt? And among these essential averments is the defendant's participation in the act charged.' And that court adds that 'the supreme courts of Indiana, Iowa and Texas, in well-considered cases, have also approved and announced, in express terms, the same doctrine,' citing *Howard v. State*, 50 Ind. 190; *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174; *Walker v. State*, 32 Tex. 360. It will be noticed that Mr. Wharton uses the expression, 'then the burden is on the defendant to prove his defense.'

"In the late case of *Harrison v. State*, 83 Ga. 129, 9 S. E. 542, the supreme court of that state, in discussing the question of alibi, uses the following language: 'Were our own minds not hedged in by authority, we would be inclined to adopt the view expressed by Judge Thompson (2 *Thomp. Trials*, para. 2436) who, after recognizing that the burden of proof is upon the accused, adds: 'But, upon the most unshaken grounds this burden is sustained, and an adequate quantum of proof produced by the defendant, when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed.'"

§ 2443. **Burden of Proof—An Alibi Is Not to Be Considered as a Basis for a Reasonable Doubt unless Established.** (a) The court instructs the jury that if the defendant has failed to establish this defense by a preponderance of the credible testimony, then he is not entitled to an acquittal upon this ground, nor to have it considered by you as a basis of his reasonable doubt.

(b) The burden of establishing this defense by a preponderance of the credible testimony is upon the defendant. If he has so established it, he is entitled to an acquittal.¹⁵

(c) The defendant in this case does not set up justification, but he undertakes to show that at the time that C. was killed he (the defendant) was not at the place where such killing occurred, but at another place, and that, therefore, he was not connected with or implicated in such crime. The burden of showing an alibi is on the defendant; but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted; but the jury should scrutinize the testimony of witnesses, to see if some of them may or may not be mistaken as to dates and times when they saw the defendant; and it is proper for the jury to consider the lapse of time since the occurrence happened, and whether witnesses are likely or not likely, after such lapse of time, to be accurate as to the precise time or hour that they saw defendant on the night the shooting occurred. In other words, in arriving at your conclusion on this point, the jury should consider whether it may or may not be true that defendant was present at the time and place C. was shot, and that some of the witnesses are honestly mistaken as to the exact time they saw defendant upon the evening and night of November 3, 1900.¹⁶

15—State v. McCarry, 111 Iowa 709, 83 N. W. 719.

The court said: "These instructions accord with the doctrines of this court pertaining to the subjects of alibi and reasonable doubt. The doctrine laid down in State v. Maher, on this subject, is expressly approved in State v. Hatfield, 75 Iowa 592, 39 N. W. 910. See also, State v. Fry, 67 Iowa 475, 25 N. W. 738; State v. Kline, 54 Iowa 183, 6 N. W. 184; State v. Hardin, 46 Iowa 623, 26 Am. Rep. 174. It is manifest that the instructions given in the case at bar are in harmony with the rule stated."

16—Rayburn v. State, 69 Ark. 177, 63 S. W. 356 (357).

The court said this "instruction is a literal copy of an instruction approved by this court in Ware v. State, 59 Ark. 379, 27 S. W. 485. That case was well considered, and the conclusion we then reached was sound. Learned counsel for appellant, we think, misapprehend the purport of the instruction. It does

not shift the burden upon the defendant to prove his innocence. The burden is still upon the state to prove beyond a reasonable doubt, upon the evidence in the whole case (which would include evidence of alibi) that the defendant was present when the crime was committed. In Commonwealth v. Choate, 105 Mass. 456, the court passed upon an instruction which told the jury: 'That where the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and, if he failed in maintaining that burden, the jury could not consider it as a fact proved in the case; that the burden, however, was upon the government to show that the defendant was present at the time of the commission of the defense, and, as bearing upon that question, the jury were to consider all the evidence offered by the defendant tending to prove an alibi; and if,

(d) The court instructs the jury that where the state makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is upon the defendant to make out his defense as to an alibi; and when the proof is all in, both that given for the defendant and for the state, then the primary question is (the whole evidence being considered), is the defendant guilty beyond a reasonable doubt?—the law being that if, after you have considered all the evidence, as well as that touching the question of alibi, as the criminating evidence introduced by the state, you have a reasonable doubt of the guilt of the accused, you should acquit; if you have not, you should convict.¹⁷

(e) The jury are instructed that when the state offers evidence and makes out a *prima facie* case (in law) of guilt against the defendants, and the defense of alibi is relied on, then the burden of proof is on the defendants to show you by a preponderance of the evidence offered that at the time and place in question it was impossible for the defendants to have been there.¹⁸

(f) Where the defendant enters a general plea of not guilty, that is a denial of the state's entire case; it puts the state upon proof of the case,—of the charge. If he goes on further, and enters a special plea (for instance, an alibi), then the defendant assumes the burden

upon all the evidence, the jury entertained a reasonable doubt as to the presence of the defendant at the fire, they were to acquit.' The court said of this: 'The substance of the whole ruling was that, if the evidence of the defendant which tended to prove an alibi was such that, taken together with the other evidence, the jury were left in reasonable doubt as to whether the defendant was present at the alleged fire, they should acquit him.' The instruction in the form given in the Massachusetts case is, perhaps, a preferable statement of the law. But the instruction under consideration, fairly construed, is of exactly the same purport. The burden to show the defendant's presence and participation in the crime is still upon the state, when the evidence considered as a whole, including that introduced by the defendant on the question of alibi. But as to the particular defense of alibi set up under the general plea of not guilty, the defendant, if he relies upon it as an affirmative fact, must show that particular fact. The state could not be expected to prove that he was not present. That would be to devolve upon the state the duty of proving a negative, i. e., that defendant was not

present, and not guilty. The state must prove its charge—the guilt of the accused—beyond a reasonable doubt, notwithstanding the testimony tending to prove an alibi, or the defendant must be acquitted; but it is the province of the defendant to introduce evidence tending to show an alibi when relied upon as an affirmative matter of defense, and as to this the burden rests upon him."

17—State v. Thornton, 10 S. D. 349, 73 N. W. 196 (197), 41 L. R. A. 530; Ackerson v. People, 124 Ill. 563, 16 N. E. 847.

See also State v. Maher, 74 Ia. 82, 37 N. W. 2, where an instruction charging the jury that "the burden is upon each defendant to prove this defense for himself, by a preponderance of evidence; that is, by the greater and superior evidence," was approved.

18—Bone v. State, 102 Ga. 387, 30 S. E. 845 (847).

A similar instruction was approved in Cochran v. State, 113 Ga. 726, 39 S. E. 332, the court adding further that "the evidence offered as an alibi is to be considered along with all the other evidence, in order to determine whether the guilt of the defendant has been shown beyond a reasonable doubt."

of proving that special plea, not beyond a reasonable doubt, but by the preponderance (the greater weight) of the testimony.

(g) It is the duty of the state to prove every material allegation in an indictment beyond a reasonable doubt, and the defendant is entitled to the benefit of any reasonable doubt growing out of all the testimony in the case.¹⁹

§ 2444. Reasonable Doubt Raised by an Alibi Sufficient to Acquit.

(a) The court instructs the jury that, if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed (if you find a crime was committed) you will acquit the defendant.²⁰

(b) The court instructs the jury that all the evidence bearing upon that point should be carefully considered by the jury. And if, in view of the evidence, the jury have any reasonable doubt as to whether the defendant was at some other place at the time the crime was committed, they should give the defendant the benefit of any doubt, and find him not guilty. The defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.²¹

(c) The defendant is not required to prove that defense beyond a reasonable doubt, but, to entitle him to an acquittal, it is sufficient

19—State v. Anderson, 59 S. C. 229, 37 S. E. 820.

In approving these instructions the court said that "in view of these instructions, and the cases of State v. Nance, 25 S. C. 173, and State v. Jackson, 36 S. C. 492, 15 S. E. 559, 31 Am. St. 890, we do not think the court in this matter committed reversible error. These cases seem to treat an alibi as a special defense, to be supported by a preponderance of the evidence, just as the plea of insanity is treated in State v. Paulk, 18 S. C. 514, and State v. Bundy, 24 S. C. 442, 53 Am. Rep. 263; but all the cases recognize that such rule is subordinate to the cardinal rule in criminal cases that the state must prove every element of the crime charged beyond a reasonable doubt. In criminal cases 'the preponderance of the evidence' is with the defendant when the evidence raises a reasonable doubt of his guilt, since the case of the state is thereby overthrown. In State v. Paulk, supra, approved in State v. Bundy, supra, the rule in this state is thus expressed: 'Where the state

fully proves a prima facie case, and a special defense, such as insanity, alibi, etc., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained beyond all reasonable doubt.' Such was the practical effect of the charge, treated as a whole."

20—State v. Davis, 186 Mo. 533 (539), 85 S. W. 354 (356).

"This instruction was approved in State v. Adair, 160 Mo. 391, 61 S. W. 187; and while in State v. McGinnis, 158 Mo. 123, 59 S. W. 83, a different form was indicated as proper, it was not ruled that the same principle might not be expressed in fewer words or in different form."

21—People v. Resh, 107 Mich. 251, 65 N. W. 99 (100).

The court said: "It requires no discussion to show the correctness of this instruction. The respondent relies on People v. Pearsall, 50 Mich. 233, 15 N. W. 98, but the instruction there given is in no respect similar to the instruction in this case."

if the evidence upon that point raises a reasonable doubt of the defendant's presence at the time and place of the commission of the crime charged. The burden is upon the defendant to prove this defense for himself by a preponderance of evidence, that is, by the greater and superior evidence.²²

(d) This defense of alibi is a legitimate defense, and if, from a consideration of the evidence, you should be convinced that the defendant was not in this county at the time when it is claimed the cattle in question were stolen, or if you entertain a reasonable doubt as to his whereabouts at that time, he would be entitled to an acquittal on this defense of alibi.²³

(e) As regards the defense of an alibi, the jury are instructed, that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal; it is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.²⁴

(f) The court instructs the jury that the burden of proof is on the accused to verify the alibi, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury. Any evidence whatever of alibi is to be considered in the general case with the rest of the testi-

22—State v. Thomas, — Ia. —, 109 N. W. 900 (902).

"It is claimed that this instruction is erroneous because it does not properly present the rule adopted by this court, and which is in some respects peculiar to this state, that, while the defense of alibi must be made out for defendant by a preponderance of the evidence relating thereto, nevertheless the defendant is entitled to acquittal if all the evidence, including that relating to alibi, leaves in the minds of the jury a reasonable doubt as to defendant's guilt of the crime charged. State v. Hogan, 115 Iowa 455, 88 N. W. 1074; State v. McGarry, 111 Iowa 709, 83 N. W. 718; State v. Hathaway, 100 Iowa 225, 69 N. W. 449; State v. Maher, 75 Iowa 77, 37 N. W. 2. The only question, as we think, is whether, in the instruction quoted, the jury was directed to take into account the evidence relating to alibi in determining whether they were satisfied beyond a reasonable doubt on all the evidence as to defendant's guilt, and we are satisfied that the instruction plainly conveys this idea. The jury was told to acquit if the evidence as to alibi raises a reasonable doubt of the defendant's presence at the time and place of the commission of the crime charged.' Certainly it must

have been understood from this instruction that, in determining whether there was a reasonable doubt of defendant's guilt, the evidence as to alibi should be considered regardless of whether defendant established the defense of alibi by a preponderance of the evidence. The instruction is quite similar in this respect to one which was held not prejudicial to the defendant in State v. Worthen, 124 Iowa 408, 100 N. W. 330. It is said in the Worthen case, that the instruction given was more favorable to the defendant than it should have been, and perhaps the same thing is true in this case; but at any rate there was clearly no error prejudicial to defendant."

In Long v. State, 42 Fla. 612, 28 So. 775, citing Adams v. State, 28 Fla. 511, 10 So. 106, 14 L. R. A. 253, the court approved a similar instruction and held that a refusal to give it constituted error.

23—Catron v. State, 52 Neb. 389, 72 N. W. 354 (355).

The court said that this instruction was of the same character as those considered in Barney v. State, 49 Neb. 515, 68 N. W. 636.

24—State v. Harden, 46 Ia. 623; State v. Jaynes, 78 N. C. 504; Howard v. State, 50 Ind. 190; State v. Watson, 7 S. C. 63.

mony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence.²⁵

(g) One of the defenses interposed by the defendants, in this case, is what is known, in law, as an alibi, that is, that the defendants were at another place at the time of the commission of the crime, and the court instructs the jury, that such a defense is as proper and as legitimate, if proved, as any other, and all the evidence bearing upon that point should be carefully considered by the jury; and if in view of all the evidence, the jury have any reasonable doubt as to whether the defendants were in some other place when the crime was committed, they should give the defendants the benefit of the doubt, and find them not guilty.²⁶

(h) The court instructs the jury that if the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. The accused is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed. And you will understand also that the attempt of the accused to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove his presence beyond a reasonable doubt.²⁷

§ 2445. Defendant Should Be Given the Benefit of a Reasonable Doubt of His Presence at the Commission of the Crime. (a) When a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi. One of the defenses interposed by the defendant in this case is what is known as an "alibi;" that is, that the defendant was in another place at the time of the commission of the crime. The court instructs the jury that such defense is as proper and legitimate, if proved, as any other, and all evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether defendant was in some other place when the crime was committed, they should give him the benefit of the doubt, and acquit him. As regards the defense of an alibi, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the defense upon that point

25—In *Henderson v. State*, 120 Ga. 504, 48 S. E. 167 (1903), this form of instruction, the court said, has been frequently approved by this court, citing *Miles v. State*, 93 Ga. 120, 19 S. E. 805, 44 Am. St. Rep. 140; see also *Boston v. State*, 94 Ga. 591, 20 S. E. 98; *Cantrell v. State*, 95 Ga. 500, 20 S. E. 218.

26—*Davis v. State*, 5 Bax. (Tenn.) 612; *Wiley v. State*, 5 Bax. 662.

In *Conrad v. State*, 132 Ind. 254, 31 N. E. 805, a similar instruction was given and the jury were told that an alibi is to be judged as any other defense.

27—*People v. Lang*, 142 Cal. 482, 76 Pac. 232 (1903).

raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.²⁸

(b) If the jury have a reasonable doubt, arising from the evidence, or from the want of evidence, whether the defendant was present at the time and place where said offense was committed (if it was), then it would be the duty of the jury to give the defendant the benefit of such reasonable doubt (if any), and acquit him.²⁹

IDENTITY OF ACCUSED.

§ 2446. Identity of Accused — Homicide — Larceny. (a) The court instructs the jury, so far as the identity of the defendant is concerned, that, if they believe, from the evidence and the circumstances proved, that there is a reasonable doubt whether the witness might not be mistaken as to his identity, then the jury would not be authorized to convict the prisoner; the corroborating circumstances tending to establish his identity must be such as, with other testimony, produces a degree of certainty in the minds of the jury so great that they can say that they have no reasonable doubt of the identity of the defendant.³⁰

(b) If the jury are satisfied from the evidence, beyond a reasonable doubt, that a larceny was committed in manner and form as charged in the indictment by some one or more of the defendants, and that this was done in pursuance of a common purpose entertained by all for the benefit of all, and according to a plan or scheme contrived or agreed upon by all of the defendants, then the jury will be warranted in finding them all guilty, although you may be in doubt as to the identity of the particular defendant who actually took and carried away the property in question.³¹

§ 2447. Identification of Defendant. The court instructs the jury that unless they believe beyond every reasonable doubt that the witness H. C. saw and recognized the defendant on the night of the killing, as stated by him, they will acquit the defendant.³²

§ 2448. Doubt as to Defendant or Somebody Else. (a) The court instructs the jury, that before they can convict the defendant in this

28—State v. McGinnes, 158 Mo. 105, 59 S. W. 83 (88).

"It is challenged because the court used the phrase 'if proved.' The language is most unfortunate, and was criticised by this court in State v. Taylor, 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; but, when taken altogether, we think it clearly informed the jury that if, in view of all the evidence, the jury had a reasonable doubt of the presence of the defendant at the time and place of the commission

of the crime, they should acquit him, and that it was sufficient, if the defense raised a reasonable doubt of his presence at the time and place of the homicide, to acquit him."

29—Tune v. State, — Tex. Cr. App.—, 94 S. W. 231 (232).

30—Painter v. People, 147 Ill. 444 (469), 35 N. E. 64.

31—Neville v. State, 60 Ind. 308.

32—Petty v. State, 83 Miss. 260, 35 So. 213, 102 Am. St. 442.

case, it must appear, from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant or some one else is the guilty party.³³

(b) The jury are instructed, that it is a rule of law that although it may be positively proved that one of two or more persons committed a crime, yet if there is any reasonable doubt as to which is the guilty party, all must be acquitted.³⁴

ARREST.

§ 2449. **When Officer May Arrest without Warrant—Right of Private Individual to Do So.** (a) The court instructs the jury that an officer or a private individual may arrest, without a warrant, one whom he has reasonable grounds to suspect of having committed a felony.

(b) An officer or a private individual may arrest, without a warrant, a person upon suspicion of felony, upon the information of a third person.

(c) An officer or a private citizen may lawfully arrest, without a warrant, one whom he has reasonable grounds to suspect of having committed a felony; and it is immaterial whether the suspicion arises out of information given by another, or whether it arises out of the officer's own knowledge.

(d) An individual without a warrant, * * * acting in good faith, may arrest a particular individual for having committed a felony in a sister state on an occasion already passed.

(e) The court instructs the jury that any one liable to be arrested as a fugitive from justice by warrant might be arrested by a private person without warrant, from necessity and sound policy, on showing that *prima facie* a felony or some crime punishable either capitally or by imprisonment for one year or upwards in a state prison was in fact committed, and the prisoner was the perpetrator.

(f) The court instructs the jury that on view of a felony committed, or upon certain information that a felony has been committed, or upon view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate to be dealt with according to law.³⁵

(g) Where it is shown by satisfactory proof to a peace officer, upon

33—Lyons v. The People, 68 Ill. 271.

34—Campbell v. People, 16 Ill. 1.

35—State v. Whittle, 59 S. C. 297, 37 S. E. 923 (1907).

the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused of such felony. In order to make the attempted arrest of defendant by G. lawful (if you believe that, at the time of the killing of H. S., G. was making such attempt) you must find the existence of all the following facts, to-wit: (1) That G., as sheriff, had satisfactory proof that defendant had committed a felonious killing of M. in Karnes county; (2) that such proof had been made upon the representation of a credible person; (3) that the defendant was about to escape; and (4) that G. had no time to procure a warrant for defendant's arrest; or (5) that if he had time to procure such warrant he made no effort to do so. The absence of any one or more of these facts would make the attempted arrest unlawful, and you should in that event so find.³⁶

§ 2450. **Unnecessary Violence in Making Arrest.** The court instructs the jury that under the law an arrest may be made by a peace officer in obedience to a warrant of arrest delivered to him, or without a warrant where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony; and the court tells you that a marshal is a peace officer. The court further tells you that an arrest is made by placing the person in restraint, or by his submitting to the custody of the person making the arrest. But in making the arrest no unnecessary force or violence shall be used, and in this case, although the jury may believe from the evidence that the defendant was a peace officer, and as such was undertaking to arrest the prosecuting witness, B., still, if you further believe from the evidence beyond a reasonable doubt that the defendant used greater force or violence in making the arrest than was apparently necessary, he would not be justified or excusable under the law, and you will find him guilty.³⁷

36—Cortez v. State, 43 Tex. Cr. App. 375, 66 S. W. 453 (459).

Held error to refuse this instruction where defendant was charged with murder of sheriff's deputy who was attempting to arrest him. "Because if there was no purpose on the part of the sheriff, and those with him, to find and arrest appellant for the killing of Sheriff M., then the acts of himself and those accompanying him were without excuse."

37—Gillespie v. State, 69 Ark. 573, 64 S. W. 947 (948), 13 Am. Cr. Rep. 123, says that "this instruction, taken with the following one, fully states the law, and the court erred in not giving it." Magness v.

State, 67 Ark. 594, 50 S. W. 554, 59 S. W. 529:

The court instructs the jury that if B, at the time of the assault complained of, was violating a city ordinance, or was committing a misdemeanor, the defendant, as city marshal, had a right, and it was his duty, to arrest him, and to use force, if necessary, to do so. He was not obliged to call any one to his assistance. It is not the law that all other means must be resorted to before using force to make the arrest. The court instructs you that, if defendant struck B. while making the arrest, and at the time that said B. was attempting to strike defendant, or

§ 2451. **Deputy Sheriff Making Arrest for Misdemeanor Can Kill Only in Self Defense.** Defendant had the right to go to the Pratt house for the purpose of making an arrest and if, while in the vicinity, and without justifiable cause or provocation, the inmates of the house began to shoot at him, and he had reasonable grounds to apprehend a design on the part of the inmates of the house to do him great personal injury, and that there was imminent danger of said design being accomplished, then the assault on the part of defendant was justifiable and the jury should find him not guilty.³⁸

§ 2452. **Right of Officer to Make Arrest—Shooting the Officer for Purpose of Escape—What Constitutes an Act of Selling Liquor.** Gentlemen of the jury, an arrest by a peace officer of a person is made by taking the person into actual custody. If you believe from the evidence in this case beyond a reasonable doubt that C. was a police officer of the city of D., B. county, Ky.; that the defendant, R. O., within the corporate limits of the city of D., in the presence of said C., while he was a police officer, sold by retail, or was engaged in the act of selling beer by retail, to any person or persons,—then it was right and the duty of said C. immediately and without warrant to arrest defendant by taking him into actual custody. And if you further believe from the evidence beyond a reasonable doubt that within the corporate limits of said city, and before the finding of the indictment, C. either arrested or undertook to arrest the defendant for that offense, and that while defendant was under arrest, or that while C. was endeavoring to arrest him, the defendant, for the purpose of breaking the arrest, or for the purpose of preventing its accomplishment, willfully and knowingly shot and killed C. with a pistol, knowing at the time that C. was a police officer, and the rea-

to do him injury, or if it reasonably appeared to defendant, viewed from his standpoint alone, by words or acts, or by words and acts, that B. was about to make an unlawful attack upon him, then and in that event the defendant had a right to use whatever means was necessary to protect himself from serious bodily injury. And this is the case, although it subsequently appeared that the defendant used more force than was actually necessary to protect himself from serious bodily injury or to make the arrest. In other words, the defendant had a right to act upon danger, or reasonable appearance of danger.

38—Territory v. Taylor, 11 N. M. 589, 71 Pac. 489 (492).

"This instruction sets out what we understand to be the law. Even a sheriff or his legally appointed deputy has no right to make an unjustifiable assault, and one

which is not warranted, upon any one whom he proposes to arrest. He must use no more force than the nature of the case warrants, and if he exceeds such limits then he may be liable for damages in a civil suit. It is true that a large discretion is vested in an officer as to the force necessary to be used in making an arrest. It is 'for the jury to decide what those circumstances were, and whether the posse acted as reasonable men would have acted in like situation. The question is one of mixed law and fact.' Territory v. McGinnis, 10 N. M. 264, 61 Pac. 208. In the case at bar the testimony as to what took place before the shooting is conflicting, and it was for the jury to decide after hearing all the evidence. The jury evidently believed that the appellant assaulted N. without any just cause for so doing and consequently returned a verdict of guilty."

son C. was arresting or attempting to arrest him, then you will find the defendant guilty of willful murder, and fix his punishment at death, or imprisonment in the penitentiary for the period of his natural life, in your discretion. To constitute an act of selling beer within the meaning of this instruction, it is not necessary that there should have been an express agreement between the parties that money should be paid for the beer, nor that the money should have been actually delivered in payment. It is sufficient, to constitute a sale, if the defendant and the person or persons who called for it actually understood and intended that it should be paid for. The words "in his presence," as used in this instruction, do not mean exclusively that C. should have actually heard the call for beer, or that he should actually have witnessed the delivery of it. It would in law be deemed to be in his presence if he was so close to the parties at the time as to witness such part of the transaction as would furnish to him a reasonable assurance of the nature of the act done and of the identity of the seller.³⁹

§ 2453. Right of Sheriff to Call Posse. The jury are instructed that in substance, under the statutes of this territory (Section 1409, Comp. Laws 1897) a sheriff or his legally constituted deputy may call on any citizen or citizens to assist him in the execution of his office, and that any person who shall refuse such assistance without a sufficient excuse shall be subject to penalty.⁴⁰

§ 2454. When a Refusal to Assist in Making Arrest Is Justified. If the jury believe that under all the circumstances, at the time of said summoning by the said W. to aid in making the arrest that an attempt to make said arrest, or to aid therein, would have been both futile and dangerous, then the defendant must be acquitted.⁴¹

39—Approved in *Quinn v. Commonwealth*, 23 Ky. L. 1302, 63 S. W. 792 (793).

40—"This is undoubtedly the law in this territory." *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489 (492).

41—*Dougherty v. State*, 106 Ala. 63, 17 So. 393 (394).

The court held that "when one is duly summoned by an officer, having lawful authority to assist him in making an arrest, the duty of the citizen to obey is absolute. 'His obligation,' says Mr. Wharton, 'to come to the aid of the sheriff or other officer, is just as imperative as that imposed on the latter, to see that the community suffer no harm from licentiousness.' Whart. Cr. Law § 652, and authorities cited; Whart. Cr. Pl. & Prac. §§ 10, 11. The citizen while acting actually or constructively, under the officer's command, becomes pro hac vice an officer, and is clothed with the same duties, responsibilities

and protection. An officer cannot decline to arrest because it is dangerous to do so, else, the desperate and lawless might go unchallenged for crime; and for the very reason, that when resistance is made to his lawful authority, and it becomes hazardous to make an arrest, then, for the sake of saving human life—either his own or that of the criminal—he is authorized by law to summon the bystanders to his assistance. Obedience to such a summons, because it involves danger, cannot be refused by the private citizen, any more than the duty to make the arrest can, for the same reason be declined by the officer. The fact that there is danger involved is the very thing which calls for and makes obedience a duty. Nor can the citizen constitute himself a judge of the necessity for obedience, and the circumstances under which he should obey, in such cases. If he should

§ 2455. Resisting Officer in Execution of a Writ—Personal Animosity Immaterial. In case you believe beyond a reasonable doubt that the defendants conspired to resist any officer in the execution of the writ of possession read in evidence, then it would be immaterial whether they had any personal animosity or cherished any malice towards G. personally.⁴²

ATTEMPT TO ESCAPE—FLIGHT.

§ 2456. Attempt to Escape—How Considered. (a) Evidence has been introduced as to an attempted escape from jail by the defendant while in the custody of the sheriff of this county, on this charge. If you find, from the evidence, that the defendant did thus attempt to escape from custody, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of guilt or innocence.⁴³

(b) If you find that burglary was committed as charged in the information, evidence of flight of the accused may be considered in determining the question as to whether he was the one who committed the act.⁴⁴

§ 2457. Flight Raises Presumption of Guilt. (a) The court instructs the jury that flight raises the presumption of guilt. Therefore, if the jury believe from the evidence that the defendant, recently after the commission of the offense alleged in the indictment, fled from H. county to avoid arrest and trial for the forging the note offered in evidence, then you may take this fact into consideration in determining his guilt or innocence.⁴⁵

(b) The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged—if you find from the evidence that the defendant fled,—is a circum-

be excused, because, in his opinion, assistance, if rendered, would be futile and dangerous, and because he supposed the officer was not discharging his full duty, it would render the statute nugatory. The law necessarily requires the judgment and summons of the officer, and not the opinion and opinion of the citizen, the measure of the duty of the latter to obey. *Watson v. State*, 33 Ala. 61, 3 So. 441, 7 Am. Crim. Rep. 64. But the officer is under obligation to have proper regard for the life and safety of the party whom he calls to aid him in making an arrest, and not recklessly, and for no good purpose to expose his life and limb to useless danger. And in this case it may be said, if the jury believed under all the circumstances, that

at the time an attempt to make said arrest, or to aid therein, would have been both futile and dangerous to the life and limb of defendant, as the charge requested clearly implies from all the facts of the case, it would have been their duty to acquit the defendant."

42—*Smith v. State*, 46 Tex. Cr. App. 267, 81 S. W. 936 (944).

Citing *Kipper v. State*, 8 Tex. Ct. Rep. 852, 77 S. W. 611.

43—*Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. Cr. Rep. 601.

44—*State v. Deatherage*, 35 Wash. 326, 77 Pac. 504 (506).

45—This instruction was given in the trial of a charge of forgery and approved in *State v. Milligan*, 170 Mo. 215, 70 S. W. 473 (474).

stance in establishing his guilt not sufficient in itself to establish guilt, but a circumstance which the jury may consider in determining the probabilities for or against him—the probabilities of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts called out in the case.⁴⁶

(c) Flight raises the presumption of guilt, and, if the jury believe and find from the evidence that after the commission of the offense alleged in the information, that the defendant fled from the state, and tried to avoid arrest and trial for said offense, then the jury may take this fact into consideration in determining his guilt or innocence.⁴⁷

§ 2458. **Flight to Avoid Arrest as Prima Facie Evidence—Homicide.** (a) If you find from the evidence that the defendant, upon being informed that he was suspected of taking the life of said B., fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which *prima facie* is indicative of guilt.⁴⁸

(b) Now, then, you consider his conduct at the time of the killing and his conduct afterwards. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him, because the law says unless it is satisfactorily explained—and he may explain it upon some theory, and you are to say whether there is any effort to explain it in this case—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience that teaches us to know whether we have done right or wrong in a given case.⁴⁹

§ 2459. **Flight as Tending to Show a Consciousness of Guilt—Significance When Defendant Is Insane.** (a) The flight of a person

46—This instruction was given where homicide was the charge and approved in *State v. Stentz*, 33 Wash. 444, 74 Pac. 588 (589).

47—*State v. Hattman*, 196 Mo. 110, 94 S. W. 237 (240).

48—*State v. Seymore*, 94 Iowa 699, 63 N. W. 661 (664).

"It is insisted that this instruction was erroneous. There was evidence in the case to establish the facts upon which it is predicated, and the rule of law announced has been approved by this court in the following cases: *State v. James*, 45 Iowa 412; *State v. Schaffer*, 70 Iowa 371, 30 N. W. 639; *State v. Arthur*, 23 Iowa 430; *State v. Boyer*, 79 Iowa 330, 44 N. W. 558. It is said the instruction is faulty because it does not relate to fleeing

from arrest for the crime charged; that under the rule announced, if defendant fled the country to avoid arrest for the larcenies he had committed, such fact would be a circumstance *prima facie* indicative of his guilt of the crime of murder. We do not think the instruction will bear this interpretation. The 'arrest' referred to in the instruction plainly means arrest for taking the life of B. No other construction can be placed upon it without doing violence to the language used. The instruction undoubtedly gives a correct proposition of law, and one having support in the record."

49—*Allen v. United States*, 164 U. S. 492 (498), 17 S. Ct. 154.

suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case.⁵⁰

(b) The court charges the jury that, if [you believe from the evidence that] the defendant fled from the consciousness of guilt, this [his flight] may be considered by the jury, in connection with all other evidence, as circumstance tending to show guilt.⁵¹

§ 2460. Flight as Evidence of Guilt—Explained by Defendant. You are instructed that the defendant insists, if there be evidence of the fact that after these were found that he absconded and fled, he insists that the truth is he did not flee by reason of the fact that he was guilty of this charge, but he claims that part of his conduct is attributable to the fact that he was charged with complicity with another matter, and that was the reason he left, and that it had no connection with the charge made in this case.⁵²

§ 2461. Flight May or May Not Be Considered as Proof of Guilt—Depends on Motive—Explained. The flight of a defendant in a criminal case, may or may not be considered as a circumstance tending to prove guilt, depending on the motive which prompted it,—whether a consciousness of guilt and a pending apprehension of being brought to justice caused the flight, or whether it was caused from some other and more innocent motive,—and the jury may look to the fact that he went to police headquarters and gave himself up.⁵³

50—*People v. Easton*, 148 Cal. 50, 82 Pac. 840 (841).

"No attack is made upon the soundness of this instruction as a proposition of law, but it is said that under the facts of this case, where the defense was insanity the giving of it was prejudicial to the defendant. Herein it is argued that, if one is insane when he commits a violent and unlawful attack upon another, his immediate flight cannot affect the question of his legal responsibility. This is quite true; but it was for the jury to say whether or not the defendant was insane, and, if they so found him, his flight was, of course, meaningless. If he was not insane, then his flight had the significance which the law attaches to it."

51—Approved as one of a series, without the words bracketed, in *Nicholson v. State*, 117 Ala. 32, 23 So. 792.

52—*Moncrief v. State*, 99 Ga. 295, 25 S. E. 735.

53—*White v. State*, 111 Ala. 92, 21 So. 330 (331).

"In *Bowles v. States*, 58 Ala. 335, we said: All evasions or attempts

to evade justice, by a person suspected or charged with crime, are circumstances from which a consciousness of guilt may be inferred, if connected with other criminating facts. Of themselves they may not warrant a conviction, but they are relevant as evidence, and the weight to which they are entitled it is the province of the jury to determine under proper instructions from the court. * * * Flight for which no proper motive can be assigned, and which remains unexplained, is a circumstance, all authorities agree. It is proper to submit to the jury in connection with other evidence tending to show the guilt of the accused. In the old common law, the rule which passed into a maxim was that flight was equivalent to a confession of guilt. 'Fatetur Facinus qui iudicium fugit.' At the present day it is regarded as a mere criminating circumstance indicative of guilt, and of an attempt to evade justice, which is subject to infirmative considerations that may deprive it of all force. The unfavorable inference against the prisoner

§ 2462. **Attempt to Escape—Inference to Be Drawn Therefrom May Be Either Strong or Slight—Terms Explained.** Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong, but if the attempt was made after many months of confinement and escape comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time.⁵⁴

§ 2463. **Failure to Flee or Voluntary Surrender No Evidence of Innocence.** The fact that, when charged with the commission of a crime, the defendant refuses to flee, but surrenders himself to the proper authorities, cannot be considered as showing his innocence of the offense charged.⁵⁵

§ 2464. **Attempt to Release Prisoner from Jail by Delivering Tools to Prisoners.** The jury are instructed that the statutes of the state of Illinois make a distinction between an attempt to set at liberty a person in the custody of an officer and an attempt to convey tools to a person confined in jail, and that a person indicted for one

would be lessened if he voluntarily returned and surrendered himself to answer the accusation. * * * We think it permissible to prove the fact of flight, and all the facts connected with it, either to increase or diminish the probative force of the fact itself. In *Sylvester v. State*, 71 Ala. 17, we declared a principle in substantially the language of the charge under consideration. The evidence shows that the defendant committed the homicide about 2 or 3 o'clock in the morning, that he fled from the place, and went directly to police headquarters, about two miles distant, reported to the sergeant of police what he had done, and surrendered himself and the gun with which he had committed the act to the officer. There is in the evidence no other fact or circumstance touching the subject of flight. It is evident, therefore, that what the defendant did, in respect

of flight, carried with it no evidence of a consciousness of guilt. It was no more than a commission of the homicide, flight from the place, and an immediate, voluntarily surrender by the perpetrator to the constituted authorities, confessing that he had committed it. Referred to this state of proof, the charge was correct, had no misleading tendency because of the singling out of a fact from other facts, and ought to have been given. It was not objectionable for referring specially to the duty of the jury to look to the surrender, for that, with the accompanying declarations of the defendant which constituted a part of the surrender, was the only circumstance which the jury could consider."

54—*Bird v. U. S.*, 187 U. S. 118 (131), 23 S. Ct. 43.

55—*Walker v. State*, 138 Ala. 53, 35 So. 1011 (1012).

of such offenses cannot be convicted of the other. The court instructs the jury for the defendants that although you may believe, from the evidence, that the defendants on trial did offer to pay J. to take tools to the jail for G. and loaned him money to buy the file testified to, yet you should find them not guilty.⁵⁶

56—Patrick v. People, 132 Ill. 529 (534), 24 N. E. 619.

"The conviction," the court said, "is claimed under section 87 of the Criminal Code (Rev. Stat. 1874, chap. 38, p. 364), which reads thus: 'Whoever sets at liberty or rescues or attempts to set at liberty or rescue a person charged with the commission of any capital offense or crime punishable by imprisonment in the penitentiary, before the conviction of such person, shall be imprisoned in the penitentiary not exceeding five years and fined not exceeding \$1,000.' The question, therefore, necessarily arises, what constitutes 'an attempt to set at liberty' a person? The statute does not define 'an attempt' and we must hence resort to the common law to ascertain what in a legal sense is its meaning. Bouvier in his Dictionary (vol. 1, p. 138) says: 'An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it.' And Wharton says: 'To make an act an indictable attempt it must be a cause, as distinguished from a condition.' 2 Crim. Law (7th ed.) sec. 2693. See also People v. Murray, 14 Cal. 159; Griffith v. State, 26 Ga. 493.

"Since the mere delivery of the saws, knives and file to G. does not manifestly open any way of escape from the jail, it is plain there is no relation of cause and effect between that which J. tried

to do, and that which the indictment charges and the jury found was committed. The saws, knives and file were only implements or tools that might be used in effecting an opening in the jail, and procuring and attempting to deliver them to G. was therefore simply attempting to prepare for an attempt to make an escape. They were means, or, adopting the language of Wharton, 'conditions' in making an attempt to escape.

"It is provided by Section 92 of our Criminal Code (Rev. Stat. 1874, chap. 38, p. 365) that 'Whoever conveys * * * into any jail * * * any instrument, tool or other thing adapted or useful to aid a prisoner in making his escape with intent to facilitate the escape of any prisoner * * * shall be punished,' as therein provided, but which is only by confinement in the county jail and by fine. And since, by section 273 of the same Code, all attempts to commit offenses prohibited by law are indictable and punishable by confinement in the county jail and by fine, it would seem clear that the offense here proved is that contemplated by these sections, and not that contemplated by section 87 of the Criminal Code, supra, and that the punishment should not have been by confinement in the penitentiary, but by confinement in the county jail and fine only. The Circuit Court therefore erred in refusing to give the instruction asked."

CHAPTER LXXXVII.

CRIMINAL—BURDEN OF PROOF—CHARACTER EVIDENCE— CIRCUMSTANTIAL EVIDENCE.

See Erroneous Instructions, same chapter head, Vol. III.

BURDEN OF PROOF.

- § 2465. Burden of proof on the state—Presumption of innocence.
- § 2466. Burden of proof—Homicide.
- § 2467. Every essential element charged must be proved to satisfaction of every juror.
- § 2468. Burden never shifts—Excuse and justification.
- § 2469. Defendant not required to prove excuse or justification—Burden of proof.
- § 2470. Burden of proving self-defense.
- § 2471. Presumption of intent—Burden of disproving.
- § 2472. Burden of proving extenuating circumstances is on the defendant.
- § 2473. Insanity—Burden of proving on defendant.
- § 2474. Burden of proof—Quantum of evidence to be produced by defendant.
- § 2475. Burden of proof—Presumption as to degree of murder.
- § 2484. Previous reputation for peace and quietude—Homicide.
- § 2485. Reputation—Relative weight of in case when positive or circumstantial evidence is relied on.
- § 2486. Previous reputation for honesty.
- § 2487. Defendants—Previous disposition towards children—Infanticide.
- § 2488. Previous bad character of defendant.
- § 2489. Character of deceased for violence immaterial when killing unlawful and premeditated.
- § 2490. Character of deceased—Same offense to kill bad person as to kill a good one.

CIRCUMSTANTIAL EVIDENCE.

CHARACTER EVIDENCE.

- § 2476. Jury may take into consideration character and motives.
- § 2477. Defendant's character.
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- § 2480. Evidence of previous good character alone may acquit.
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- § 2482. Previous good character—Requires stronger proof of malice.
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- § 2491. Circumstantial evidence defined.
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- § 2493. Circumstantial evidence is competent.
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- § 2495. Positive and circumstantial evidence distinguished.
- § 2496. Elements necessary for conviction.
- § 2497. Facts must all be consistent with guilt and inconsistent with innocence.
- § 2498. No reasonable theory of innocence must be possible.
- § 2499. A single inconsistent fact acquits.
- § 2500. Circumstances proven must be consistent with one another, and, taken together, must exclude every reasonable hypothesis of innocence.
- § 2501. Certainty required.
- § 2502. Circumstantial evidence need not be conclusive—Degree of proof.

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| <p>§ 2503. Only inferences or presumptions necessarily arising from proved circumstances should be considered.</p> <p>§ 2504. Conviction upon circumstantial evidence alone—Homicide — Extenuating circumstances.</p> <p>§ 2505. What must be proved in order to convict on.</p> <p>§ 2506. Circumstantial evidence, weight of—How to be considered by jury.</p> | <p>§ 2507. Weight of—As conclusive as direct.</p> <p>§ 2508. Credibility—Of circumstantial evidence.</p> <p>§ 2509. Murder may be proven by facts and circumstances attending the killing—Absence of body.</p> <p>§ 2510. Failure to use deadly weapon at hand.</p> <p>§ 2511. Instruction when testimony is largely circumstantial.</p> <p>§ 2512. Inference of fact.</p> |
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BURDEN OF PROOF.

§ 2465. Burden of Proof on the State—Presumption of Innocence.

(a) The court instructs the jury that the burden of proof in this case is on the state to prove to the satisfaction of the jury, beyond all reasonable doubt, that the defendant is guilty as charged in the indictment; and unless you are so satisfied of his guilt beyond reasonable doubt you will find him not guilty.¹

(b) The law presumes every man to be innocent, and in this case the burden of proof is upon the state, and, to entitle her to a conviction of the defendant, she must prove every element material of the offense charged to your satisfaction beyond a reasonable doubt, and to the satisfaction of each member of the jury.²

(c) The prisoner at the bar is presumed to be innocent until he is proven to be guilty. He is not required to prove his innocence, but may rest upon the presumption in his favor until it is overthrown by positive, affirmative proof. The burden is therefore on the state to establish to your satisfaction, beyond any reasonable doubt, the guilt of the prisoner as to the crime charged in this indictment, or any other lesser one included in it. If you entertain any reasonable doubt as to any fact or element necessary to constitute the prisoner's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. And even where the evidence demonstrates probability of guilt, yet if it does not establish it beyond reasonable doubt, you must acquit the prisoner. You are prohibited by law and your oath from going beyond the evidence to seek for doubts upon which to acquit the prisoner, but you must confine yourselves strictly to a dispassionate consideration of the testimony given upon the trial. You must not have recourse to extraneous facts and circumstances in reaching your verdict. You are the exclusive judges of the facts. You find from the evidence what facts have been proven and what have not.³

1—Strother v. State, 74 Miss. 247, 21 So. 147 (148), 34 L. R. A. 472.

2—Rains v. State, 137 Ind. 83, 36

N. E. 532 (534); State v. Linhoff, 121 Iowa 632, 97 N. W. 77 (78).

3—State v. Aspara, 113 La. 940, 37 So. 883 (889).

§ 2466. **Burden of Proof—Homicide.** The court instructs the jury that up to the moment when the killing is proved, the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless as before stated, the proof on the part of the prosecution tends to show the crime committed only amounts to manslaughter, or that the defendant was justified or excused in doing the act.⁴

§ 2467. **Every Essential Element Charged Must Be Proved to Satisfaction of Every Juror.** (a) The state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror, beyond a reasonable doubt.⁵

(b) The court instructs the jury, that the law presumes the defendant innocent, and that the burden of proving⁶ beyond all reasonable doubt every material allegation necessary to establish defendant's guilt rests upon the state throughout the trial.⁶

(c) The court instructs the jury that the prosecution must make out and prove to the satisfaction of the jury, beyond all reasonable doubt, every material allegation in the information, and unless that has been done the jury should find the defendant not guilty.⁷

(d) The court instructs the jury that the burden is upon the prosecution to prove beyond a reasonable doubt, by competent evidence, every essential ingredient of the crime charged in this indictment, before the prisoners, or either of them, can be found guilty thereof.⁸

(e) The court instructs the jury that as a matter of law, the burden of proof is upon the people, and it is for them to prove their case by a preponderance of evidence.⁹

(f) The court instructs you that when all the evidence in the case is before the jury the burden of proof remains where it started, with the prosecution.¹⁰

§ 2468. **Burden Never Shifts—Excuse and Justification.** The court instructs the jury that the law presumes that the defendant is innocent, and that the burden of proving beyond all reasonable doubt every material allegation necessary to establish defendant's guilt rests upon the state throughout the trial, and that the burden of

4—People v. Mathai, 135 Cal. 442, 67 Pac. 694 (695).

"The whole instruction certainly presents a fair exposition of the law. People v. Milner, 122 Cal. 179, 54 Pac. 837."

5—State v. Ryno, 68 Kan. 348, 74 Pac. 1114 (1116), 64 L. R. A. 303.

6—Blalock v. State, 79 Miss. 517, 31 So. 105.

7—Hill v. State, 42 Neb. 503, 60 N. W. 916.

8—State v. Brinte, — Del. —, 53 Atl. 258.

9—Johnson v. People, 140 Ill. 350, 29 N. E. 895.

10—People v. Rich, 133 Mich. 14, 94 N. E. 375.

proof never shifts to the defendant; and that the law does not require the defendant to prove by his evidence excuse or justification, but that if, from all the evidence, the jury entertains a reasonable doubt, as to whether the killing proceeded from deliberate and premeditated intent on the part of the defendant, or, on the other hand, from the principle of self-defense, they must find the defendant not guilty.¹¹

§ 2469. Defendant Not Required to Prove Excuse or Justification—Burden of Proof. You are instructed that the burden of proof never shifts to the defendant and that the law does not require the defendant to prove by his evidence excuse or justification; but if from all the evidence the jury entertains a reasonable doubt as to whether the killing was done in the heat of passion, or proceeded from the principle of self-defense, you will find the defendant not guilty.¹²

§ 2470. Burden of Proving Self-Defense. (a) The court instructs the jury that if the use of deadly weapon is proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and, to avail him, he must prove such defense by a preponderance of the evidence.¹³

(b) The jury are instructed that, the killing being proved, the burden of proving circumstances that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the homicide.¹⁴

(c) When the defendant sets up self-defense in justification or excuse of a killing, the burden of proof is upon him to show the jury

11—*Blalock v. State*, 79 Miss. 517, 27 So. 642.

The case was reversed and remanded for the refusal of this instruction as asked, and for erroneously modifying the same by adding the phrase "of the charge of murder." The same case was again before the Supreme Court two years later and reported in 79 Miss. 517, 31 So. 105.

12—*Blalock v. State*, 79 Miss. 517, 31 So. 105 (106).

13—*State v. Staley*, 45 W. Va. 792, 32 S. E. 198 (199).

14—*Duncan v. People*, 134 Ill. 110 (118), 24 N. E. 765.

The court said: "It is claimed that this instruction assumed, and therefore took from the jury, the question of the killing of the deceased by the defendant, and also excused the prosecution from proving in the first instance that the homicide was unlawful, willful and felonious. It is clear that neither of these criticisms can be sustained. This, like the four preceding instructions, was a mere copy

of a certain provision of the criminal code, this being in the exact language of section 155 of the act of 1874 in relation to criminal jurisprudence. It was, and was doubtless understood by the jury to be a mere statement of an abstract legal proposition applicable alike to all prosecutions for homicide, and the words with which it began, namely 'The killing being proved' could not have been understood as an assumption that in this case the killing had been proved, but a statement of the rule that when in any prosecution for a homicide the killing is proved, the burden of justifying or excusing the homicide is upon the accused. Nor did the instruction in any just sense relieve the prosecution from proving an unlawful and felonious killing. It merely announced the statutory rule that the killing of one human being by another is *prima facie* felonious, so as to throw the burden of justification or excuse on the person killing."

by the evidence that there was a present, impending danger, real or apparent, to life or limb, or of grievous bodily harm, from which there was no other probable means of escape, unless the evidence which proves the homicide proves also its excuse or justification.¹⁵

(d) The unlawful killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide devolves on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.¹⁶

(e) The burden is upon the defendant to reasonably satisfy your minds that he acted in self-defense.¹⁷

§ 2471. Presumption of Intent—Burden of Disproving. (a) Having thus instructed you as to murder of the first and second degrees and the lesser grades of homicide, for your proper guidance in determining the guilt or innocence of the prisoners whom you have in charge, it is also proper to remind you that, as the law presumes every accused person to be innocent until he is proven guilty, the burden is upon the prosecution to prove beyond a reasonable doubt, by competent evidence, every essential ingredient of the crime charged in this indictment, before the prisoners, or either of them, can be found guilty thereof. But on the other hand, every sane man is presumed to intend that which is the ordinary and natural consequence of his own willful act. Therefore, on the charge of murder, where the fact of killing as charged in the indictment is shown by the prosecution, unaccompanied by circumstances of legal justification, excuse, or mitigation, the law presumes that the homicide was committed with malice, and hence amounts to murder, until the contrary is shown; and consequently the burden is thereupon thrown upon the accused of disproving the malice, and showing by evidence to the satisfaction of the jury, that the killing was not malicious, but was either justifiable or excusable homicide, or else manslaughter.¹⁸

§ 2472. Burden of Proving Extenuating Circumstances Is on the Defendant. The court instructs the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any provocation, or even with slight provocation, is *prima facie* willful, deliberate and premeditated killing, and throws upon the prisoner the necessity of showing extenuating circumstances.¹⁹

§ 2473. Insanity—Burden of Proving on Defendant. Every one over the age of 14 years is presumed by law to be of sound mind and discretion until the contrary is proven, and the burden is on the defendant in this case to satisfy you, but not beyond a reasonable doubt, that he is not of sound mind and discretion.²⁰

15—Jarvis v. State, 138 Ala. 17, 34 So. 1025 (1030).

16—Williams v. U. S., 4 Ind. Ter. 269, 69 S. W. 871.

17—Miller v. State, 107 Ala. 40, 19 So. 37.

18—State v. Brinte, — Del. —, 58 Atl. 258 (262).

19—Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339 (340).

20—State v. Mills, 116 N. C. 992, 21 S. E. 106 (107), affirming convic-

§ 2474. Burden of Proof—Quantum of Evidence to Be Produced by Defendant. The court instructs the jury that when the court says that the burden of proof is on the defendant it means that the evidence must be sufficient to raise a reasonable doubt of defendant's guilt.²¹

§ 2475. Burden of Proof—Presumption as to Degree of Murder. All murder is presumed in law to be murder in the second degree, and in order to elevate the offense to murder in the first degree the burden of proof is on the commonwealth, and in order to reduce the offense below murder in the second degree the burden is on the prisoner.²²

CHARACTER EVIDENCE.

§ 2476. Jury May Take into Consideration Character and Motives. (a) The court further instructs the jury that, in arriving at a verdict in this case, you are the sole judges of the facts and credibility of each and every witness introduced in this case, and you have the right to disregard the testimony of any witness or witnesses who, in the opinion of the jury, may have testified falsely in this case, or give to the testimony of any such witness such weight as, in the opinion of the jury, the same may be entitled to, and in ascertaining such weight the jury may take into consideration the character and motive of the witnesses as disclosed by the evidence in this case.²³

(b) Gentlemen of the jury, if the evidence convinces you that E. P. is a man of bad character, and unworthy of belief, then you may disregard his evidence altogether.²⁴

§ 2477. Defendant's Character. (a) The court instructs the jury that if you believe and find from the evidence that at the time this charge was made against the defendant he was a man of good character, you should take such good character into consideration in passing upon the question of his guilt or innocence, for the law presumes that a man of good character is less likely to commit a crime than one whose character is not good. If, however, upon a consideration

tion of murder in first degree and sentence of death.

21—*Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1930), charge of homicide.

22—*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (340).

23—*State v. Roberts*, 50 W. Va. 422, 40 S. E. 484 (486).

The supreme court approves the above instruction given by the trial court as a modification of the following, which it holds was erroneous:

The court further instructs the

jury that, in arriving at a verdict in this case, they are the sole judges of the facts, and credibility of each and every witness introduced in said case, and that they have the right to disregard the testimony of any witness or witnesses that have testified in the said case, and may take into consideration the character and motive for the testimony of each and all of said witnesses.

24—*Prater v. State*, 107 Ala. 26, 18 So. 238 (239).

of all the evidence, including that touching his good character, you believe him to be guilty, you should not acquit him solely on the ground of such good character.

(b) Evidence of a witness that he had known the defendant prior to the time the charge was made against him, and was acquainted in the neighborhood in which the defendant lived, and that he had never heard anything said against him, is evidence tending to show and prove that his character was good at said time in said neighborhood.²⁵

(c) The previous good character of the defendant, if proved to your satisfaction in the case, you ought to consider, together with all the other facts in evidence, in passing upon the question of his guilt or innocence of this charge, for the law presumes that a man whose character is good is less likely to commit a crime than the one whose character is not good.²⁶

(d) Where there is a serious conflict in the testimony as to the commission of an offense like that charged in this case, evidence of the previous good character of the defendant, as to such offenses, should be considered by the jury, in connection with all the other evidence given on the trial, in determining whether the defendant would be likely to commit, and did commit, the offense in question.²⁷

§ 2478. **Evidence of Good Character Not Sufficient to Acquit.** (a) If the jury believe from the evidence beyond a reasonable doubt that the defendant committed the crime in question, as charged in the information, it will be their sworn duty as jurors to find the defendant guilty, even though the evidence may satisfy their minds that the defendant, previous to the commission of the alleged crime, had sustained a good reputation and character for being a law-abiding and peaceable citizen.²⁸

(b) Evidence has been given in regard to the character of the defendant for peace and quietude. This evidence should be considered by the jury in determining the guilt or innocence of the defendant; but, if the jury should be satisfied beyond a reasonable doubt of the guilt of the defendant, then, in that view of the case, although you might believe that the defendant had a good character before the alleged offense occurred, if it did occur, that would not avail him as a defense or entitle him to an acquittal.²⁹

25—State v. Weber, 156 Mo. 249, 56 S. W. 729.

26—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (461), homicide case.

27—Kistler v. State, 54 Ind. 400, 2 Am. Cr. Rep. 18.

28—State v. Jones, 32 Mont. 442, 80 Pac. 1095 (1096).

"We think the instruction correctly states the law and could hardly be misunderstood by the jury."

29—Walker v. State, 136 Ind. 663, 36 N. E. 356 (357).

"We do not think there is any error in this instruction. It is easily distinguishable from the case of Kistler v. State, 54 Ind. 400, 2 Am. Cr. Rep. 18, in which the jury was instructed that, if the defendant was guilty, evidence of good character was of no benefit. Good character may always benefit a guilty defendant, for the jury may take it into consideration in fixing his punishment, and may, by reason of his character, mitigate the punish-

§ 2479. **When Jury Should Convict Notwithstanding Proof of Previous Good Character.** (a) The court instructs the jury as a matter of law that the defendant has put in evidence his general reputation for honesty and integrity, that such evidence is permissible under the law, and is to be, by the jury, considered as a circumstance in this case. But the court further instructs the jury that if, from all the evidence in this case, you are satisfied beyond a reasonable doubt, of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact, if such be the fact, that heretofore the accused has borne a very good character for honesty.³⁰

(b) Upon the question of the good character of the defendant for being a peaceable and law-abiding citizen, the court instructs the jury that this evidence should be considered by the jury as tending to establish a defense. If, however, the jury should be satisfied of the guilt of the defendant beyond a reasonable doubt, after a full consideration of all the evidence in the case, including the evidence in regard to the character of the defendant for being a peaceable and law-abiding citizen, then, though the jury might believe the defendant had a good character for being a peaceable, law-abiding citizen before the charge for which he is now being tried, such evidence of good character would not avail the defendant as a defense and entitle him to an acquittal.³¹

(c) In determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character as a moral man, and you should give to such testimony such weight as you deem proper; but if, from all the evidence, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate or mitigate the offense, and you cannot acquit him merely because you believe he has been a person of good repute.³²

(d) The defendant has in this case placed his previous character and reputation as to being a man of peace and quiet in evidence. If you find that previous to this difficulty he sustained a good reputation for peace and quiet, you will weigh it in his favor for what, in your judgment, you may think it is worth. Where the question to be determined by you may be close, it should be sufficient to turn the scales in his favor. If, however, you are satisfied that notwithstanding his former good reputation, the proof shows in this case beyond

ment. Under this instruction, the jury was given the liberty of considering the good character of the appellant in mitigation of his punishment, if it chose to do so; but they were told, if he was guilty of the charge preferred against him he was not entitled to acquittal because his character had previously been good."

30—Approved in case of larceny as bailee; *Young v. People*, 193 Ill. 236 (238-9), 61 N. E. 1104.

31—Approved in case of homicide; *State v. Stentz*, 33 Wash. 444, 74 Pac. 588 (590).

32—Approved where charge was homicide; *State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (460).

a reasonable doubt that he is guilty of either of the crimes of murder in the first degree or second degree, or manslaughter, as the same have heretofore been defined in these instructions, then the former good character or reputation of the defendant would not be a defense in this action.³³

(e) The court instructs the jury that the previous good character of the defendant, if proven to your reasonable satisfaction, is a fact in the case which the jury should consider in passing upon the question of the defendant's guilt or innocence; but if all the evidence in the case, including that given touching the previous good character of the defendant, shows him to be guilty of the offense, then his previous good character cannot justify, excuse or mitigate the offense.³⁴

§ 2480. Evidence of Previous Good Character Alone May Acquit.

(a) The court instructs the jury that the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false.³⁵

(b) The court instructs the jury that evidence of good character may of itself create a reasonable doubt, where otherwise no reasonable doubt would exist. And in relation to that you can give such

33—Approved where charge was homicide; *McCormick v. State*, 66 Neb. 337, 92 N. W. 606 (608).

34—*State v. Kinder*, 184 Mo. 276 (290), 83 S. W. 964 (966).

35—*People v. Elliott*, 163 N. Y. 11, 57 N. E. 103 (104), holds that refusal of this instruction was obvious error. "The defendant was entitled to have the jury distinctly instructed that good character will sometimes, of itself, create a doubt, when without it none would exist. *Cancemi v. People*, 16 N. Y. 501; *Stephens v. People*, 4 Parker 396; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 71; *Remsen v. People*, 43 N. Y. 9. The court had been previously requested by defendant's counsel to charge as follows: 'I ask the court to charge the jury that the jury may, in the exercise of sound judgment, give the person the benefit of previous good character, no matter how conclusive the other testimony may appear to be.' The court in response charged: 'I leave it to the jury to say what weight good character should have in determining the question of the defendant's guilt or innocence. I think it is a proper subject for their consideration.' Exception was taken to the refusal to charge as requested. The vice of this ruling is the same

as in the one already considered. The jury were not clearly informed as to their power in the exercise of a sound discretion. The defendant was entitled to the charge as requested, without change or comment."

Citing also *Remsen v. People*, 43 N. Y. 8, 2 Reiss, Crimes 785, 3 Greenl. Ev. § 25, and *People v. Hughson*, 154 N. Y. 153 (164), 47 N. E. 1092, where the court said: "Good character may create a doubt against positive evidence, but this doubt against positive evidence is created only when, in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence. In such a case the prisoner must be given the benefit of the doubt."

In *People v. Garbutt*, 17 Mich. 9, 97 Am. Rep. 162, Cooley, J., said: "Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense, which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole dependence, and may prove sufficient to outweigh evidence of the most positive character."

testimony that consideration that you think it is entitled to, and no more; taking it into consideration with all the other facts and circumstances of the case.³⁶

§ 2481. Previous Good Character May Overcome Positive Evidence of Guilt—A Question for the Jury. The evidence of good character is evidence which must be considered, and if, in the judgment of the jury, that good character does raise a doubt against positive evidence, they have a right to entertain that doubt and the prisoner must have the benefit of it.³⁷

§ 2482. Previous Good Character—Requires Stronger Proof of Malice. I have been requested to charge you as to the defendant's good character. The question of fact as to whether he has satisfied you from the evidence that he has established a good character is for you to determine. I have been requested to charge you "that, should the jury conclude from the evidence that the defendant has borne a reputation for peaceableness, they should require a greater degree of certainty in the proof of the maliciousness attributed to him than would be requisite if the contrary were shown." I so charge you. Every party charged with crime has a right to introduce and make proffer of his good character, that character having reference to the nature of the charge made against him, and if he does the jurors are required to take that testimony, in connection with all the other facts of the case, in determining whether the guilt of the party has been established beyond a reasonable doubt.³⁸

§ 2483. Previous Good Character as Against Positive Facts Showing Guilt. (a) In regard to evidence of this character, it is the duty of the court to say to you that, where it is shown to your satisfaction that the defendant was of good general reputation for peace and good order in the community, that kind of testimony, if properly made out to you, is positive and substantial evidence, and it should be weighed by you in consideration of this case. The courts of highest resort in this state have said it is evidence which may work a doubt for the acquittal of the defendant. If that evidence is properly made out to you, it should be sufficient in that line. It is not, however, to weigh against positive facts which should convince your mind that this defendant did the deed which he is charged with committing here. Where the facts and circumstances are such as to leave no room for doubt, and the minds of the jury are thoroughly and fully

36—*People v. Jackson*, 182 N. Y. 66, 74 N. E. 570.

In regard to this instruction "counsel argues that, while the court charged as requested, the qualification following was error; citing *People v. Bonier*, 179 N. Y. 315, 72 N. E. 226. The charge as requested and made was within the rule laid down in the case cited, and the qualification that

followed neither added to nor took from the proper rule as stated to the jury."

37—*People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092 (1095). See previous section.

38—Approved in case where charge was homicide. *State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (996).

convinced, this evidence itself would not then work the acquittal of the defendant, but it is to come in the consideration of the case, the same as any other evidence, as positive and substantive evidence, and to be weighed by you in that line.

(b) Evidence of good character is not a mere makeweight, thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal.³⁹

§ 2484. Previous Reputation for Peace and Quietude—Homicide. You are instructed that the defendant is entitled to have the evidence touching the question of his reputation for peace and quietude considered by the jury in determining the question of his guilt, and especially in determining the question as to who was the aggressor in the affray in which K. lost his life. In such cases, proof of good reputation for peace and quietude on the part of the defendant is proper evidence to be considered by the jury, in connection with all the other evidence. In determining the guilt or innocence of the accused, the weight to be attached to the fact of good character or reputation, like that to be attached to every other fact of the case, is for the jury alone to determine.⁴⁰

§ 2485. Reputation—Relative Weight of in Cases Where Positive or Circumstantial Evidence Is Relied On. You are instructed that evidence of good character is always receivable in a court of law, where a person is charged with the commission of a crime, and sometimes it proves a very important part of the testimony, as, for in-

39—Commonwealth v. Harmon, 199 Pa. 521, 49 Atl. 217, 85 Am. St. Rep. 799.

The court said: "It is plain that the judge did not see any inconsistency in these two instructions, nor do we think they are fairly open to that objection. The true rule was accurately expressed in Commonwealth v. Eckerd, 174 Pa. 137, 34 Atl. 305, in this form: 'That evidence of good character is substantive and positive proof in the prisoner's behalf, and may give rise to a reasonable doubt, which would not otherwise exist, by making it improbable that a man of such character would commit the offense charged; but where the jury is satisfied beyond a reasonable doubt, under all the evidence, that the defendant is guilty, evidence of previous good character is not to overcome the conclusion which follows from that view of the case.' The charge complained of in the present case did not vary substantially from this rule."

40—State v. Cushing, 14 Wash.

527, 45 Pac. 145 (146), 53 Am. St. Rep. 833.

The court held it was error to refuse this instruction. The court said: "We think it too well settled to admit of any doubt or controversy that a defendant in a criminal case may introduce evidence of his good character, with respect to the elements involved in the charge against him, as a fact to weigh in his favor, and that he is entitled, if he requests it, to have the jury advised as to the weight to be given to such evidence. 3 Thomp. Trials, par. 444; Kistler v. State, 54 Ind. 400, 2 Am. Cr. Rep. 18; State v. Clemons, 51 Iowa 274, 1 N. W. 546; McQueen v. State, 82 Ind. 72; People v. Laird, 102 Mich. 135, 60 N. W. 457; People v. Jassino, 100 Mich. 536, 59 N. W. 230. In this last case the court said: 'Evidence of good character is admissible, not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt.'"

stance, in a case that depends entirely upon circumstantial evidence, or where the testimony as to the commission of the crime or offense is very contradictory. In such cases the testimony might be very important. Sometimes in such a case the testimony of good character would turn the scale in favor of the defendant. But, in a case where the testimony is direct and positive as to the commission of the offense, it is not of so much weight—not of so much value. Still it is to be considered by the jury, and to be given by them all the weight they believe it entitled to receive. It should be considered in connection with all of the other testimony and circumstances surrounding the alleged commission of the offense.⁴¹

§ 2486. **Previous Reputation for Honesty.** Evidence as to the good reputation of the defendant for honesty and integrity was received, and you should consider such evidence together with all the other evidence in the case in arriving at your verdict. But, if from all the evidence in the case you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity.⁴²

§ 2487. **Defendant's Previous Disposition Toward Children—Infanticide.** Defendant has introduced evidence as to his character as a man of humane and kindly disposition towards children. In passing on the question of his guilt or innocence, and, if you find him guilty, in passing on the grade of his offense, this evidence as to his character constitutes an ingredient to be considered by you, without reference to the apparently conclusive or inconclusive character of the other evidence; and it is for you to consider this evidence throughout your deliberations on the facts of the case, and give it such weight as you think it justly entitled to.⁴³

§ 2488. **Previous Bad Character of Defendant.** The court instructs the jury that no person should be convicted upon his reputation, character or former convictions, but must be convicted by the evidence in the case; and the evidence must exclude any and every reasonable doubt, and to a moral certainty.⁴⁴

§ 2489. **Character of Deceased for Violence Immaterial When Killing Unlawful and Premeditated.** (a) If defendant K. had the previously formed design unlawfully to take S.'s life and carried it into effect pursuant thereto, or if he was the aggressor, or brought on the difficulty, then S.'s character for violence, no matter how clearly proved, will avail him nothing.⁴⁵

(b) In trials of homicide, in all doubtful questions as to who was

41—Grabowski v. State, 126 Wis. 44, 105 N. W. 808.

42—State v. Dunn, 125 Wis. 181 (197), 102 N. W. 935 (940).

43—State v. Cunningham, 111 Iowa 233, 82 N. W. 775 (779). "The law as stated is in harmony with

the decisions of this court." Citing State v. Gustafson. 50 Iowa 194.

44—McVay v. State, — Miss. —, 26 So. 947.

45—Karr v. State, 106 Ala. 1, 17 So. 328 (329).

the aggressor, the violent or bloodthirsty character of the deceased, if such be his character, may be given in evidence, for the reason that an assault or attack by one known to be of a violent character, and one who fights with weapons would justify more prompt and decisive measures than if by one of a milder character. But such evidence is confined to defensive measures.

(c) The evidence of character as to the deceased is immaterial if the defendant was the aggressor, or was not acting in self-defense.⁴⁶

§ 2490. Character of Deceased—Same Offense to Kill Bad Person as to Kill a Good One. The evidence offered as to the character of deceased should be considered by the jury in determining whether or not by his acts and conduct at the time of the homicide, J., deceased, gave the defendant reasonable cause to apprehend such danger as to justify defendant in striking him, if he did strike him, on the ground of self-defense, as defined in these instructions. But if you find from the evidence that the defendant was the aggressor, and that he sought the deceased, and provoked, began, or entered into a difficulty with him with a preconceived intent of wreaking his malice upon said J., then the bad character of J., if he was a person of bad character, would afford the defendant no excuse for taking his life, if he did take his life, because it is the same offense to kill a bad person as it is to kill a good one.⁴⁷

CIRCUMSTANTIAL EVIDENCE.

§ 2491. Circumstantial Evidence Defined. The court further instructs the jury, that what is meant by circumstantial evidence in criminal cases, is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the party or parties charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendants, or any of them, beyond a reasonable doubt, then such evidence is sufficient to authorize a jury in finding a verdict of guilty, as to such of the defendants as the jury are so satisfied, beyond a reasonable doubt, from the evidence, are guilty.⁴⁸

46—*Winter v. State*, 123 Ala. 1, 26 So. 949 (1905).

47—*State v. Darling*, 199 Mo. 168, 97 S. W. 592.

48—*Law v. State*, 33 Tex. 37.

Circumstantial evidence defined by illustration:

As tending to show there was intoxicating liquor kept there, the state has introduced evidence tending to show that soon after the officers or some one of them, at least, entered the front room, this

respondent passed into the second room. One of these officers testified that he heard a noise, as of something falling. He has described the manner in which he found O.G. near the dump, so called, as it rises in the second room, back of the counter. He has testified that he smelled the fumes of whisky coming from the dump. Now, if you find that he did in fact smell intoxicating liquor, then that establishes, or tends to establish,

§ 2492. **Circumstantial Evidence—What Is Meant by.** The court instructs the jury that what is meant by circumstantial evidence in criminal cases is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and, if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty.⁴⁹

§ 2493. **Circumstantial Evidence Is Competent.** If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant deliberately and intentionally shot J. M., in manner and form as charged, and as he was passing along the public highway, and that from the effects of such shooting the said J. M. died, as charged in the indictment, it matters not that such evidence is circumstantial, or made up from facts and circumstances, provided, the jury believe such facts and circumstances pointing to his guilt, to have been proven, beyond a reasonable doubt, by the evidence.⁵⁰

§ 2494. **Legal and Competent—Excluding Every Reasonable Hypothesis.** (a) The court further instructs the jury that circumstantial evidence is legal and competent in criminal cases, and, if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, is entitled to the same weight as direct testimony.⁵¹

two facts: First, that he did actually smell an odor there present, that it had existence and that that odor came from intoxicating liquors, and therefore it tends to show that intoxicating liquor had been present there. Now, to illustrate how this kind of testimony is acted upon in the ordinary experience of mankind, I will bring to your minds a very homely illustration,—one which presents itself to me. You hear a commotion in your hen-house. You are aware by the disturbance, that some animal is there. You hasten to the place. You do not see the animal. He has fled at your approach. But when you get in there you have the unmistakable odors of a skunk. There is the evidence of an odor, and that proves that the animal has been there at some time. It is on account of our being able to act upon such circumstances as these, arising in our ordinary human experience, with reasonable safety, and a reasonable assumption of their truth, that the law has permitted this class of evidence to be used in criminal cases. If you are satisfied from the evidence of Mr. C. that he smelled the fumes of in-

toxicating liquor there, you will say whether or not there was intoxicating liquor there in that dump. It does not make any difference whether the officer found any liquor, so that he was enabled to lay his hand upon it. If you find there was intoxicating liquor there, that establishes the fact. Approved in *State v. O'Grady*, 65 Vt. 66, 25 Atl. 905.

49—*Cunningham v. State*, 56 Neb. 691, 77 N. W. 60 (61).

The court said: "We see nothing wrong with this instruction. *Law v. State*, 33 Tex. 37."

50—*Schoolcraft v. People*, 117 Ill. 277, 7 N. E. 649.

51—*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (341).

The same instruction, excepting the last phrase, was approved in *Cunningham v. State*, 56 Neb. 691, 77 N. W. 60. It is as follows:

The court instructs the jury that circumstantial evidence is legal and competent in criminal cases, and, if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is sufficient to authorize a conviction.

The court in support of the in-

(b) You will have observed, gentlemen, on the prosecution of this case, that the evidence is largely, if not entirely, circumstantial. Now in respect to that, I charge you that circumstantial evidence is legal and competent in criminal cases. If it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct evidence. If you believe from the evidence beyond a reasonable doubt that the defendant deliberately and intentionally set fire to the building, as charged in the information, it matters not that such evidence is circumstantial, or made up of facts and circumstances, provided you believe such facts and circumstances pointing to her guilt to have been proven beyond a reasonable doubt by the evidence.⁵²

§ 2495. Positive and Circumstantial Evidence Distinguished. (a) Evidence is either direct and positive, or presumptive and circumstantial. Evidence is direct and positive, when the very facts in dispute are communicated by those who have had actual knowledge of them by means of their senses, and where, therefore, the jury may be supposed to perceive the fact through the organs of the witnesses. It is presumptive or circumstantial where the evidence is not direct, but where, on the contrary, a fact which is not directly and positively known is presumed or inferred from one or more other facts or circumstances which are known. The state claims that it has connected the defendant with the crime alleged in the second count of the information, not by direct and positive evidence, but by what has been herein defined as presumptive and circumstantial evidence; that is, the state has offered no evidence of a witness or witnesses who saw the act that is alleged in the second count of the information, which it is claimed resulted in the death of the said G., but the state has offered the testimony of witnesses tending to prove a catalogue of facts and circumstances which the state claims presumably and circumstantially connects the defendant with the commission of the alleged crime in said second count, and establishes his guilt of the crime charged beyond a reasonable doubt.⁵³

(b) The court instructs the jury that evidence is of two kinds—direct and circumstantial. Direct evidence is when a witness testified directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eye-witnesses;

struction cited *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Johnson v. State*, 53 Neb. 103, 73 N. W. 463.

52—*Colbert v. State*, 125 Wis. 423, 104 N. W. 61 (66).

53—"The instruction assailed is indeed a fair statement of the claim advanced in behalf of the state, and in no wise prejudicial to the rights of the accused." *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (795).

but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.⁵⁴

§ 2496. **Elements Necessary for Conviction.** (a) The jury are instructed that the prosecution seeks a conviction in this case upon circumstantial evidence alone. The court therefore instructs you that you cannot convict the defendant unless the state has proven his guilt from the evidence beyond a reasonable doubt, by facts and circumstances all of which are consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of his innocence.⁵⁵

(b) Circumstantial evidence is the evidence of certain facts from which are to be inferred the existence of other material facts bearing upon the question at issue or fact to be proved. This evidence is legal and competent, and, when of such a character as to exclude every reasonable doubt of defendant's innocence, is entitled to as much weight as direct evidence. When a conviction is sought on circumstantial evidence alone, it must not only be shown by preponderance of evidence that the facts are true, but they must be such as are absolutely opposed, upon any reasonable ground of reasoning, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. The degree of certainty must almost be equal to that of direct testimony, and, if there is any one single fact proved to your satisfaction by a preponderance of evidence which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant. In order to justify the inference of legal guilt from circumstantial evidence, the proof must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If there is any reasonable doubt as to reality of the connection of the circumstances of evidence with the facts to be proved, or as to the completeness of the proof of the *corpus delicti*, or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than in convicting.⁵⁶

(c) The rule with reference to circumstantial evidence is to prove such facts and circumstances with or surrounding the commission of the crime charged are true, to show the guilt or innocence of the party charged; and, if these facts and circumstances are sufficient to convince the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty.⁵⁷

54—State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888), homicide case.

55—State v. Pyscher, 179 Mo. 140, 77 S. W. 836 (842).

56—Approved in State v. Aspara,

113 La. 940, 37 So. 883 (889), in a homicide case.

57—This instruction approved in a homicide case; Smith v. State, 94 Ga. 591, 22 S. E. 214 (215).

§ 2497. **Facts Must All Be Consistent with Guilt and Inconsistent with Innocence.** (a) The jury are instructed, as a matter of law, that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the accused.⁵⁸

(b) When circumstantial evidence is relied upon to obtain a conviction of a person charged with crime, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all be inconsistent with any other rational conclusion.⁵⁹

58—1 Greenl. on Ev. § 12.

In *Gantling v. State*, 40 Fla. 237, 23 So. 857 (859), the following instruction was given:

As to the evidence in the case at bar, which is circumstantial you are instructed as matter of law that circumstantial evidence is legal evidence, (and are further instructed that it is well settled by decisions of various courts in this country, and especially by our own supreme court, 'that circumstantial evidence is not only legal evidence, but also that a well connected train of circumstances is as conclusive of a fact as is the greatest array of positive evidence.) The value of this kind of evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any controverted facts. In criminal cases they must not only be consistent with guilt of the accused, but must be inconsistent with the innocence of the accused. Where a conviction of guilt depends upon circumstantial evidence alone, the circumstances proven should not only all concur to show that the prisoner committed the crime, but that they are all inconsistent with any rational conclusion. And the circumstances proven should all connect, or tend to connect, the accused with the commission of the alleged crime, and the circumstances proven should be of such character as to satisfy the minds of the jurors trying the case of the guilt of the accused beyond a reasonable doubt. The circumstances from which the conclusion is drawn should be fairly estab-

lished. All the facts should be consistent with the hypothesis of guilt. The circumstances should be of conclusive nature and tendency, and the circumstances, when alone relied upon for a conviction, should, to a moral certainty, actually exclude every hypothesis but the one to be proved.

The court said that it "states the rule somewhat stronger in favor of the accused than our previous decisions have gone, and perhaps stronger than the law requires," citing *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *Whetson v. State*, 31 Fla. 240, 12 So. 661; *Kennedy v. State*, 31 Fla. 289, 5 So. 805.

59—*Bird v. State*, 143 Fla. 541, 30 So. 655 (656).

The supreme court commented as follows:

"The court gave, in connection with and immediately following the instruction, another, to the effect that the accused is presumed to be innocent of crime, and that presumption of innocence continues throughout every state of trial until it is overcome by evidence which satisfies the jury of his guilt beyond a reasonable doubt. In other portions of the charge and in the instructions given on behalf of plaintiff in error the jury were repeatedly told that they must not convict the accused unless they believed from the evidence beyond a reasonable doubt that he was guilty. We are of opinion that, taking the entire instruction given to the jury, the plaintiff in error has no ground to complain of the alleged omission in the instructions

(c) Before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty.⁶⁰

(d) To authorize a conviction upon circumstantial evidence alone, the circumstances must not only all be in harmony with the guilt of the accused, but they must be of such a character that they cannot reasonably be true in the ordinary nature of things and the defendant be innocent.⁶¹

(e) The court instructs the jury that in order to warrant a conviction for crime on circumstantial evidence, the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no one else committed the offense charged; and it is the invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and as cannot, upon any reasonable theory, be true and the party charged be innocent; and in this case if all the facts and circumstances relied upon by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant.⁶²

(f) The court instructs the jury, that it is an invariable rule of law, that to warrant a conviction for a criminal offense upon circumstantial evidence alone, such a state of facts and circumstances must be shown as that they are all consistent with the guilt of the party charged, and such that they cannot, upon any reasonable theory, be true and the party charged be innocent.⁶³

(g) In order that a jury may be warranted in finding a defendant guilty on circumstantial evidence, all the facts and circumstances necessary to establish the conclusion of guilt must be proved beyond reasonable doubt, all such facts and circumstances must be consistent with each other and with the conclusion sought to be established, which is that the person on trial committed the crime as charged. All such facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant, and such facts and circumstances, taken all together, must be of such conclusive and satis-

mentioned, and that the instruction complained of is not faulty in the respect contended for."

60—*Burton v. State*, 107 Ala. 108, 18 So. 284 (286), homicide case.

61—*Horn v. State*, 12 Wyo. 80, 73 Pac. 705 (725).

62—*Marzen v. People*, 173 Ill. 43 (62), 50 N. E. 249.

63—*Beavers v. State*, 58 Ind. 530; *Block v. State*, 1 Tex. App. 368.

factory nature as to produce in the minds of the jurors a reasonable and moral certainty that the person on trial, and not some other person, committed the offense charged.⁶⁴

(h) In criminal cases, where the prosecution rely upon circumstantial evidence alone for a conviction, it is not enough that all the circumstances proved are consistent with and point to the defendant's guilt. To authorize a conviction upon circumstantial evidence alone, the circumstances must not only all be in harmony with the guilt of the accused, but they must be of such a character that they cannot reasonably be true, in the ordinary nature of things, and the defendant be innocent.⁶⁵

(i) The test of the sufficiency of circumstantial evidence in a criminal case is whether the circumstances, as proven, are capable of explanation upon any reasonable hypothesis consistent with the defendant's innocence, and, if they are capable of such explanation, then the defendant should be acquitted.⁶⁶

§ 2498. No Reasonable Theory of Innocence Must Be Possible.

(a) It is necessary for the prosecution to show, under all circumstances, as a part of their own case, that there is no innocent theory possible which will, without violation of reason, accord with the facts proven in the case. Circumstances are never to be presumed. Each fact making up the chain of circumstances must be proven beyond a reasonable doubt. Circumstantial evidence is sufficient, and is often more apt to convince the mind of the existence of a fact than the positive evidence of a witness, who may be mistaken; whereas a concatenation and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken or fail to elicit the truth. But then those circumstances should be as strong in themselves, should each of them tend to throw light upon and prove each other, and the result of the whole should be to leave no doubt upon the mind that the offense has been committed, and that the accused, and no other, could be the person who committed it.⁶⁷

(b) The court instructs you that when one seeks to convict on circumstantial evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt, and the circumstances must point to his guilt to the exclusion of any other reasonable hypothesis.

64—Galloway v. State, 44 Tex. Cr. App. 230, 70 S. W. 211 (212).

"In the latter clause of the charge we find this language: 'It is not permitted to jurors to receive any evidence or consider any facts in the case except as shown in, or deducible from, the testimony of the witnesses.' This, taken in connection with the above quoted charge, certainly is all that appellant could insist upon."

The court cited Chitister v. State, 33 Tex. Cr. App. 635, 29 S. W. 683; Lopez v. State, — Tex. Cr. App. —, 20 S. W. 395, 28 Am. St. 935.

65—Com. v. Goodwin, 14 Gray (Mass.) 55.

66—Bowen v. State, 140 Ala. 65, 37 So. 233 (234).

"The test of the sufficiency of circumstantial evidence for conviction, as laid down in the above charge, is in substance the same as that which in Pickins v. State, 115 Ala. 42, 50, 22 So. 551, was affirmed to be correct. In the refusal of this charge there was error."

67—People v. Foley, 64 Mich. 148, 31 N. W. 94 (99).

That means no more than this: Having carefully considered all the facts and circumstances, does your mind lead you, as reasonable men, to the conclusion that this defendant is guilty of the offense? If it does, and your minds come to that conclusion from the surroundings in which he was placed, in reference to this matter, then it would be your duty to write a verdict of "Guilty." But if, after having calmly and carefully considered all the facts and circumstances of the case, you have a reasonable doubt—that is to say, if you can say, "We ought not to find the defendant guilty because we have a reasonable doubt, from the evidence of his guilt,"—then you will say, "Not guilty," because he is entitled to the benefit of every reasonable doubt. The state makes out its case beyond a reasonable doubt, and then, on the whole case as made out by the state and the defendant, he is entitled to such doubt.⁶⁸

§ 2499. A Single Inconsistent Fact Acquits. The jury are instructed that in cases of circumstantial evidence the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person. If there is any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and the jury should acquit the defendant.⁶⁹

§ 2500. Circumstances Proven Must Be Consistent with One Another, and, Taking Together, Must Exclude Every Reasonable Hypothesis of Innocence. (a) You are instructed that it is not necessary to prove the defendant is guilty by the testimony of the witnesses who may have seen the offense committed. Guilt may be shown by proof of the facts and circumstances from which it may be reasonable and satisfactorily inferred. In determining whether the defendant is guilty or not, you should take into consideration all the facts and circumstances in evidence, the acts and conduct of the defendant, and his motive, if any, for doing or not doing the act charged as shown by the evidence; and if you find from all the facts

68—State v. Jackson, 68 S. C. 53, 46 S. E. 538 (539).

The court commented as follows: "Where circumstantial evidence is relied on, the absence of reasonable doubt implies impossibility of explaining the evidence on any reasonable hypothesis of innocence. The effect of evidence not being sufficient to exclude every other reasonable hypothesis than guilt is to leave doubt of guilt more or less strong, according to the circumstances of the particular case. Taking all the language here used together, the jury could not have

failed to receive the impression that the accused be convicted only in case they were convinced no theory of the testimony could be adopted which could produce reasonable doubt. It is manifest this is the true view of the law. If the defendant thought the statement not sufficiently clear, he should have asked from the court more specific instructions. State v. Milling, 35 S. C. 16, 14 S. E. 284; State v. Davenport, 38 S. C. 348, 17 S. E. 37."

69—Horn v. State, 12 Wyo. 80, 73 Pac. 705 (725).

and circumstances in evidence that there is no other reasonable conclusion than that he is guilty, you will so find; but to convict the defendant on circumstantial evidence alone the circumstances proven must be consistent with one another, and must, taken together, point so conclusively to his guilt as to exclude every reasonable hypothesis of his innocence.⁷⁰

(b) All the evidence produced by the state is circumstantial. There is no direct or positive evidence that the defendant committed the crime charged. And to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt.⁷¹

(c) Crime may be proven by circumstantial evidence, as well as by direct testimony of eye-witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants, and inconsistent with any reasonable theory of defendants' innocence.⁷²

§ 2501. Certainty Required. (a) The rule of law is, that to warrant a conviction on a criminal charge upon circumstantial evidence alone, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and sufficient to exclude all reasonable doubt of the party's guilt. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but be perfectly reconcilable with the supposition of his guilt.⁷³

(b) And while it is true, in cases depending solely upon circumstantial evidence, that the circumstances should, to a moral certainty, actually exclude every other reasonable hypothesis but the guilt of

70—State v. Heusack, 189 Mo. 295, 88 S. W. 21 (27).

71—Colbert v. State, 125 Wis. 423, 104 N. W. 61 (66).

72—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (196).

73—People v. Padillia, 42 Cal. 535.

the accused—that is, beyond all reasonable doubt—yet if the facts proven coincide with, and are legally sufficient to establish the truth of, the hypothesis claimed, namely, the guilt of the accused, and are inconsistent with every other reasonable hypothesis, then the jury would be authorized to convict, though upon circumstantial evidence.⁷⁴

§ 2502. Circumstantial Evidence Need Not Be Conclusive—Degree of Proof. (a) In cases of circumstantial evidence it is not necessary that the proof shall be conclusive; it is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubts in their minds of this fact. If the jury think that the facts in this case are all consistent with the supposition that the prisoners are guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find them guilty. All that can be required, is not absolute and positive proof, but such proof as convinces them that the crime has been made out against the accused beyond a reasonable doubt.⁷⁵

(b) The court instructs the jury that, before they can convict the defendant on circumstantial evidence alone, every material fact necessary to show the defendant's guilt must be proven beyond a reasonable doubt, and that, if any material fact necessary in this case to show the defendant guilty as charged in the indictment has not been proven to the exclusion of a reasonable doubt, you should acquit this defendant.⁷⁶

§ 2503. Only Inferences or Presumptions Necessarily Arising from Proved Circumstances Should Be Considered. The jury are instructed that, while circumstantial evidence is legal and proper evidence in criminal cases, yet no inferences or presumptions should be indulged in by a jury that do not in their minds necessarily arise from the circumstances proved.⁷⁷

§ 2504. Conviction Upon Circumstantial Evidence Alone—Homicide—Extenuating Circumstances. The jury is further instructed that one charged with crime may be convicted by a jury upon circumstantial evidence alone, if the jury believe to a moral certainty, beyond a reasonable doubt, by said circumstantial evidence, that the person so charged is guilty of the crime alleged against him. Therefore the court instructs the jury in this case that they have the right to convict the defendant upon circumstantial evidence alone, if the jury believe from the said circumstantial evidence the guilt of the defendant to a moral certainty, beyond a reasonable doubt. And the court further instructs the jury that circumstantial evidence in

74—*Smith v. State*, 94 Ga. 591, 22 S. E. 214 (215).

75—*Robertson v. State*, 40 Fla. 509, 24 So. 474 (478), 52 L. R. A. 751.

76—*Alderson v. Commonwealth*, 25 Ky. L. 32, 74 S. W. 679 (681).

77—*Gannon v. People*, 127 Ill. 507 (520), 21 N. E. 525, 11 Am. St. Rep. 147.

criminal cases is not only competent evidence, but is sometimes the only mode of proof, and therefore, if the jury believe, from the evidence and circumstances in this case, to a moral certainty and beyond a reasonable doubt, that the defendant, S. S., with a deadly weapon, gave to A. S. a mortal wound, without any provocation, from which wound she died within a few days from the time it was so inflicted, the said defendant, S. S., was guilty of willful, deliberate and premeditated murder, unless he shows extenuating circumstances, or they appear by the case made by the state; and if he fails to show extenuating circumstances, and they do not appear from the case made by the state and all the evidence considered, the jury should find him guilty of murder in the first degree.⁷⁸

§ 2505. What Must Be Proved in Order to Convict. The court instructs the jury, as a matter of law, that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the People must not only show by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused.⁷⁹

§ 2506. Circumstantial Evidence—Weight of—How to Be Considered by the Jury. (a) The court instructs the jury that circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eye-witnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations or circumstances which do

78—State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (686).

"The instruction merely tells the jury that, in order to find the defendant guilty, they must believe, to a moral certainty and beyond a reasonable doubt, that he did commit the crime, and that this conviction on their part must spring from the evidence and circumstances in the case, and that if, from it, they believed him guilty, they must so find, notwithstanding the evidence was circumstantial. To hold this instruction improper, it would be necessary to say that there was no evidence in the case which the jury might consider. This would be an invasion of the province of the jury, for it would be a determination upon the part of the court as to the weight of evidence, which is a matter for the

sole consideration of the jury, unless the evidence is clearly insufficient to warrant a verdict."

79—Everett v. People, 216 Ill. 478 (486), 75 N. E. 188.

"This instruction," said the court, "fully covered the question, and we cannot conceive of any declaration of law more pointed or emphatic than the latter part of the given instruction, where the jury are advised that the facts and circumstances must be such as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused. It would matter little how many times that thought was expressed. Its clearness could hardly be added to, and with this instruction given there was no occasion for the refused ones."

not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven as the guarded judgment of a reasonable man would ordinarily make under like circumstances.⁸⁰

(b) The value of circumstantial evidence depends upon the conclusive nature and tendency of the circumstances relied on to establish any controverted fact. They [the facts proven] must not only be consistent with guilt but inconsistent with innocence. Such evidence is insufficient where, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis of innocence may still be true, for it is the actual exclusion of every other reasonable hypothesis but that of guilt which invests mere circumstances with the force of proof. What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury [beyond a reasonable doubt]. Absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances; it is sufficient if they, with all the other evidence, produce moral certainty to the exclusion of every reasonable doubt.⁸¹

§ 2507. **Weight of—As Conclusive as Direct.** (a) Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its own convincing power as direct and positive evidence of eye witnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances.⁸²

(b) The court instructs the jury that circumstantial evidence is

80—State v. Elsham, 70 Iowa 531, 31 N. W. 66 (68).

81—Jenkins v. State, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; Myers v. State, 43 Fla. 500, 31 So. 275 (280). Words in brackets are modifications suggested by the editor of this edition.

82—Smith v. State, 61 Neb. 296, 85 N. W. 49 (52).

"It occurs to us that this is a conservative statement of the rule announced. The rule, stated in stronger language than in the present instance, is approved in Davis v. State, 51 Neb. 301, 70 N. W. 984.

The rule as announced has received judicial sanction in many other jurisdictions. It does not appear to us that it permits a conviction on a preponderance of the evidence, as suggested. The jury are told in other instructions that they must be convinced of the truth of the charge beyond a reasonable doubt. The instruction does not purport to speak of the requisite degree of proof, but of the consideration to be given circumstantial evidence, and the effect thereof. We find no error in the giving of this instruction."

legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, is entitled to the same weight as direct testimony.⁸³

(c) The evidence in this case is what is known as "circumstantial," that is, no person who has testified was an eye witness of the alleged crime, and the state seeks to connect the defendant with the crime by showing a chain of circumstances leading up to it, and connected with it and the defendant; and this is circumstantial evidence. And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypothesis other than that of the defendant's guilt beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged. . . . Circumstantial evidence, when competent and when complete and satisfying to your minds, as has been charged, is entitled to the same weight that direct evidence is.⁸⁴

§ 2508. Credibility of Circumstantial Evidence. (a) The court instructs the jury that in determining what facts are proven in this case, you should carefully consider all the facts before you with all the circumstances of the transaction in question as detailed by the witnesses; and you may find any fact proven which you may believe may be rightfully and reasonably inferred from the evidence given in the case, although there may not be any direct testimony as to such facts.⁸⁵

(b) While the plaintiff must prove his case by a preponderance of evidence, still the proof need not be the direct evidence of persons who saw the occurrence sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circum-

83—Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339 (340). See also Smith v. State, 94 Ga. 591, 22 S. E. 214 (215); Myers v. State, 43 Fla. 500, 31 So. 278 (281).

84—State v. Coleman, 17 S. D. 594, 98 N. W. 175 (180).

"The law is correctly stated therein and such an instruction in a case dependent entirely upon circumstantial evidence seems eminently proper, as jurors sometimes get the impression that unless there is a direct testimony of the guilt of the accused they cannot safely convict.

"Sackett in his work on Instructions to Juries gives the following as a correct instruction: 'The court instructs the jury that circumstantial evidence is legal and com-

petent in criminal cases, and, if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony." Schoolcraft v. People, 117 Ill. 277, 7 N. E. 649; United States v. Reder (D. C.), 69 Fed. 965; Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; 1 Greenleaf on Ev. (13th Ed.), Sec. 13 a."

85—Moulton v. Gibbs, 105 Ill. App. 104 (106).

"If the refused instruction above should not be held as law in every case the value of circumstantial evidence would be destroyed, and no fact could be established save by positive or direct evidence."

stances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the evidence in the case, constitute a preponderance of evidence.⁸⁶

(c) This kind of evidence, when strong and convincing, is often the most satisfactory from which to draw conclusions of the existence or non-existence of a disputed fact.⁸⁷

§ 2509. **Murder May Be Proven By Facts and Circumstances Attending the Killing—Absence of Body.** (a) The court instructs the jury that while it is necessary for the killing to be willful, deliberate, premeditated, and with malice aforethought in order to constitute murder in the first degree, yet these elements need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if you can satisfactorily and reasonably infer their existence from all the evidence in the case, you will be warranted in so finding.⁸⁸

(b) The court instructs you that the absence of the infant, unaccounted for, does not prove that it is dead.⁸⁹

§ 2510. **Failure to Use Deadly Weapon at Hand.** If the jury find in this case that there was an opportunity to use a deadly weapon, but that none was actually used, this circumstance should be considered as evidence against willful and premeditated murder.⁹⁰

§ 2511. **Instruction When Testimony Is Largely Circumstantial.** You are further instructed in this case that there is no positive and direct testimony of the defendant's guilt except as to the evidence of the witness, B. The evidence against him is largely what is termed in law circumstantial evidence.⁹¹

86—U. S. Brwg. Co. v. Stoltenberg, 211 Ill. 531 (535), 71 N. E. 1081.

"Instructions of this character have been approved of by this court in the following cases: N. C. St. R. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812; Miller v. Balthasser, 78 Ill. 302; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; C. & E. I. R. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. 144; Ch. & Atl. Ry. Co. v. Carey, 115 Ill. 115, 3 N. E. 519."

87—Wheeler v. Chicago M. & St. P. Ry. Co., 85 Ia. 167, 52 N. W. 119 (122).

"We do not think this instruction is open to the objection urged by appellant, as placing a higher value upon presumptions or inferences than upon positive and direct testimony. Furthermore, the instruction is fully sustained by the authorities. In State v. Moelchen, 53 Ia. 310, 5 N. W. 186, an instruction was in this language: 'Strong

circumstantial evidence, in cases of crime, is often the most satisfactory of any from which to draw the conclusions of guilt;' and the court said it was not objectionable, and was in accord with the views of the ablest writers upon the subject. 'In both cases (civil and criminal) a verdict may well be founded on circumstances alone, and these often lead to a conclusion far more satisfactory than direct evidence can produce.' 1 Greenl. Ev. para. 13; Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711."

88—State v. Vaughan, 200 Mo. 1, 98 S. W. 2.

89—Haynes v. State, — Miss. —, 27 So. 601 (602).

90—State v. Hunt, 134 N. C. 684, 47 S. E. 49 (50). Held properly given, the word "strong" before the word "evidence" having been stricken out first.

91—State v. Haynes, 7 N. D. 352, 75 N. W. 267 (268).

§ 2512. **Inference of Fact.** An inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men.⁹²

When the evidence is circumstantial the court should so state to the jury.

Henderson v. State — Tex. Cr. App. —, 96 S. W. 37 (38).

92—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017 (1019).

"As this instruction was given in the exact language of section 1960 Code Civ. Proc. no just criticism can be made upon it."

CHAPTER LXXXVIII.

CRIMINAL—CONFESSIONS—DEFENDANT'S TESTIMONY— INDICTMENT.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2513. Confessions of guilt—When admissible—Value as evidence—Jury judges of degree of credit to which entitled.</p> <p>§ 2514. Confessions must be treated like other evidence.</p> <p>§ 2515. Whole of confession must be taken together considered with other evidence.</p> <p>§ 2516. Same subject—Defendant's testimony on former trial.</p> <p>§ 2517. Defendant's admissions in former civil suit—Incriminating questions.</p> <p>§ 2518. Defendant's admission of guilt—How to be considered—Must be voluntarily made.</p> <p>§ 2519. Statements of defendant satisfactory as evidence.</p> <p>§ 2520. Confessions entitled to great weight when spontaneous, voluntary and corroborated.</p> <p>§ 2521. Casual statements by defendant to third party weak as evidence.</p> <p>§ 2522. Confession sufficient to convict.</p> <p>§ 2523. Confession must be corroborated by other evidence.</p> <p>§ 2524. Confession received with caution unless supported by other proof.</p> <p>§ 2525. The phrase "has sought to prove" considered.</p> <p>§ 2526. Confession induced by threat or promise by one in authority.</p> <p>§ 2527. Statements by one defendant when not admissible against co-defendants.</p> <p>§ 2528. Statements of defendant as part of <i>res gestae</i>.</p> <p>§ 2529. Statements of defendant at time of arrest.</p> <p>§ 2530. Contradictory and inconsistent statements.</p> <p>§ 2531. Verbal confessions—How considered by jury.</p> | <p>§ 2532. Confession voluntarily and freely made and corroborated—Arson.</p> <p style="text-align: center;">DEFENDANT'S TESTIMONY—RULE IN
VARIOUS STATES.</p> <p>§ 2533. Weighing defendant's testimony—Rule in Alabama.</p> <p>§ 2534. Arkansas.</p> <p>§ 2535. California.</p> <p>§ 2536. Colorado.</p> <p>§ 2537. Connecticut.</p> <p>§ 2538. Florida.</p> <p>§ 2539. Illinois.</p> <p>§ 2540. Indiana—Indian Territory.</p> <p>§ 2541. Iowa—Dakota.</p> <p>§ 2542. Louisiana.</p> <p>§ 2543. Michigan.</p> <p>§ 2544. Mississippi.</p> <p>§ 2545. Missouri.</p> <p>§ 2546. Nebraska.</p> <p>§ 2547. New Mexico—Oklahoma.</p> <p>§ 2548. Washington.</p> <p>§ 2549. West Virginia.</p> <p>§ 2550. Wisconsin—Wyoming.</p> <p>§ 2551. United States Courts.</p> <p>§ 2552. Unsworn statement of defendant—Georgia statute.</p> <p>§ 2553. Defendant competent witness.</p> <p>§ 2554. Defendant and his wife competent witnesses—Weighing their testimony—Missouri.</p> <p>§ 2555. Defendant need not testify.</p> <p>§ 2556. Defendant's failure to testify not to be taken against him—Louisiana.</p> <p>§ 2557. Same subject—Mississippi.</p> <p>§ 2558. Same subject—Missouri.</p> <p>§ 2559. Same subject—Nebraska.</p> <p>§ 2560. Defendant's failure to testify not to be alluded to in jury's deliberations—Texas.</p> <p>§ 2561. Defendant wilfully sworn falsely.</p> <p>§ 2562. Fabrication of testimony—By defendant.</p> |
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| § 2563. Fabrication of evidence—
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§ 2513. Confessions of Guilt—When Admissible—Value as Evidence—Jury Judges of Degree of Credit to Which Entitled. Regarding confessions of guilt in criminal prosecutions, you will remember that these are either indirect confessions, or confessions inferred from the conduct, etc., of the accused, and termed “indirect confessions of guilt.” Confessions of guilt should not be received where they are not free and voluntary, but procured through the influence of threats or the promise of favor. Both their admissibility and value depend upon their being deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interests and safety unless impelled to do so by the promptings of truth and conscience. A confession of guilt reduced to writing, and signed by the person making it, if deliberately made and signed, without being influenced thereto by any threats and promises by others, should be regarded in the absence of evidence to the contrary, as strong and convincing evidence in the case. The degree of credit due to them is to be estimated by the jury under the circumstances of the particular case. The whole of what the accused said on the subject at the time of making the confession should be taken together. The jury may believe that part which criminales the accused and reject that which is in his favor or credit so much as is in his favor and discard that which is against him, if they see sufficient grounds, upon all the evidence, for so doing, for the jury are at liberty to judge of it, like any other evidence, from all the proven circumstances of the case.¹

§ 2514. Confessions Must Be Treated Like Other Evidence. If the jury believe, from the evidence, that the defendant made the confession, as alleged, and attempted to be proved in this case, the jury should treat and consider such confession precisely as they would any other testimony; and hence, if the jury believe the whole confession to be true they should act upon the whole as true. But the jury may believe part of the testimony and reject the balance if they see sufficient grounds in the evidence for so doing; the jury are at liberty to judge of it like other evidence, in view of all the circumstances of the case as disclosed by the evidence.²

§ 2515. Whole of Confession Must Be Taken Together, Considered with Other Evidence. (a) The court instructs the jury that where a confession of the prisoner charged with a crime is offered in evi-

1—State v. Brinte, — Del. —, 58 Atl. 258 (263).

2—Jackson v. People, 18 Ill. 269.

dence, the whole of the confessions so offered and testified to must be taken together, as well that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant.³

(b) The court instructs you that in considering the weight to be given to any alleged confession made by defendant, you should consider all the testimony in the case upon that point, the position of the defendant at the time, his surroundings, his strength of mind, as shown by the evidence, and any hopes or fears, if any, that may have influenced him.⁴

(c) You are instructed that, where the state puts a confession in evidence, the whole of said confession is to be taken together, and the state bound by it, unless it is shown by the evidence to be untrue in whole or in part.⁵

(d) If you find from the evidence that the defendant made any statement or statements in relation to the offense charged in the indictment after such offense is alleged to have been committed, you must consider such statement or statements all together. What the defendant said against himself, if anything, the law presumes to be true, because said against himself. What he said for himself, you are not bound to believe because said in a statement or statements proved by the state, but you may believe or disbelieve it, as it is shown to be true or false by the evidence in the case. It is for you to consider, under all the circumstances, from the evidence, how much of the whole statement or statements of the defendant proved by the state is worthy of belief.⁶

3—Refusal of this instruction held error. *Burnett v. People*, 204 Ill. 208 (225), 68 N. E. 505.

4—*People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

5—*McKinney v. State*, — Tex. Cr. App. —, 88 S. W. 1012.

"It was not necessary for the court to have given this charge, since there was other testimony than the confession. However, the charge of the court was in proper form, if the confession was relied upon alone for conviction. *Pharr v. State*, 7 Tex. App. 472; *Jones v. State*, 29 Tex. Cr. App. 20, 13 S. W. 990, 25 Am. St. 715; *Slade v. State*, — Tex. App. —, 16 S. W. 253."

6—*State v. Brennan*, 164 Mo. 487, 65 S. W. 325 (331).

In *State v. Merkel*, 189 Mo. 315, 87 S. W. 1186, a case where the

charge was embezzlement, a somewhat similar instruction was approved. The court said in comment:

"It appears from the testimony in the record that the defendant made certain statements and admissions as to the conversion of the money collected, and doubtless his instruction was predicated upon such statements. It was an appropriate instruction, based upon the statements of defendant, and has met with uniform approval by this court. *State v. Sushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1047; *State v. Hopper*, 71 Mo. 425; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Carlisle*, 57 Mo. 102."

And in *State v. Coats*, 174 Mo. 396, 74 S. W. 864 (869), the following

(e) The jury are instructed, that where evidence is given tending to show admissions made by the defendant in a criminal case, the defendant is entitled to have the whole statement or admission heard and considered by the jury. But the jury are not obliged to believe, or disbelieve, all of such statement; they may disregard such parts of it, if any, as are inconsistent with the other testimony, or which the jury believe, from the facts and circumstances proved on the trial, are untrue.⁷

(f) In considering the evidence as to the oral admissions of the defendant touching the matters involving the offense with which he is charged, you will take into consideration all the statements made by him, whether for or against himself, and give such statements fair consideration.⁸

§ 2516. Same Subject—Defendant's Testimony on Former Trial. The court further instructs the jury that in this case the People have offered in evidence the testimony of the defendant, given by him on his examination before the justice of the peace, for the crime for which he is now on trial, and that the whole of the testimony so read must be taken together, as well as that part which makes for the accused, as that which may make against him, and if any part of such testimony is in favor of the defendant, and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of his testimony is entitled to as much consideration from the jury as any other part of his testimony. The testimony so offered and read for the People, must be considered as the testimony of the defendant in the case so far as it goes.⁹

instruction, which is the same instruction, a little more elaborate, was approved:

The court instructs the jury that if they believe and find from the evidence that the defendant made any statements in relation to the homicide charged by this information, after such homicide was committed, the jury must consider such statement or statements all together. The defendant is entitled to the benefit of what he said for himself, if true; and the state is entitled to the benefit of anything he said against himself, if any statement or statements proved by the state. What the defendant said against himself, the law presumes to be true, because said against himself. What the defendant said for himself, the jury are not bound to believe because it was said in a statement or statements proved by the state, but the jury may believe or disbelieve it, as it is shown to be true or false by the evidence in this case. It is for the jury to consider under all the circum-

stances, how much of the whole statement or statements of the defendant, proved by the state, the jury, from the evidence in this case, deem worthy of belief. And if the jury believe, from the evidence, that the defendant, at the times he made the confessions or statements introduced in evidence, was insane, then they should disregard such confessions or statements.

The court, in comment, said that "it is sufficient to say as to this instruction that it has been approved by a uniform and unbroken line of decisions of this court. *State v. Talbott*, 73 Mo. 347; *State v. Hollenscheit*, 61 Mo. 302; and numerous other cases."

7—*Conner v. State*, 34 Tex. 659; *Riley v. State*, 4 Tex. App. 538; *Eiland v. State*, 52 Ala. 322; *State v. Hollenscheit*, 61 Mo. 302.

8—Approved in trial for homicide; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

9—*Gott v. People*, 187 Ill. 249 (262), 58 N. E. 293.

§ 2517. Defendant's Admissions in Former Civil Suit—Incriminating Questions. The court instructs the jury that the fact that the defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did not answer any such questions; and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offense when he made such admission, if he did make any such.¹⁰

§ 2518. Defendant's Admission of Guilt—How to Be Considered—Must Be Voluntarily Made. (a) If a person accused of a crime voluntarily admits the accusation, that is very strong evidence of his guilt, because it would be unnatural for a person accused of crime to voluntarily admit the accusation against himself, knowing that it would be used against himself, unless he committed the crime; and the only exception to that rule would be where a person is so coerced, or under such duress or restraint, as that he would make a confession or admission involuntarily, and not of his own free will. The court has permitted the evidence in this case to come to the jury that the jury might take it, analyze it, and weigh it, to see what is the truth of the matter; and, if the confession or admission was made, for what purpose, with what motive, and if it was true. You have the right to take into consideration the testimony of the respondent in this case on that branch of the case, as upon all other branches of the case.¹¹

(b) In regard to the evidence of the confession of the defendant made to the sheriff, if you believe there was any such confession made, and you find that such confession was free and voluntarily made by the defendant, after he had been cautioned that such confession might be used against him, then you will consider the same; but if you believe that the defendant made such confession, but it is not shown to be freely and voluntarily made, or if it is shown by the evidence to have been made upon compulsion or persuasion, or under such undue influence as to extort the same, then I charge you that you will reject it from your consideration in making up your verdict in this case. Should you consider such confession or declaration, then I charge you that, such confession or declaration having been introduced in evidence by the state, the whole of such confession or declaration must be taken together, and so considered by the jury; and the state is bound by them, unless they are shown to be untrue by the evidence. Such confessions or declarations, if any, you believe to have been made by the defendant, are to be taken into consideration, if at all, by the jury, in connection with all other facts and circumstances of the case. The state having put in evidence the statement and confession of the defendant, J. M., con-

¹⁰—State v. Burrell, 27 Mont. 282,
70 Pac. 982 (1903).

¹¹—People v. Rich, 133 Mich. 14,
94 N. W. 375 (1903).

cerning the transaction, you cannot convict the defendant unless you be satisfied beyond a reasonable doubt that the defendant's account of the affair, as stated in such confession, is not true.¹²

§ 2519. Statements of Defendant Satisfactory as Evidence. The court instructs the jury that declarations of a defendant regarding his connection with any transaction, when fully and accurately proven, constitute a very satisfactory kind of evidence.¹³

§ 2520. Confessions Entitled to Great Weight When Spontaneous, Voluntary and Corroborated. (a) If you believe from the evidence that the confessions or admissions testified to by the witnesses as having been made to them by the defendant were so made, and that they were the spontaneous and voluntary acts of the defendant, and if you further believe that such confessions have been corroborated by satisfactory proof that the said T. S. was murdered, and that the defendant was so situated that he had an opportunity to commit the crime, then such confessions and admissions may be entitled to great weight in your minds; and if you believe from all the evidence beyond a reasonable doubt that the defendant is guilty, then you should so find by your verdict.¹⁴

(b) The court instructs you that a confession, to be admissible, must have been freely and voluntarily made. It must not have been induced by another by the remotest fear of injury, or the slightest hope of benefit or reward, or anything whatever. It must have been freely and voluntarily made. It is for you to say from the evidence now, if you find there is any evidence in reference to confessions in this case, whether they were voluntarily made. It is for you to judge from the evidence, and see whether or not it comes up to the rules I have just given you in reference to whether or not it was freely and voluntarily made by the accused, provided you find there is any evidence of a confession before you. A confession alone, uncorroborated, will not justify a conviction, but the confession may be corroborated by other facts and circumstances. Now, in this case, I charge you that, if you find that any confession has been made, see whether or not it was freely and voluntarily made, under the law as I have told you. Then, if you find it has been freely and voluntarily made, you may consider it in connection with other evidence in the case.¹⁵

§ 2521. Casual Statements by Defendant to Third Party Weak as Evidence. Statements or admissions of a party satisfactorily

12—Moore v. State, 44 Tex. Cr. App. 45, 68 S. W. 279 (281).

13—State v. Johnson, 72 Ia. 393, 34 N. W. 177 (180).

"The language is the ground of an objection which we think is not well taken. Any declaration or statement made by defendant showing his connection with the

crime, 'fully and accurately proven' would surely be very satisfactory, for no rational man would ordinarily make such statements if he were innocent."

14—State v. Haworth, 24 Utah 398, 68 Pac. 155 (164).

15—Powell v. State, 101 Ga. 9, 29 S. E. 309 (313), 65 Am. St. 277.

proven, which bear upon or give character to the acts of a party, or throw light upon a pending controversy, are proper to be considered by the jury; but evidence of casual statements or admissions of a party, made in casual conversation to disinterested persons, should be considered with caution by the jury, in determining the weight to be given them, in view of the liability of witnesses to misunderstand or forget just what was said, depending upon all the surrounding circumstances.¹⁶

§ 2522. Confession Sufficient to Convict. If the jury believe from the evidence, beyond a reasonable doubt, that in this county, and within three years before the finding of this indictment, M. had 18 or any number of cows feloniously taken and carried away, and that the defendant T. confessed that he was one of the persons engaged in such felonious taking and carrying away of said cows, this is sufficient to authorize the conviction of the defendant, without regard to the testimony of the accomplice.¹⁷

§ 2523. Confession Must Be Corroborated by Other Evidence. The jury are instructed that they cannot convict defendant alone upon his own confession, unless the same is corroborated by other evidence tending to connect defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of an offense.¹⁸

§ 2524. Confession Received with Caution Unless Supported by Other Proof. (a) The court further instructs the jury, for the defendant, that, if they believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions are to be received by them with great caution, and, unless supported by other proof in the case, are not sufficient to convict.¹⁹

(b) In making up your verdict you have a right to consider any statements shown to have been made by the defendant after the charge was made against him, but in considering such statements you must consider the whole statements of conversation together. He is entitled to the benefit of what he said in his own behalf, if

16—*Emery v. State*, 101 Wis. 627, 78 N. W. 145 (154).

The court said: "The charge criticised is free from error. It is a literal copy of one considered by this court in *Haven v. Markstrum*, 67 Wis. 493, 30 N. W. 720, except that, instead of the language immediately following the words 'disinterested persons,' that is, 'should be considered by the jury in determining the weight to be given to them,' the following is used: 'Are regarded by law as very weak testimony.' The court not only approved of that instruction, saying it was strictly accurate as far as it went, but said 'the trial court

might have gone further and said that evidence of admissions made to third and disinterested persons is the weakest kind of evidence that can be produced.' As before indicated that is elementary. 1 *Greenl. Ev.* (Redf. 8th Ed.) para. 200; *Dreher v. Fitchburg*, 22 Wis. 643; and *Husbrook v. Strawser*, 14 Wis. 403."

17—*Crittenden v. State*, 134 Ala. 145, 32 So. 273 (275).

Note.—See next section.

18—*Cox v. State*, — Tex. Cr. App. —, 69 S. W. 145 (147).

Note.—See previous section.

19—*Haynes v. State*, — Miss. —, 27 So. 601.

you believe it is true; but, if you do not believe it is true, you are not bound to believe and consider it because proven by the state. You should consider such statement, however, with caution, on account of the liability of the witness to forget or misunderstand what was really said or intended.²⁰

§ 2525. **The Phrase, "Has Sought to Prove," Considered.** The state has sought to prove the defendant's guilt by introducing certain alleged confessions and admissions, and by showing that he was seen, after the burglary, carrying something under his coat.²¹

§ 2526. **Confession Induced by Threat or Promise by One in Authority.** The court instructs the jury that no confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat or promise proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly, and if such inducement, threat or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. The prosecutor, officers of justice having the prisoner in custody, or magistrate are persons in authority. It is time for the jury to determine for themselves whether the alleged confession of the defendant was made freely and voluntarily without any influence of hope or fear. If so, they may consider it. If not, it is no evidence. Any—the slightest—menace or threat, or any hope engendered or encouraged that the prisoner's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced; and any words spoken in the hearing of the prisoner which may, in their nature, engender such fear or hope, render it necessary that a confession made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away.²²

§ 2527. **Statements by One Defendant; When Not Admissible Against Co-Defendants.** (a) You are further instructed that all statements made by the witness, R., made to the witnesses, W., M. and K., and not in the presence of defendant, were admitted solely

20—State v. Weber, 156 Mo. 249, 56 S. W. 729.

21—Connors v. State, 95 Wis. 77, 69 N. W. 981 (1902).

"It is claimed," said the court, "that this instruction took the question from the jury. It is said to be equivalent to an instruction that he was so seen. A very simple analysis will clearly show that this is not the effect of the instruction.

The phrase 'has sought to prove * * * by showing,' very clearly, is not equivalent, either grammatically or in the common usage of the language, to the phrase 'has shown' or 'has proved.' And it should not, naturally, be so understood by the jury."

22—People v. Clarke, 105 Mich. 169, 62 N. W. 1117 (1918).

upon the issue of the guilt or innocence of defendant, R., and cannot be considered by you for any other purpose, if for any purpose.²³

(b) After the commission of a crime has been accomplished, no one engaged in it can, by any subsequent declaration or act of his own, not made or done in the presence of another, affect that other person. His confession, therefore, is not admissible in evidence as such against any but himself. If the confession of one prisoner implicates any other person by name, it must be proved as it was made, not omitting such name; but the court should instruct the jury, as we do you, that it is not evidence against any but the prisoner who made such confession.²⁴

§ 2528. **Statements of Defendant as Part of Res Gestæ.** Declarations accompanying the act, or so nearly connected therewith, in time, as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*, and subject to be judged and weighed by the jury under the same rules which I have given you for weighing and considering other evidence in the case; that is, the connection of the defendant with the case, his interest in it, whether such declarations are consistent throughout, or are conflicting with themselves or other facts.²⁵

§ 2529. **Statements of Defendant at Time of Arrest.** Some evidence has been offered of statements made by the defendant at the time of his arrest, and I charge you in relation thereto that such statements made at the time of the arrest are to be received with great caution; for besides the danger of misapprehension of witness, or the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is often oppressed by the calamity of his situation, and that he is often influenced by motive of hope or fear to make statements.²⁶

§ 2530. **Contradictory and Inconsistent Statements.** It is claimed by the prosecution that the defendant has made different and contradictory and inconsistent statements concerning his whereabouts for one or two hours immediately before the fire in question; but, even if defendant did make such contradictory statements, and they were partially or wholly false, that, of itself, would not be sufficient to convict the defendant; and you should very carefully consider what the average young man of his condition in life might do under

23—*Wilkerson v. State*, — Tex. Cr. App. —, 57 S. W. 956 (962).

"The objection of appellant to this paragraph is that it is upon the weight of the evidence, in that it assumes as a fact proven that the witness R. did make statements to W. M. and K., which tended to establish the guilt or innocence of said R. We do not think these contentions are correct, but believe

the charge as a whole is a clear, correct and proper presentation of the law of this case."

24—*State v. Brinte*, — Del. —, 58 Atl. 258 (263), citing 1 Greenleaf on Evidence, Secs. 218, 233.

25—*Hinkle v. State*, 94 Ga. 595, 21 S. E. 595 (601).

26—*People v. McArron*, 121 Mich. 1, 79 N. W. 944 (958).

like trying circumstances; and in this connection you should recall the fact that the young men, C. and M., were both quickly ready to resort to falsehood for the purpose of warding away suspicion, notwithstanding their acknowledged innocence; and now, gentlemen, if you should believe that this defendant made contradictory statements, and that some of them, or all of them, were false, it will not be unnatural that such belief on your part may create prejudice in your minds against this defendant. If such should be the case, it will be your duty to exercise great care that you do not permit that prejudice to take the place of and be substituted in your minds for actual evidence and proof of all the necessary facts to constitute the chain necessary to establish the defendant's guilt.²⁷

§ 2531. Verbal Confessions—How Considered by Jury. (a) Any verbal statements or admissions made by the defendant and which have been proven in this case, may be taken into consideration by you, together with all other facts and circumstances detailed in evidence. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true, because said against himself; but anything you may believe from the evidence that defendant said in his own behalf you are not obliged to believe, but you may treat the same as true or false, when considered with a view to all the other facts and circumstances in the case.²⁸

(b) The court further instructs the jury that, if verbal statements of the defendant have been proven in this case, you may take them into consideration with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true; but anything you may believe from the evidence that the defendant has said in his own behalf you are not obliged to believe, but you may treat the same as true or false, when considered with a view to all the other facts and circumstances in the case.²⁹

§ 2532. Confession Voluntarily and Freely Made and Corroborated—Arson. If the evidence be clear and decisive, satisfying your minds beyond a reasonable doubt that the storehouse was willfully and maliciously burned, and if you believe that the defendant voluntarily and freely confessed that he did it, then such a confession thus corroborated may, in your discretion, serve as sufficient corroboration to authorize a conviction.³⁰

27—Held error to refuse this charge. *People v. Stewart*, 75 Mich. 21, 42 N. W. 662 (665).

28—*State v. Darling*, 199 Mo. 168, 97 S. W. 592.

29—Approved in homicide case; *State v. Gatlin*, 170 Mo. 354 (364), 70 S. W. 885 (888).

30—*Morgan v. State*, 120 Ga. 499, 48 S. E. 238 (240).

The court said in comment that

"while the court did not charge as to the specifications set out in the defendant's statement as to the reason for the fear causing him to make the confession, he did thoroughly cover that branch of the case. He instructed the jury that they must not consider any confession unless they were satisfied that it had been made freely and voluntarily; that they were not con-

DEFENDANT'S TESTIMONY.

§ 2533. **Weighing Defendant's Testimony—Rule in Alabama.** The jury have no right to disregard the testimony of the defendant on the ground alone that he is a defendant, and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty; and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if, from all the evidence, the jury may have any reasonable doubt whether, at the time of the shooting complained of, the pistol was accidentally discharged, they should give the defendant the benefit of the doubt and acquit him.³¹

§ 2534. **Arkansas.** The court instructs the jury that under the law the defendant, B., has the right to testify in his own behalf, but the credibility and weight to be given his testimony are matters exclusively for the jury. In weighing the testimony of the defendant in the case, you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of your verdict as affecting his credibility. You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true, and made in good faith, or only for the purpose of avoiding conviction.³²

cluded by the fact that evidence of confessions had been admitted, but that if, from the evidence, they found that the confession had not been freely and voluntarily made, they should disregard it. The court went further, and charged that if one confession had been induced by hope or fear, and was therefore not voluntary, no subsequent confession could be considered, if made under the influence of the original improper inducement."

31—*Moses v. State*, 58 Ala. 117; see also *Nelson v. Vorce*, 55 Ind. 455; *Bressler v. People*, 117 Ill. 441, 8 N. E. 62. In *Bohlman v. State*, 135 Ala. 45, 33 So. 44, the following instructions were approved:

The court charges the jury that in determining the weight they will give to the defendant's testimony they should consider, along with all the other circumstances having any bearing on the matter, the fact that he is the defendant, and, in fact, if they so find, that

his testimony is in conflict with the other testimony in the case.

The court charges the jury that the interest the defendant has in the case may be considered by them in weighing his own evidence.

Approved in *Miller v. State*, 107 Ala. 40, 19 So. 37 (38).

32—*Blair v. State*, 69 Ark. 558, 64 S. W. 948 (950).

Such instructions have been repeatedly held by this court to be correct. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Jones v. State*, 61 Ark. 88, 32 S. W. 81; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054."

In *Hudson v. State*, 77 Ark. 334, 91 S. W. 299, the following instruction was held good:

The defendant has the right to testify, and the jury should give his testimony the same impartial consideration that they accord to the testimony of other witnesses. They should not arbitrarily disregard what he testifies simply because he is the defendant, nor, on the other hand, are they required

§ 2535. **California.** In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements, taken in connection with all the evidence in the case, and, if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And, in judging of the defendant who has testified before you, you are in duty bound to presume that he has spoken the truth; and, unless that presumption has been legally repelled, his evidence is entitled to full credit.³³

§ 2536. **Colorado.** The jury are instructed that, in determining the credibility that should be accorded to the testimony of the defendant, they have a right to take into consideration the fact that he

blindly to receive a fact because he says it is true; but they are to consider his testimony in connection with the other facts in proof, in order to determine whether his statements are true and made in good faith, or made only to avoid conviction. The jury are the exclusive judges of the weight of such testimony. In considering the degree of credit to be given it, they may take into consideration his appearance and manner while testifying, the reasonableness and unreasonableness of his statements, and his interest in the result of the verdict. After a due consideration of his testimony, in connection with the other evidence in the case, they should give it such weight as they may deem it entitled to receive, their sole object being to ascertain the truth.

33—*People v. Hill*, 1 Cal. App. 414, 82 Pac. 398 (399).

"The appellant complains of this instruction, but there is no merit in such complaint. *People v. Wells*, 145 Cal. 138, 78 Pac. 470. The language, 'if convincing and carrying with it a belief in its truth, act upon it,' is found in the instruction in the *Cronin* case, 34 Cal. 196, and that case has been often affirmed upon this point."

In *People v. Wells*, 145 Cal. 138, 78 Pac. 470 (471), the following instruction was given:

The court instructs the jury that the defendant has been examined as a witness in his own behalf. This it is his right to be, and the jury will consider his testimony as they would that of any other witness examined before you. It is proper for the jury, however, to bear in

mind the situation of the defendant, and the manner in which he may be affected by the verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether his position and interest may not affect his credibility or color his testimony. But it is your duty to consider it fairly and give it such credit and weight as you think it is entitled to receive.

In comment the court said:

"Appellant's counsel objects to the above instruction on the ground that it is unfair to the defendant and that it invades the province of the jury. He admits that it is substantially the same as the one approved in *People v. Cronin*, 34 Cal. 204, but he thinks that case is not good law and should be modified. In the recent case of *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904, however, this court said of a similar instruction: 'This instruction was in effect the same as an instruction given in the case of *People v. Cronin*, and there held to be correct. It has since been frequently held that where this instruction, though it may be regarded as erroneous, if kept well within the language considered in the *Cronin* case, the judgment will not be reversed on account of it. *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520. It only undertakes to lay down the guidance of the jury a matter that they would be apt to know about and act upon without any such instruction.'"

Note.—From the comment it seems it has not the unqualified approval of the court.

is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand and during the trial.³⁴

§ 2537. **Connecticut.** He is to be regarded by you as every other witness is to be regarded. You are to take into consideration his appearance, his manner of testifying, the reasonableness of his story, and, above all, you are to take into consideration the fact that he is the accused in the case; and, taking those facts into consideration, you are to give to his statements in court, or any statements made by him out of court, such effect and such force as you think they justly should have.³⁵

§ 2538. **Florida.** Defendants in criminal cases have the right to take the stand and testify in their own behalf, the same as any other witnesses, and their testimony goes to you to be weighed and judged upon the same rules as you would judge the evidence of any other witness testifying in the case. In weighing the testimony of any witness you should take into consideration the interest, if any, the witness may have in the result testified about; the reasonableness or unreasonableness of the testimony as judged by your canons of common sense; the manner of the witness on the witness stand; and, in fact, all the circumstances surrounding the witness are to be considered by you in arriving at your judgment on this matter. If, after carefully and conscientiously considering, on your oaths as jurors all the evidence in the case, you have a reasonable doubt of the guilt of the defendant, you must, under your oaths as jurors, give him the benefit of such doubt and acquit him. If, on the other hand, after such careful and conscientious consideration, you feel that you have an abiding conviction to a moral certainty that the charge is true, then the charge has been made out to the exclusion of and

34—*Boykin v. People*, 22 Colo. 496, 45 Pac. 419 (420), homicide.

"The instruction given by the trial court, as to that part now under consideration, is identical in language with one approved by the supreme court of Illinois in *Hirschman v. People*, 101 Ill. 568, and also in *Rider v. People*, 110 Ill. 11. In the subsequent case of *Purdy v. People*, 140 Ill. 46, 29 N. E. 700, an instruction containing the same language is condemned as to the words 'during the trial.' Again in *Siebert v. People*, 143 Ill. 571, 32 N. E. 431, the same instruction, omitting, however, the words 'during the trial,' received the sanction of the court, which, in the immediate connection, refers approvingly to the two cases supra, from 101 and 110 Ill., and says that there was no intention in the *Purdy* case to change the rule of law in said two earlier cases, and that there was no conflict between them and

the *Purdy* cases. A critical examination of the decision in the *Purdy* case shows that the defendant was the only witness in his own behalf, and this fact, and the further fact that the court was in grave doubt as to the sufficiency of the circumstantial evidence to warrant a conviction, led the court to hold that the instruction did not fully and fairly submit to the jury the question of defendant's credibility. We are unable to harmonize the decision in the *Purdy* case with the two earlier cases, unless the former rule announced is to be confined to the peculiar state of facts of that case, and possibly, as so restricted, it might not be objectionable. We are, however, of the opinion that the instruction as given by the trial court in the case at bar is correct, certainly as applicable to the facts in this case."

35—*State v. Fiske*, 63 Conn. 388, 28 Atl. 572 (573).

beyond a reasonable doubt, and it is then equally your duty to convict the defendant.³⁶

§ 2539. **Illinois.** The defendant is a competent witness in her own behalf, and you have no right to discredit her testimony from caprice, nor merely because she is the defendant. You are to treat her the same as any other witness, and subject her to the same tests, and only the same tests, as are legally applied to other witnesses; and while you have the right to take into consideration the interest she may have in the result of this trial, you have also the right, and it is your duty, to take into consideration the fact, if such is the fact, that she has been corroborated by other credible evidence.³⁷

36—*Lang v. State*, 42 Fla. 612, 28 So. 856 (857).

In *Olive v. State*, 34 Fla. 203, 15 So. 925 (927), and in *Bond v. State*, 21 Fla. 738, the following was approved:

The statement of the prisoner is evidence before you, to be allowed such weight, and such only, as you see fit to give it.

37—In *McElroy v. People*, 202 Ill. 473 (478), 66 N. E. 1053, it was held error to refuse this instruction. The charge was embezzlement.

In *Regent v. People*, 96 Ill. App. 189 (198), it was held proper to instruct as follows:

The court instructs you that in this state the law declares that a defendant in a criminal case may be a witness in his own behalf. This is no idle form of law, but is a substantial privilege guaranteed to the defendant.

In *Bressler v. The People*, 117 Ill. 422, 8 N. E. 62, the following was approved:

The court instructs the jury that although the law makes the defendants in this case competent witnesses, still, the jury are the judges of the weight which ought to be attached to their testimony; and, in considering what weight should be given it, the jury should take into consideration all the facts and circumstances surrounding the case, as disclosed by the evidence, and give the defendants' testimony only such weight as they believe it entitled to, in view of all the facts and circumstances proved on the trial.

In *Hirschman v. People*, 101 Ill. 568, it was held not error to charge as follows:

The jury in criminal cases are not bound to believe the testimony of the defendant any further than

it may be corroborated by other credible evidence in the case.

In *Johnson v. People*, 140 Ill. 350 (353), 29 N. E. 895, the following instruction was given:

The court instructs the jury that, by the law of this state, the defendant is made a competent witness upon the trial in this case, but it is left entirely with the jury to judge of his credibility as such witness; and in judging of the credit to be given to such witness, it is proper for the jury to take into consideration the probability or improbability of his statements as such witness in view of all the testimony in the case.

Approving it the supreme court said:

"The ground of the objection urged is that the jury were not told that they were to take into consideration the manner and appearance of the witness while testifying. But this instruction does not assume to lay down a general rule for determining the credibility of the witness. It simply calls attention to a circumstance that may legitimately affect the testimony of the witness either sustaining or depreciating it. This is proper for the consideration of the jury, and that is fair to each side."

In *Johnson v. People*, *supra*, the following, also, was approved:

The jury are instructed that the relatrix in this case is interested in the event of this case, and that the defendant is interested, and the interest of these parties may be considered in determining their credibility as witnesses.

In *Henry v. People*, 198 Ill. 162, 65 N. E. 120, the following was approved:

The court instructs the jury that, although the defendants

§ 2540. **Indiana—Indian Territory.** In determining the weight to be given to the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand, the probability or improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony. The defendant has testified as a witness, and you should weigh his testimony as you weigh that of any other witness. Consider his interest in the result of the case, his manner, and the probability or improbability of his testimony.³⁸

have a right to be sworn and to testify in their behalf, the jury are not bound to believe their testimony, but they are bound to give it such weight as they believe it is entitled to, and their credibility, and the weight to be attached to their testimony, are matters exclusively for the jury, and the defendants' interest in the result of the trial is a matter proper to be taken into consideration by the jury in determining what weight ought to be given to their testimony.

The court said: "The instruction thus complained of is a literal copy of instruction numbered six, set forth in *Bressler v. People*, 117 Ill. 422, 8 N. E. 62, and there approved by this court. In *Hirschman v. People*, 101 Ill. 568, this court said (p. 576): 'The jury were not bound to believe the evidence of the defendant any further than it may have been corroborated by other credible evidence (*Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109), and we see no impropriety in saying so to them.' The instruction, in substance, is sustained by *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324; *Yundt v. Hartrunft*, 41 Ill. 9; *Miller v. People*, 39 Id. 457; see also *Bulliner v. People*, 95 Ill. 394; *Chambers v. People*, 105 Id. 409."

In *Doyle v. People*, 147 Ill. 394 (397), 35 N. E. 372, the following was approved:

The jury are instructed that while it is true that, under the law of this state, defendants in criminal cases are competent witnesses in their own cases, yet you are instructed that their credibility is left, by the statute, to the consideration of the jury; and in considering the amount of credit or value you will give to the testimony of L. L. in this case, you may take into consideration his interest in the case, his desire to

avoid punishment for the crime with which he is charged, and all other interests or motives that would likely surround or affect the testimony of a person similarly surrounded or situated.

38—*Anderson v. State*, 104 Ind. 467, 4 N. E. 64 (66), 5 N. E. 711, 5 Am. Cr. Rep. 601.

The court cited *Nelson v. Vorce*, 55 Ind. 455; *Canada v. Curry*, 73 Ind. 246; *Fisher v. State*, 77 Ind. 42; *Woolen v. Whitacre*, 91 Ind. 502; *Dodd v. Moore*, Id. 522; *Overton v. Rogers*, 99 Ind. 595.

In *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354 (355), the trial court gave the following instruction:

The law gives persons accused of crime the right to testify on their own behalf, but their credibility and the weight to be given to their testimony are matters exclusively for the jury. Therefore, in weighing the testimony of the defendant in this case, you have the right to take into consideration the manner of his testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of the case, as affecting his credibility. You are not required to receive blindly the testimony of such accused person as true, neither are you at liberty to disregard his testimony, but you are to give it due consideration, and to determine whether or not his statements are true, and made in good faith, or only for the purpose of avoiding conviction.

Affirming judgment of conviction, the court said: "While this instruction standing alone cannot be said to be a complete or accurate statement to the jury of the rules by which they ought to be guided in weighing the testimony of the defendant, and while it may also be said that it is possibly open to the criticism that it singles

§ 2541. **Iowa—Dakota.** Under our statute a person charged with the commission of a crime is a competent witness and may testify in his own behalf. The defendant in this case has availed herself of this privilege, and in determining her guilt or innocence, you must consider her testimony. She testifies as an interested witness, and from an interested standpoint, and as such you should consider her testimony; and when you do this, together with all the other surrounding circumstances developed by the evidence, give the testimony of the defendant such weight, in connection with the other evidence in the case, as you may think it entitled to, and no more.³⁹

out the defendant and directs the admonition or advice therein given alone to his testimony, yet, in the absence of the evidence, we would not be in a position to adjudge that appellant was prejudiced in any of his substantial rights thereby."

The court instructs you that, under the law the defendant is a proper witness in his own behalf, and you should take into consideration his evidence in determining the guilt or innocence of the defendant; but in determining what weight you will give the evidence of the defendant, you should take into consideration the fact that he is the defendant, the interest he has in the result of the suit, his intelligence or lack of intelligence, his appearance and manner of testifying while on the stand, and, taking all of these facts into consideration, you should give his evidence such weight as you think it entitled to under all the circumstances of the case.

Helms v. United States, 2 Ind. Ter. 595, 52 S. W. 60 (63).

The court said: "While we find no reversible error in this charge, we think the better practice, instead of singling out the defendant, and giving the jury the rule by which his testimony is to be measured, is to lay down the rule as to the testimony of all the witnesses including that of the defendant."

39—*State v. Hossack*, 116 Iowa 194, 89 N. W. 1077 (1081), homicide case.

"This language seems to have been taken from an instruction approved by this court in *State v. Sterrett*, 71 Iowa 386, 32 N. W. 387. We cannot agree that the existence of the marital relation alters the rule as to the credibility of defendant as a witness, although it may have strengthened the presumption of her innocence."

In *State v. Harris*, 97 Iowa 407, 66 N. W. 728 (729), the following instruction was approved by the court:

The defendant has the right to testify in his own behalf, and he has availed himself of that privilege. The character of the defendant as a witness has been attacked, and evidence offered tending to show his moral character is bad. You have a right to consider his evidence, but you have also the right, in determining what weight you give to the evidence, to consider his interest in the case, the temptation to shield himself from the consequences of crime. Also you may, in that connection, consider the evidence offered tending to show his bad moral character, and give to the evidence just such weight as you may think the same entitled to.

In *State v. Wisnewski*, 13 N. Dak. 649, 102 N. W. 883 (884), the following instruction was given:

The defendant shall, at his own request, and not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him, nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place. Therefore, under the law, the mere fact that the defendant has not testified in this case shall not create any presumption of guilt in your minds against the defendant, and should not be considered by you in this case.

Approving it the court said: "A defendant's failure to become a witness might well be considered as a circumstance unfavorable to the defendant, and to advise them [the jury] it shall not be so considered is not the subject of prejudice or exception. Enc. Pl. & Pr. vol. II,

§ 2542. **Louisiana.** The court instructs the jury that while our statute permits parties accused of crime to testify in their own behalf, still the jurors are the judges of the credibility (creditableness) and weight of such testimony; and, in determining such weight and credibility, the fact that such witnesses are interested in the result of the cause may be taken into account by the jury, and you may give the same such weight as you think it justly entitled to under all the circumstances of the case, and in view of the interest of such witnesses.⁴⁰

§ 2543. **Michigan.** In the beneficence of our modern statutes in this state, one on trial for a crime is allowed to testify under oath in his own behalf. His interest in the result of the trial, that would

p. 352; *State v. Weems*, 96 Iowa 448, 65 N. W. 387; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *State v. Landry*, 85 Me. 95, 26 Atl. 998.

40—*State v. Wiggins*, 50 La. 330, 23 So. 334 (336).

"An accused person who does not go on the stand is entitled to have the judge charge the jury that the fact that he declines to avail himself of the privilege gives rise to no inference against him. *State v. Walsh*, 44 La. Ann. 1134, 11 So. 811; *Whart. Cr. Ev.* p. 435; Act No. 29 of 1886. So, too, if he goes on the stand as a witness, the judge may charge the jury that, in weighing his testimony, they are entitled to take into account the fact of interest in the result of the trial. 29 Am. & Eng. Enc. Law, p. 677; *Pruitt v. State*, 92 Ala. 41, 9 So. 406; *Reagan v. U. S.*, 157 U. S. 301, 15 Sup. Ct. 610; *State v. Tartar*, 26 Ore. 38, 37 Pac. 53; *People v. Resh*, 107 Mich. 251, 65 N. W. 99; *State v. Fiske*, 63 Conn. 388, 28 Atl. 572; *Sackett Instruct. Juries*, p. 43, §§ 20, 21. Nor is such instruction prejudicial error because it singles out the accused from the other witnesses in the case. No other witness occupied the same position as did the accused, and the instruction, therefore, does not apply to him a test of credibility which could have been applied to others. *Doyle v. People*, 147 Ill. 394, 35 N. E. 372. This was, in effect, charging one or more of the general rules of evidence, viz., that the motive or bias of a witness—his interest in the outcome of the trial—may affect more or less, his evidence for credibility, and the jury are the judges of the effect and value, the weight and sufficiency, of the evi-

dence addressed to them. The statute (Act 29 of 1886) specifically requires the judge to charge the jury that such testimony shall be weighed and considered according to the general rules of evidence. It was intended, of course, that the judge should not merely say to the jury, 'You are to weigh and consider the testimony of the accused according to the general rules of evidence,' but should explain to them what the particular general rules of evidence are that are applicable to testimony given by an accused person. This is what the judge in the instant case did. This court said in *State v. Walsh*, supra, that 'the weight of the testimony (of the accused) is left to the jury.' *Whart. Cr. Ev. Pars.* 429, 434, 436. If it is left to the jury it is proper for the judge to tell them so. The words 'but all testimony shall be weighed and considered according to the general rules of evidence, in the concluding clause of section 2 of the act of 1886, have reference, clearly, to all the testimony given by accused persons under the permission of the act. The judge is to charge that all such evidence—i. e. that given by defendants in criminal causes—'shall be weighed,' etc. It was not necessary to use that language as to the testimony of other witnesses in a case, for it has always been the law that their evidence is to be weighed and considered by the general rules of evidence. This demonstrates that the lawmaker intended to apply the language used in the statute to the testimony of accused persons. It is with reference to accused persons only that section 2 of the acts speaks."

formerly preclude his so testifying, now has not that effect, and it is the duty of jurors, where this is done, to give his testimony such weight as, in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His interest is to be considered only so far as it affects his credit. His testimony is to be scanned and tested the same as that of other witnesses. If rational, natural and consistent, it may outweigh the testimony of other witnesses. If inconsistent with established facts, or with his prior statements; you will treat it the same as you would that of any other witness whose testimony is thus defective.⁴¹

§ 2544. Mississippi. The court instructs the jury that under the law the defendant is a competent witness in his own behalf, and his testimony is entitled to whatever weight the jury, as the judges of the evidence, may see fit to give it.⁴²

§ 2545. Missouri. The defendant is a competent witness in his own behalf, and his testimony is to be received by you and weighed by the same rules as the testimony of any other witness. In determining what weight you will give to his testimony, you may take into consideration the fact that he is the defendant on trial, and his interest is the result of the trial.⁴³

41—*People v. Willett*, 105 Mich. 110, 62 N. W. 1115 (1116).

The court found no error in an instruction given in *People v. Resh*, 107 Mich. 251, 65 N. W. 99 (100) as follows:

The respondent has been a witness before you, as he had a right to be; and you have a right to weigh his testimony, and give it such credit as you think it fairly entitled to. We have a right to take into consideration, in weighing the testimony, his relation to the offense charged in the information.

The court cited *Housh v. State*, 43 Neb. 163, 61 N. W. 571; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489.

In *People v. McCarron*, 121 Mich. 1, 79 N. W. 944, the following instruction was given:

The defendant, under our statute, is allowed to testify under oath in his own behalf, and it is the duty of the jurors, where he has done so, to give his testimony such weight as, in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His testimony is to be tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of all other witnesses.

42—*McVay v. State*, — Miss. —, 26 So. 947.

43—*State v. Bond*, 191 Mo. 555, 90 S. W. 830 (831).

In *State v. Maupin*, 196 Mo. 164, 93 S. W. 379 (383), the following was given:

The court instructs the jury that the defendant is a competent witness in his own behalf, and you may consider his testimony, but in determining what weight and credit you will give his testimony you may take into consideration that fact that he is the defendant on trial and interested in the result of the trial.

In *State v. Hughes*, 149 Mo. 514, 51 S. W. 89, the following was approved:

Under the law, the defendant is a competent witness in his own behalf, and you should take his testimony in account, and give it such weight as you deem it entitled to receive, in passing upon his guilt or innocence; but, in determining what weight you will attach to his testimony, you may take into consideration the fact that he is the defendant in the cause, testifying in his own behalf, and his interest in the result of this trial.

The defendants are competent witnesses in their own behalf, but the fact that they are the defend-

§ 2546. **Nebraska—Murder.** Under the law of this state the accused is a competent witness in his own behalf, and you are bound to consider his testimony; but in determining what weight to give to his testimony, you may weigh it as you would the testimony of any

ants, and, as such, interested in the result of this case, may be considered by you in determining the credibility of their testimony. Approved in *State v. Vaughan*, 200 Mo. 1, 98 S. W. 2.

The court instructs the jury that the defendant is a competent witness in his own behalf, but the fact that he is the accused party on trial, and testifying in his own behalf, may be considered by the jury in determining what weight and credit they will give to his testimony. Approved in *State v. Smith*, 164 Mo. 567, 65 S. W. 270.

The defendant is a competent witness in the case, and in arriving at your verdict you must consider his testimony, but in determining what weight and credibility you will give to his testimony you may take into consideration the fact that he is the accused party on trial, testifying in his own behalf, and the interest he has in the result of the trial. Approved in *State v. Darling*, 199 Mo. 168, 97 S. W. 592. A similar instruction, slightly differently worded, was approved in *State v. Gatlin*, 170 Mo. 354, 70 S. W. 885 (888).

The court instructs the jury that the defendant is a competent witness in his own behalf, and you should consider his testimony in connection with the other evidence given on the trial. In determining what weight you will give to defendant's testimony, you may take into consideration the fact that he is the defendant on trial, and interested in the result of the prosecution. Approved in *State v. May*, 172 Mo. 630, 12 S. W. 918 (920), a murder case.

The defendants are competent witnesses in their own behalf, and their testimony is to be received by you and weighed by the same rules as the testimony of any other witnesses. In passing upon what weight you will give to their testimony, you may take into consideration the fact that they are the defendants on trial, and their interest in the result of the trial. Approved in *State v. Hale*, 156 Mo. 102, 56 S. W. 881 (882).

In *State v. Miller*, 190 Mo. 449,

89 S. W. 377, the jury were instructed as follows:

You are further instructed that you are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight, you will take into consideration the character of the witness, his manner in the stand, his interest, if any, in the result of the trial, his relation to or feeling towards the defendant, and the probability and improbability of his statements, as well as all the facts and circumstances given in evidence. In this connection you are further instructed that, if you believe that any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony. The defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf and the interest he has at stake in the case may be considered by you in determining the credibility of his testimony.

The court, in comment, said of the above instruction:

"Objection is made to this instruction because, in that portion referring to the credibility of witnesses, it includes simply the relation to the feeling towards the defendant. The instruction is set out in full in the accompanying statement, and we think is not obnoxious to the criticism made upon it in this respect. The words 'his relation to or feeling towards the defendant' necessarily contemplate whether the witness was friendly or unfriendly to the defendant. The instruction was well enough as it was written.

A further objection to this instruction is that, in speaking of the competency of the defendant, the court told the jury "he was a competent witness in his own behalf, but the fact that he was a witness testifying in his own behalf might be considered by the jury." Complaint is made to the use of the conjunction "but" instead of "and", which it is conceded would have been proper. We

other witness, and you make take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and giving to his testimony such weight as, under all the circumstances, you think it entitled to.⁴⁴

are unable to concur in this criticism of the evidence of the defendant testifying in his own behalf. This identical formula was approved in *State v. Zorn*, 71 Mo. 415, and we think the distinction sought to be made is entirely too nice to be of practical benefit to the defendant on trial."

In *State v. Weber*, 156 Mo. 249, 56 S. W. 729, the court instructed the jury:

The defendant is a competent witness in his own behalf, and his testimony should be considered by you in making up your verdict; but in determining what weight you will give to his testimony you may consider the fact that he is the defendant, and on trial.

44—*Housh v. State*, 43 Neb. 163, 61 N. W. 571 (573),

The court said:

"Were the question an open one at this time, the writer would with reluctance sanction a practice which permits any reference by the court to the subject of the prisoner's credibility as a witness. There is, on principle, no more reason to call the attention of the jury to him, and to caution them to consider his interests as affecting his credibility, than for like caution with respect to any other witness. But that question has been fully settled in this court by decisions in conformity with the practice in this case, which we are constrained to follow. See *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489."

In *Philamalee v. State*, 58 Neb. 320, 78 N. W. 625 (626), the following was approved:

The jury are instructed that, when the defendant testified in this case, he became as any other witness, and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor upon the stand, and the

fact that he has been contradicted by other witnesses.

The court cited *Johnson v. State*, 34 Neb. 257, 51 N. W. 835; *Housh v. State*, 43 Neb. 163, 61 N. W. 571; *St. Louis v. State*, supra; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489.

In *Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (713), a homicide case, the following was approved:

The jury are instructed that they have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of a crime. Nor are the jury required to receive blindly, the testimony of the defendant as true, but the jury are fully and fairly to consider whether it is true and made in good faith; and for this purpose the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case and if, from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt, and acquit him.

In *Johnson v. State*, 34 Neb. 257, 51 Neb. 835 (836), the court approved this instruction:

The court instructs the jury that the law makes the defendant a competent witness in his own behalf, and the jury should not discredit his testimony for the sole reason that he is the defendant; still the jury are the judges of the weight which ought to attach to his testimony; and, in considering what weight should be given his testimony, the jury should take into consideration all the facts and circumstances surrounding the case as disclosed by the evidence, and the interest of the defendant in the result of the trial, and give

§ 2547. **Mexico—Oklahoma.** The defendant is a competent witness in his own behalf, and when he testified as a witness in this case he became as any other witness, and his credibility is to be tested by, and is subject to, the same tests as are legally applied to any other witness; and in determining the degree of credibility that should be accorded to the testimony of the defendant, the jury have a right to take into consideration the fact that he is interested in the result of the prosecution as well as his demeanor and conduct on the witness stand.⁴⁵

§ 2548. **Washington.** You are further instructed that, while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as, in your judgment, it is fairly entitled to.⁴⁶

the testimony of the defendant only such weight as they believe it entitled to, in view of the facts and circumstances proven on trial.

The court said:

"In *St. Louis v. State*, 8 Neb. 418, 1 N. W. Rep. 371, the trial court has instructed the jury that they were at liberty to take into consideration the great interest which the accused has in the result. Lake, J., in discussing the question raised by the instructions, says, 'Not only were the jury, as told by the court, at liberty to consider this interest, but it was their duty to do so in determining the credit to be given to the prisoner's testimony.' In *Murphy v. State*, 15 Neb. 389, 19 N. W. Rep. 489, Reese, J., says: 'It would have been proper for the court to have instructed the jury that, in weighing his (defendant's) testimony, they should consider his interest in the result of the trial.' The instruction in question is in harmony with the rule which has prevailed in this state ever since *St. Louis v. State*, and we can see no sufficient reason for reversing it now."

45—Territory v. Taylor, 11 N. M. 588, 71 Pac. 489 (493).

"The objection to this instruction is not well founded. Except in the two states of Kentucky and Mississippi, it is established that the trial court may, in civil and criminal cases, instruct the jury that they are authorized to take into consideration the interest of the party, or the relationship of the

witness testifying to the party in interest in determining his credibility. 11 Enc. Pl. & Prac. 315. One instruction somewhat similar to this although stronger has been directly passed upon and approved by this court in the case of *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905. We can see no objection to this instruction."

In *Wells v. Territory*, 14 Okla. 436, 78 Pac. 124 (129), the following was approved:

A defendant in a criminal case may be sworn and may testify in his own behalf. In such a case the jury, in judging the credibility and weight to be given his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. You are instructed that you have no right to disregard the testimony of the defendant on the ground alone that he is the defendant, and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf; and the jury should fairly and impartially consider his testimony, under the instructions above given, together with all the other evidence in the case, and if, from all the evidence, the jury have a reasonable doubt as to the guilt of the defendant, it is your duty to acquit him.

46—*State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

"Instructions substantially like

§ 2549. **West Virginia.** The court instructs the jury that they have no right to arbitrarily disbelieve the testimony of the prisoner, but that they should weigh and consider his testimony the same as any other witness in the case, giving it such weight as they think it is entitled to.⁴⁷

§ 2550. **Wisconsin—Wyoming.** Under the laws of this state the defendant is a competent witness in his own behalf. Notwithstanding that fact, however, the jury have a right to consider the situation, his interest in the result of the trial, the temptation that exists under the circumstances to testify falsely, and everything appearing in the case bearing on his credibility; and it is your duty to give his testimony such weight as you believe it entitled to receive. It should be considered in connection with all the other evidence in the case, and the same tests that are applied to his testimony for the purpose of determining its credibility should be applied to the testimony of each and every other witness.⁴⁸

that above quoted have been frequently sustained by the courts. See *State v. Sterrett*, 71 Iowa 386, 32 N. W. 387; *People v. Calvin*, 60 Mich. 113, 26 N. W. 851; *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8; *State v. Elliott*, 90 Mo. 350, 2 S. W. 411; *Territory v. Gonzales*, 11 N. M. 301, 68 Pac. 925; *People v. Cronin*, 34 Cal. 204; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. Cr. Rep. 601; *State v. Sanders*, 76 Mo. 35; 2 *Thompson on Trials*, par. 2445. In *Haines v. Territory*, supra, the instruction objected to was practically similar to that here under consideration, and in regard thereto the court said: 'It is conceded that the above instruction contains nothing but sound legal propositions, and the only complaint made is that defendants were singled out by the court from the body of witnesses for comment. We do not think the court erred in giving the instruction as it did.'

In *State v. Deathenage*, 35 Wash. 326, 77 Pac. 504 (506), the following was approved:

While the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf, and the court so instructs the jury in this case.

See also *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707.

47—*State v. Dodds*, 54 W. Va. 289, 46 S. E. 228 (230).

In *State v. Dodds*, supra, the following was also approved:

The court instructs the jury that in considering all the evidence in this case they may consider the evidence of the prisoner, and how far, if at all, his interest in the case might bias his testimony, and to give his evidence and all other evidence in the case just such weight as they may think it entitled to.

48—*Grabowski v. State*, 126 Wis. 447, 105 N. W. 809.

"Certainly this charge, as so given, is not open to the criticism of discriminating against a single witness as claimed by counsel, in *Schutz v. State*, 125 Wis. 452, 104 N. W. 90, 93, and cases there cited. The portion of the charge as so given was proper."

In *Emery v. State*, 101 Wis. 627, 78 N. W. 145 (154), the following was approved:

Under the law of this state, the defendants are competent witnesses in their own behalf. They have given their testimony, and it is before you to consider with the other evidence in the case. They are directly interested in the result of this trial. In determining the weight to be given to their testimony it is proper for you to take such interest into consideration. You are to give their testimony such weight as under all cir-

§ 2551. **U. S. Courts.** The defendant goes upon the stand before you and he makes his statement; tells his story. Above all things, in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it.⁴⁹

§ 2552. **Unsworn Statement of Defendant—Georgia Statute.** The defendant in this case avails himself of this statute: In all criminal trials in this state, the prisoner shall have the right to make the court and jury such statement in the case as he or she may deem proper in his or her defense, said statement not to be under oath, and to have such force only as the jury may think right to give it; and the jury may believe such statement in preference to the sworn testimony in the case: provided the prisoner shall not be compelled to answer any question on cross-examination should he or she think proper to decline to answer such question.⁵⁰

cumstances, you think it entitled to. If other witnesses have any such interest disclosed by the evidence, it is your duty to consider it in determining the degree of credit that should be given their testimony. You are cautioned, however, that interest in the result of the trial creates no presumption that such witnesses will swear falsely.

In *Younger v. State*, 12 Wyo. 24, 73 Pac. 551 (553), this instruction was approved:

The jury have no right to disregard the testimony of the defendant on the ground alone that he is the defendant and has been charged with the commission of a crime. The law presumes the defendant to be innocent until he has been proved guilty, and the law allows a man to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case.

In *Younger v. State*, supra, the following was approved:

The defendant has offered himself as a witness on his own behalf in this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements, taken in connection with the evidence within the cause, you should consider his relation and situation under which he gave his testimony, the consequences to him relating as a

result from this trial, and all of the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which the witness is entitled. If convincing and carrying with it a belief in its truth act upon it; if not, you have a right to reject it.

The court said that similar instructions had been approved in the following cases:

"*Norris v. State*, 87 Ala. 85, 6 So. 371; *Bressler v. People*, 117 Ill. 439, 8 N. E. 62; *State v. Adair*, 160 Mo. 391, 61 S. W. 187; *State v. Miller*, 159 Mo. 113, 60 S. W. 67; *State v. Wisdom*, 84 Mo. 190; *Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Haines v. Territory*, 3 Wyo. 168, 13 Pac. 8."

49—*Johnson*, alias *Overton v. U. S.*, 157 U. S. 320 (323), 15 S. Ct. 614. Compare an instruction on the same point in *Hicks v. U. S.*, 150 U. S. 442 (450), 14 Sup. Ct. 144.

50—*Hinkle v. State*, 94 Ga. 595, 21 S. E. 595 (601). A homicide case.

In *Smith v. State*, 94 Ga. 591, 22 S. E. 214 (216), homicide case, the following was approved:

The law declares, in all criminal cases in this state defendant shall make to the court and jury just such statement in his defense as he thinks proper to make. Such statement is not to be under oath, and is to have just such force and effect only as the jury think proper to give it; but the jury may be-

§ 2553. Defendant Competent Witness. The defendant is a competent witness in his own behalf, and his testimony is to be weighed by the same rules that govern the testimony of other witnesses; but in weighing his testimony the jury may take into consideration the

Heve it in preference to the sworn testimony, if they think proper to believe it, provided the defendant shall not be subject to cross-examination, except by his own consent.

In *Walker v. State*, 120 Ga. 491, 48 S. E. 184, the following was held unobjectionable as "amounting to an instruction that the jury were authorized, if they saw fit, to consider the statement in connection with the evidence, and weigh it all together, to see what credit should be given to each."

The court instructs the jury that the defendant on trial is allowed to make a statement in his own behalf. The statement is a voluntary statement not made under oath, and made by the defendant in his own behalf; but the statement is allowed to go to the jury, to be considered by them and given such weight and credit as the jury see proper to give it. The jury have the right to believe the statement of the defendant in preference to all the sworn evidence in the case, if they see proper to do so, or the jury have the right to believe the sworn testimony in preference to the voluntary statement of the defendant, if they see proper to do so. The jury have the right to believe portions of the statement and portions of the sworn evidence in arriving at a verdict in the case. It should be the object and purpose of an impartial jury impaneled and sworn to try the case between the state and the defendant to find a true verdict, and in their deliberations they should accept the truth of the transaction, whether it comes from the statement of the defendant or from the sworn testimony. You should consider carefully the statement made by the defendant, so as to determine whether it is the truth about the manner of the killing. Consider it in connection with all the other facts and circumstances proven to your satisfaction, and see if it is corroborated by the sworn evidence or any physical facts proven to your satisfaction, or whether it is inconsistent with or contradicted

by other facts and circumstances proven to be true in the case to your satisfaction beyond all reasonable doubt; and when you have carefully considered the statement and explanation of the defendant as to how the killing occurred in connection with and along with the sworn testimony submitted to you, then you will determine what weight and credit you will give to the defendant's statement. You will then determine, as rational, reasonable jurors, whether, under all the evidence submitted to you, considered in connection with the defendant's statement, you are satisfied beyond all reasonable doubt as to the defendant's guilt, under the law which I will read to you, applied to what you find to be the facts in regard to the killing.

In *Barnes v. State*, 113 Ga. 716, 39 S. E. 488, the following instruction was approved, although a dissenting opinion held it erroneous on the ground that the prisoner had the right to have his statement considered by itself without testing its correctness by the other evidence.

The court instructs the jury that the prisoner has the right to make a statement not under oath. It is your province and duty to consider his statement in connection with the sworn testimony in the case, and give it such weight as you think proper. If you find the statement consistent and true, you have the right to believe it in preference to the sworn testimony in the case. You should do so not carelessly and capriciously, but under your oath as jurors, considering the statement in connection with the sworn testimony in the case, and testing it in the light of that testimony, giving it such weight as you think proper. That is a matter exclusively for your determination.

In *Mason v. State*, 97 Ga. 388, 23 S. E. 831, the following was approved:

To this statement you can give just credit as you think it is entitled to. You may believe the whole of it, or any part of it. You may reject the whole of it or any part of it. You may go to the ex-

fact that he is the defendant in the case, and his interest in the result of the trial.⁵¹

§ 2554. Defendant and His Wife Competent Witnesses—Weighing Their Testimony—Missouri. The court instructs the jury that the defendant and his wife are competent witnesses in his behalf, but the fact that he is the defendant, and that she is his wife, on trial, and the interest he has in his own case, and she has as his wife in same, may be considered by the jury in estimating the weight to be given to their testimony.⁵²

§ 2555. Defendant Need Not Testify. (a) The defendant in this case had a right to go upon the witness stand to testify in his own behalf, if he chose to do so. The law, however, expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So, in this case, the mere fact that this defendant has not availed himself of the privilege which the law gives him, should not be permitted by you to prejudice him in any way. It should not be considered as evidence either of his guilt or innocence. The failure of the defendant to testify is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part.⁵³

tent of believing it in preference to the sworn testimony in the case, provided you believe it to be the truth.

In *Westbrook v. State*, 97 Ga. 189, 22 S. E. 398, it was held there was no error in giving the following:

Find out what the truth of the case is; what the real facts are; and look to the evidence for that purpose, and to the prisoner's statement, if you think it is worthy of credit.

"It is not necessary to state that a reasonable doubt may arise from the prisoner's statement, when the jury are instructed generally as to the weight to be given to that statement. *Walker v. State*, 118 Ga. 34, 44 S. E. 850."

51—*State v. McCarver*, 194 Mo. 717, 92 S. W. 684.

52—*State v. Milligan*, 170 Mo. 215, 70 S. W. 473.

53—*People v. Provost*, 144 Mich. 17, 107 N. W. 716.

"The statute in this state which makes a defendant in a criminal case a competent witness reads: 'No person shall be disqualified as a witness in any criminal case or proceeding, by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or

conviction may be shown for the purpose of affecting his credibility; provided however, that a defendant in a criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him nor shall the court permit any reference or comment to be made to or upon such neglect.' Section 10, 211, Comp. Laws 1897.

The consideration of statutes similar to this has been before the courts of several states. It will be noted that the statutes of some of these states differ in some respects from the statute in this state. In Missouri and Minnesota, both court and counsel are prohibited by statute from making any comments whatever upon the fact that a defendant has not testified. *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065. In Iowa and Texas, where the statute prohibits the attorney for the state from referring to the fact that the defendant has not testified, and makes such reference a misdemeanor and cause for new trial, the courts hold that a charge instructing the jury that such a failure to testify raises no presumption against him was not prohibited. *State v. Weems*, 96 Iowa 426,

(b) The court instructs the jury that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and if the defendant does not claim the right to be sworn and does not testify, this fact must not be used to his prejudice.⁵⁴

§ 2556. **Defendant's Failure to Testify Not to Be Taken Against Him—Louisiana.** You are instructed that while under the statute the accused is permitted to testify, yet it does not require him to testify, and if the defendant does not testify, such fact is not to be taken against him.⁵⁵

65 N. W. 387; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; see also *State v. Skinner*, 34 Kan. 256, 8 Pac. 420. The same was held in Ohio under a statute practically the same as in this state. *Sullivan v. State*, 9 Ohio Cir. Ct. Rep. 652, 4 Cir. Dec. 451. In New York a charge given by the court, on its own motion, broader than the charge requested in the case at bar, was held not to be erroneous. *People v. Hayes*, 140 N. Y. 485, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572, citing and approving, *Ruloff v. People*, 45 N. Y. 213. See also, *People v. Fitzgerald*, 20 App. Div. 139, 46 N. Y. Supp. 1020. In several states it has been held proper to give such a charge, but not error to omit it in the absence of a request to do so. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Felton v. State*, 139 Ind. 531, 39 N. E. 228. In Maine and Illinois the question raised the case at bar was squarely before the courts. In *State v. Landry*, 85 Me. 95, 26 Atl. 998, the court said: "The requested instruction should have been given. It was in exact verbal accordance with the rule laid down in *State v. Banks*. 78 Me. 490, 7 Atl. 269. The legal proposition was relevant to the issue. It was founded upon the statutory provision that the fact that the person accused does not testify in his behalf shall not be taken as evidence of his guilt. The respondent was entitled to have the jury know of the existence of the statute and understand the effect of it. If not so, then a statute expressly created for the benefit of a class of persons is wholly useless to them. The natural inclination of the jury would lead them to adopt the presumption which the statute was designed to prevent.

It is contended that in the Maine and Illinois cases the circum-

stances were such, that such a charge was made necessary, and the decisions are to be accounted for on that ground. We do not so construe these opinions. In both states the courts hold defendants were entitled to have the law in this regard stated to the jury. The peculiar circumstances are mentioned as emphasizing the proposition. Where such a request to charge has been made, we find no authority warranting its refusal. The contention of respondent in this case is founded both upon reason and authority. A respondent is protected in his right under the statute to elect not to testify. A jury, upon his request, should be informed of that right, to prevent the creation in their minds of any presumption of guilt by reason of his silence. The court was in error in refusing to give the request as presented."

54—*State v. Fuller*, — Mont. —, 85 Pac. 369 (375).

"Criticism is made of this part of the charge in that it comments upon and calls the attention of the jury to the fact that the appellant did not testify, and also informed the jury that the appellant might have testified had he so desired, but that the state could not compel him to do so. The defendant was not sworn as a witness. This fact was apparent to the jury. The court was perhaps not bound to instruct the jury with reference to this fact. It was entirely proper, however, if the court chose to do so, to inform the jury as it did, that the fact that the defendant failed to testify could not be used to his prejudice. In any event, the instruction was favorable to the defendant, and for that reason he has no right to complain of it."

55—*State v. Johnson*, 54 La. Ann. 138, 23 So. 199.

"Ingenuous counsel for the ac-

§ 2557. **Mississippi—Same Subject.** It does not devolve upon the defendant to account for or to show the whereabouts of the infant in question, and the fact that he does not testify in this cause is not to be considered unfavorably to him by the jury.⁵⁶

§ 2558. **Missouri—Same Subject.** The court instructs the jury that the fact that the defendant did not testify should not be considered by the jury in arriving at a verdict in this case, and no juror should be prejudiced against the defendant because he did not testify in the case.⁵⁷

cused, in the brief, state that no judge would presume to comment upon the fact that a witness had not been called by the accused, and that, even if the other evidence in the case plainly showed that a certain person knew all about the matter, still, if the accused failed or refused to place the person on the stand, the judge could not legally call the attention of the jury to the fact; that he would not be allowed to say: 'There seems to have been a witness who knew all about this matter. He could have been produced by the accused. Indeed, the accused was the only one who could have made him a witness. No one else could have done so. But, gentlemen of the jury, that fact must not be construed against the accused. He was not bound to do so.' The affirmative statement of the court, as put by counsel in argument, is so pronounced, and so directly bears on the case of an accused for not producing a witness, that it renders of no effect all subsequent admonition of the court. Here the case is different. * * * The accused remained silent, and the judge informed the jury that the privilege of silence should not occasion question or suspicion of any kind. We would not be justified in assuming that the jury took a contrary view, and upon his silence found him guilty, despite the instruction of the court."

Among the cases cited against the instruction was *State v. Carr*, 25 La. Ann. 408. Counsel for defendant cites *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. Ct. 765; *Austin v. People*, 102 Ill. 261-264, and *State v. Cameron*, 40 Vt. 556. See also *Tines v. Commonwealth*, 25 Ky. Law, 1233, 77 S. W. 363 (364), holding that it is error for the court to state the terms of the statute to the jury, the prisoner being en-

titled to absolute silence on that subject.

In *State v. Marceaux*, 50 La. 1137, 24 So. 611 (614) the following was approved:

The court instructs the jury that, while the law provides that a person charged with a crime may testify in his own behalf, yet he is under no obligation to do so, and the law expressly declares that his failure to testify should not be construed for or against him.

56—*Haynes v. State*, — Miss. —, 27 So. 601 (602).

57—*State v. DeWitt*, 186 Mo. 61 (65), 84 S. W. 956. Rape case.

"Our statute (section 2638, Rev. St. 1899) provides that: 'If the accused shall not avail himself or herself of his or her right to testify or of the testimony of the wife or husband on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt nor be referred to by any attorney in the case nor be considered by the court or jury before whom the trial takes place.' Counsel for defendant urges that the giving of the foregoing instruction was a violation of section 2638, supra, and was a comment on the evidence. The latter objection is clearly not tenable. Certainly it was not a prejudicial comment to defendant. Was it a violation of the statute to mention the failure to testify? Every juror knows that the defendant may testify if he sees fit, and we have often ruled that it is reversible error for counsel for the state to comment upon such failure; but does this instruction in any way fall within the mischiefs which we have so often condemned? We think not. By it the jury were cautioned and prohibited from using such fact in arriving at a verdict. The jury are required

§ 2559. **Same Subject—Nebraska.** You are instructed that, while the statute of this state provides that a person charged with crime may testify in his own behalf, yet he is under no obligation to do so, and the statute expressly declares that his neglect to do so shall not create any presumption against him.⁵⁸

§ 2560. **Defendant's Failure to Testify Not to Be Alluded to in Jury's Deliberations—Texas.** The jury are instructed that any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant so to testify shall not be taken as a circumstance against him. And in this case the jury should not take into consideration the fact that the defendant has failed to testify as a witness in his own behalf, and the jury

to accept the law of the case from the court, and when the court positively directs them they shall not consider a certain fact how can it be said that such a charge is prejudicial error. We are, however, confronted with what was said in *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066. In that case the defendant prayed an instruction that his failure to testify should not create any presumption against him, which was refused, and the refusal was assigned as error in this court. It was held not error, and it was added, 'If the court had given such an instruction, it would have disobeyed the spirit, if not the letter, of the law.' That such an instruction is not necessary, and that it would not be error to refuse it, we may concede; but is it reversible error to give it in the form in which this instruction was given in this case? Upon a full reconsideration of the point we are satisfied it was not prejudicial to the defendant. It is the law that the jury shall not consider the failure of the defendant to testify, and how can it, in reason, be held error for the court to caution the jury against considering that which the law forbids? Taking the whole section together, and the purpose of its enactment, we think it was designed to prevent the indulging of any adverse presumption by court or jury from the failure of defendant to testify and to prohibit any adverse comment on that account; but to say that when a court directs a jury they shall not consider such a failure to testify in making up their verdict amounts to an adverse comment is illogical and unreasonable, and we must reject

such a conclusion. We think that while it was unnecessary to give the instruction it was not reversible error to do so."

58—*Lamb v. State*, 69 Neb. 212, 95 N. W. 1050.

"It may well be doubted whether the beneficent purpose of the statute is not in some measure thwarted by the giving of an instruction which pointedly directs the attention of the jury to the fact that the accused might have been, but was not, a witness in his own behalf. However, it is now settled doctrine in this state that the giving of an instruction like the one above set out is not error. *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Ferguson v. State*, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512. The jury may be told that the failure of defendant to testify does not create any presumption against him, but our decisions give no countenance to the claim that the court must, if requested, direct them to refrain from commenting on the fact that he did not avail himself of his statutory privilege. The prohibition against reference to, or comment upon, the failure of an accused person to testify was evidently intended as a restraint upon the public prosecutor, and, with the exception indicated by our previous decisions, upon the court as well. *State v. Robinson*, 117 Mo. 663, 23 S. W. 1066; *State v. Weems*, 96 Iowa 426, 65 N. W. 387; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *Sullivan v. State*, 9 Ohio Cir. Ct. R. 652; *Enc. Pl. & Pr.* 352."

The statutory provision of Nebraska is as follows: "*** nor shall the neglect or refusal to testify create any presumption

are further instructed not to allude to this fact in their deliberations in arriving at a verdict.⁵⁹

§ 2561. Defendant Willfully Swearing Falsely. If the jury believe from the evidence that any witness in this cause has willfully sworn falsely on this trial as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony except in so far as it has been corroborated by other evidence, or by the facts and circumstances proved on the trial. The defendant in this case, having gone upon the stand as a witness in his own behalf, subjects himself to all the rules governing the credibility of other witnesses, and this instruction applies equally to him as well as to any other witness.⁶⁰

§ 2562. Fabrication of Testimony by Defendant. The jury are instructed, that if they believe, from the evidence, that the accused believed that the circumstances surrounding him were calculated to awaken suspicion against him, and that he was ignorant of the nature and course of criminal proceedings, and, under such belief, was induced by his friends to fabricate testimony, then, the jury may take these facts into consideration in considering the conduct of the defendant in relation to fabricating such testimony, and in determining his guilt or innocence.⁶¹

§ 2563. Fabrication of Evidence—Used Against Accused. You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him, because the law says that he who resorts to perjury, he who resorts to subornation of perjury to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt.⁶²

§ 2564. Admission of Other Crimes—Indiana. In this case, as in all other criminal cases, the law provides that the defendant is a competent witness in his own behalf, and that his testimony is to be received and weighed by the jury as in the case of the testimony of any other witness; and if, in this case, the defendant has elected to testify in his own behalf, and in so doing has testified to the commission of any other or different crime from the one here charged

against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." Sec. 473 Neb. Crim. Code.

59—"This charge was proper, and the court did not err in giving the same." *McCoy v. State*, — Tex. Cr. App. —, 81 S. W. 46 (47).

60—*State v. Melvern*, 32 Wash. 7, 72 Pac. 489 (496).

"Nor do we perceive any error

in the above instruction. It certainly states the law correctly, and it would, therefore seem to be unobjectionable. *Rider v. People*, 110 Ill. 13. See also, *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570."

61—*Yoe v. People*, 49 Ill. 410.

62—*Allen v. U. S.*, 164 U. S. 492 (499), 17 S. Ct. 154.

in the indictment, you will not, nor have you the right to, consider such testimony for the purpose of punishing him for the crime here charged, nor must you talk about it in your jury room for that purpose, but must wholly free your mind from any such thing, and not permit it to prejudice you or bias your judgment against the cause of the defendant. But you may consider such evidence, if any there be, in this case, in determining what credibility should be given to the defendant's testimony in this case.⁶³

§ 2565. Conduct of Defendant. The defendant has testified to his actions and conduct the night of the fire. You are to inquire whether this is indicative of innocence or guilt and whether it is consistent with the hypothesis that the defendant did not criminally cause the death of these parties.⁶⁴

INDICTMENT.

§ 2566. Indictment Not Evidence. (a) The jurors are instructed that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself any evidence of the guilt of the defendants, or of any one of them; and no juror should permit himself to be to any extent influenced against any of the defendants because or on account of the indictment in the case, nor by reason of the fact that they were convicts in the penitentiary when the killing charged in the indictment occurred.⁶⁵

(b) The indictment preferring this charge against defendant is no evidence whatever of his guilt; it is simply an accusation or charge; and no juror should suffer himself to be influenced in the slightest degree by the fact that this indictment has been returned against the defendant.⁶⁶

(c) The jury are instructed that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and it is not of itself any evidence of defendant's guilt, and no juror

63—Boyle v. State, 105 Ind. 469, 5 N. E. 203 (208), 55 Am. Rep. 218. Homicide case.

"It has been the law in this state since 1852 that the conviction of an infamous crime may be proved against the credibility of a witness, and for hundreds of years it was the rule of the common law that the conviction of an infamous crime rendered a person incompetent to testify."

In Conrad v. State, 132 Ind. 254, 31 N. E. 805 (806), it was held not to be error to refuse a substantial copy of this instruction. The court held that all that was decided in the Boyle case was "that the giving of the instruction was not

error of which the appellant could avail himself for a reversal of the judgment."

64—Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

"It is suggested that the language tended to convey to the jury that the trial court believed the accused to be guilty. No good reason, in fact, no reason at all, is given in support of that suggestion. We cannot discover any."

65—State v. Vaughan, 200 Mo. 1, 98 S. W. 2.

In State v. McCarver, 194 Mo. 717, 92 S. W. 684, the court approved a similar instruction.

66—State v. Moore, 168 Mo. 432, 68 S. W. 358 (360).

should permit himself to be to any extent influenced against the defendant because or on account of the indictment in the case.

(d) The fact that the indictment was found by the grand jury, or the indictment itself, cannot be considered by the jury in making their verdict.⁶⁷

(e) You are instructed, that while an indictment can be found by the grand jury only after the hearing of evidence, still the indictment in this case is a mere accusation or charge against the defendant, and is not of itself any evidence in this case that the defendant is guilty of the crime therein charged and set forth, but the prosecution must have shown to your satisfaction, beyond a reasonable doubt, that the defendant is guilty as therein charged.⁶⁸

(f) The court instructs the jury that the indictment in this case is a mere formal charge, and is no evidence whatever of defendant's guilt.⁶⁹

(g) The court further instructs the jury that the law presumes the defendant to be innocent of the charge preferred against him by the indictment returned to the court by the grand jury, until all of the allegations in such indictment have been proven to be true, beyond a reasonable doubt, and the law is that he is entitled to have this jury indulge in such presumptions of innocence towards him until you may believe from all the evidence, that he has been proven guilty beyond a reasonable doubt, and the fact that he has been indicted by the grand jury upon a charge of murder and is now being tried upon that charge is not evidence of his guilt, and you are not to consider that fact, or the indictment in this cause, any evidence of his guilt, and if you convict the defendant you must do so upon all the evidence in the case, and you cannot give any weight to any belief to which you may arrive, unless that belief be founded upon the facts in evidence introduced before you in this case. And if, after you have heard all the evidence, you then have a reasonable doubt in your minds as to the defendant's guilt, then it is your duty to find him not guilty.⁷⁰

§ 2567. Indictment and Statement of Counsel, Not Evidence—Testimony Stricken Out Not to Be Considered. The indictment in this case is a mere formal charge, and is not in itself any evidence against the defendant. Statements of counsel are not evidence and should not be so considered. Offers to prove certain alleged facts which may have been made in your presence are not evidence, and you should not take the same into consideration, nor allow yourselves to be in any manner influenced thereby. Neither should the jury consider any testimony stricken out by the court.⁷¹

⁶⁷—State v. Hollingsworth, 156 Mo. 173, 56 S. W. 1087.

⁶⁸—Padfield v. People, 146 Ill. 660 (662), 35 N. E. 469.

⁶⁹—State v. May, 172 Mo. 630, 72 S. W. 918 (920). Murder case.

⁷⁰—Parsons v. People, 218 Ill. 386 (396, 398), 75 N. E. 993.

⁷¹—State v. Hudspeth, 159 Mo. 178, 60 S. W. 136.

§ 2568. Information Mere Formal Accusation—No Evidence of Guilt—Presumption of Innocence. (a) The information in this case, filed on the — day of —, 1905, charges the defendant with the crime of murder in the first degree. To this charge defendant pleads not guilty. In making up your verdict in this case, the jury will be governed by the instructions given by the court, as follows: The information in this case is a mere formal accusation against the defendant. It is no evidence of his guilt, and no juror should permit himself to be influenced against the defendant because or on account of said information. The law presumes the defendant to be innocent, and this presumption of innocence attends him throughout the trial until his guilt is established by the evidence beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence, you have a reasonable doubt of the guilt of the defendant, you should acquit him, but a doubt to authorize an acquittal on that ground should be a substantial doubt touching the guilt of defendant, and not a mere possibility of his innocence.⁷²

(b) The information in this case is a mere formal charge against the defendant, and of itself is no evidence whatever of his guilt, and no juror should permit himself to be in any degree or to any extent influenced by it.⁷³

(c) The court instructs the jury that the information filed in this case is a mere formal accusation, and raises no presumption against the defendant, and the jury should not permit themselves to be influenced thereby against the defendant on account of said information.⁷⁴

(d) The information in this cause is a mere formal accusation, and does not of itself constitute any evidence of guilt.⁷⁵

72—State v. Darling, 199 Mo. 168, 97 S. W. 592.

73—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (460).

74—State v. Todd, 194 Mo. 377, 92 S. W. 674.

75—State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888, 890).

CHAPTER LXXXIX.

CRIMINAL—INSANITY—INTOXICATION—JURY JUDGES OF THE LAW AND FACTS IN SOME STATES—MALICE.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2569. Insanity — Presumption — Burden of proof.</p> <p>§ 2570. Insanity—Test of criminal responsibility.</p> <p>§ 2571. Insanity as a means to evade the law—Should be examined with care.</p> <p>§ 2572. Insanity—Question of law determined by the jury.</p> <p>§ 2573. Distinguishing right from wrong.</p> <p>§ 2574. Knowledge of right and wrong the test.</p> <p>§ 2575. Obliterating the sense of right and wrong.</p> <p>§ 2576. Defendant not conscious of nature of act must be acquitted.</p> <p>§ 2577. Want of power to realize nature and quality of act.</p> <p>§ 2578. Want of will power by reason of some insane impulse sufficient defence.</p> <p>§ 2579. Excitement, passion and revenge distinguished from insanity.</p> <p>§ 2580. Excitement, frenzy, irresistible impulse no defence.</p> <p>§ 2581. Uncontrollable impulse.</p> <p>§ 2582. Irresistible impulse—Essential element of.</p> <p>§ 2583. Irresistible impulse must result from mental disease—Knowing right and wrong.</p> <p>§ 2584. Whether mere weakness of mind may amount to insanity — Irresistible impulse.</p> <p>§ 2585. Emotional insanity defined.</p> <p>§ 2586. Partial insanity—Laboring under mental delusion.</p> <p>§ 2587. When insane delusion is a sufficient defence.</p> <p>§ 2588. Erroneous conclusion distinguished from insane delusion.</p> <p>§ 2589. Distinction between permanent and temporary insanity—Delirium tremens.</p> | <p>§ 2590. Insanity—From use of drugs — Requisites — Burden of proof.</p> <p>§ 2591. Insanity or idiocy—Must be "clearly proved"—Requisites of defence.</p> <p>§ 2592. Killing must be the direct consequence of insanity.</p> <p>§ 2593. Insanity once shown presumed to continue until disproved beyond reasonable doubt.</p> <p>§ 2594. Reasonable doubt as to sanity of defendant acquits him.</p> <p>§ 2595. Prisoner need only create reasonable doubt to cast burden on state.</p> <p>§ 2596. Sanity presumed — Unless evidence "clearly establishes" insanity.</p> <p>§ 2597. Insanity—Defendant must establish by preponderance.</p> <p>§ 2598. Burden of proof—Alabama statutory plea of insanity.</p> <p>§ 2599. Insanity—Need not be proven by direct evidence.</p> <p>§ 2600. Insanity at time of trial—Jury not to determine.</p> <p>§ 2601. Evidence as to ancestor's insanity admissible only in corroboration.</p> <p>§ 2602. Insanity of defendant's mother must be considered.</p> <p>§ 2603. Insanity—Suicide not necessarily evidence of.</p> <p>§ 2604. Children poisoned by mother of suicidal tendency.</p> <p>§ 2605. Insanity—Hypothetical case put to experts.</p> |
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INTOXICATION.

- § 2606. Voluntary drunkenness no excuse.
- § 2607. Getting intoxicated with a view of committing crime.

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| <p>§ 2608. Intoxication procured by artifice of deceased—Not voluntary.</p> <p>§ 2609. Irresistible impulse from voluntary drunkenness no defense.</p> <p>§ 2610. Insanity—Not the immediate effect of intoxicants.</p> <p>§ 2611. Delirium tremens.</p> <p>§ 2612. Intoxication not amounting to insanity no defence.</p> <p>§ 2613. Insanity produced by intoxication an excuse.</p> <p>§ 2614. Temporary insanity produced by use of intoxicating liquors in mitigation—Murder.</p> <p>§ 2615. Intoxication not inconsistent with premeditation.</p> <p>§ 2616. Intent—Intoxication as affecting intention—Larceny.</p> <p>§ 2617. Voluntary intoxication will not excuse any grade of homicide except murder in first degree.</p> <p>§ 2618. Intoxication may reduce from murder to manslaughter.</p> <p>§ 2619. Drunkenness—Evidence as to must raise a reasonable doubt as to mental capacity.</p> | <p>§ 2620. Duty of jury to receive the law the court states.</p> <p>§ 2621. Instruction—Same weight for both state and defendant—Adoption by court of instructions.</p> <p>§ 2622. Jury judges of the law as well as of the facts—Georgia.</p> <p>§ 2623. Same subject—Illinois.</p> <p>§ 2624. Same subject—Indiana.</p> <p>§ 2625. Jury should give instructions of court respectful consideration—Indiana.</p> <p style="text-align: center;">MALICE.</p> <p>§ 2626. Definition of malice.</p> <p>§ 2627. Malice aforethought — Defined.</p> <p>§ 2628. Malice aforethought — A question of fact.</p> <p>§ 2629. Malice express and implied.</p> <p>§ 2630. Express malice defined.</p> <p>§ 2631. Malice—Difference between implied or constructive malice and express malice.</p> <p>§ 2632. Defining "deliberately, feloniously, willfully, premeditatedly, malice, and malice aforethought"—Missouri.</p> <p>§ 2633. Malice presumed from use of deadly weapon.</p> |
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INSANITY.

§ 2569. **Insanity—Presumption—Burden of Proof.** (a) The court instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control.¹

(b) You are instructed that every man is presumed to be sane, and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the

1—Mathley v. Commonwealth, 120 Ky. 389, 86 S. W. 988 (1889).

"The above instruction is objected to because it places the burden of proving his own insanity upon the accused. This instruction is approved in Abbott v. Commonwealth, 107 Ky. 624, 55 S. W. 196;

Ball v. Commonwealth, 81 Ky. 662; Brown v. Commonwealth, 14 Bush., Ky., 1400, and Wright v. Commonwealth, 24 Ky. L. 1838, 72 S. W. 340, and must now be considered as affording, when applicable, the correct rule."

evidence, and unless insanity is established by a fair preponderance of the evidence the presumption of sanity must prevail.²

(c) Every presumption is in favor of the innocence of the defendant; the only presumption against him being that he is of sound mind and discretion, and hence responsible for his acts.³

§ 2570. **Insanity—Test of Criminal Responsibility.** The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists.⁴

§ 2571. **Insanity as a Means to Evade the Law—Should Be Examined with Care.** (a) The jury should be careful that it (meaning insanity or the plea of insanity) is not used as a means to evade the law, as well as to see to it that a person irresponsible should not be punished.⁵

(b) The defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such mental disorder should furnish protection to guilt.⁶

2—State v. Clark, 34 Wash. 485, 76 Pac. 98 (101).

3—State v. Mills, 116 N. C. 992, 21 S. E. 106 (107).

4—Hotema v. United States, 186 U. S. 413 (416), 22 S. Ct. 895.

5—Braham v. State, 143 Ala. 28, 38 So. 919 (926).

6—People v. Donlan, 135 Cal. 489, 67 Pac. 761 (762), citing People v. Larrabee, 115 Cal. 159, 46 Pac. 923; where an instruction almost identical in terms was approved on

the strength of People v. Pico, 62 Cal. 50. "In People v. Dennis, 39 Cal. 625, and in People v. Bumberger, 45 Cal. 650, it was held to be proper for the trial court to instruct the jury to 'view the evidence upon the defense of insanity with care, lest feigned insanity might shield a defendant from the just consequences of his guilt.'"

The court said:

"This instruction met with unqualified approval in Sawyer v.

§ 2572. **Insanity—Question of How Determined by the Jury.** In determining the question whether the defendant was insane at the time of the alleged commission of the act, the jury are to consider all his acts at the time of, before, and since the alleged commission of the act, as such acts and conduct have been shown by the evidence, and the jury have the right to consider the defendant's appearance and actions during the trial as a circumstance in determining his insanity at the time of the homicide.⁷

§ 2573. **Distinguishing Right from Wrong.** (a) If you believe from the evidence beyond a reasonable doubt that, at the time of doing the alleged acts, the defendant was able to distinguish right from wrong, then you cannot acquit him on the ground of insanity.

(b) If you believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime in manner and form as charged in the indictment, and at the time of committing such act was able to distinguish right from wrong, you should find him guilty.

(c) If from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and

State, 35 Ind. 80; and the principle therein enunciated has been referred to approvingly in *Sanders v. State*, 94 Ind. 147; and *Butler v. State*, 97 Ind. 378. It can hardly be said to contain the statement of any proposition of law, but it is rather in the nature of a general disparagement of the defense of insanity, which the accused had pleaded, as provided by statute. A case might possibly arise in which such a statement could be appropriately made by the court. As the judgment in the present case must be reversed for other reasons, we do not determine whether or not it constituted reversible error in this case. It is sufficient to say that, as at present constituted, the court does not regard with favor any statements by the trial court which are designed to cast discredit or suspicion upon any defense which is recognized by the law as legitimate, and which an accused person is making in apparent good faith. In this respect, we are unable to appreciate any well-grounded distinction between the defense of insanity, self-defense, or alibi. *Line v. State*, 51 Ind. 172, 1 Am. Cr. Rep. 615; *Sater v. State*, 56 Ind. 378; *Albin v. State*, 63 Ind. 599, 3 Am. Cr. Rep. 295; *Simmons v. State*, 61 Miss. 243; *Dawson v. State*, 62 Miss. 241; *Thomp. Trials*, para. 2433. In those jurisdictions where judges are per-

mitted to comment upon the weight and value of evidence, it has been held proper for the court to caution the jury concerning a defense which judicial experience has shown to be often attempted by contrivance and perjury. *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Thomp. Trials*, para. 2434. This rule does not prevail in Indiana. *Unruh v. State*, 105 Ind. 117, 4 N. E. 453."

This instruction, however, was held error in *State v. Shuff*, 9 Idaho 115, 72 Pac. 664 (670), 13 Am. Cr. Rep. 443, where the court said:

"In all other matters except that of insanity, the defendant is entitled to every reasonable doubt. It is a well-settled principle that trial courts should be guarded from any expression, in the presence or hearing of the jury, that can in any way be construed into an expression of their views on any evidence that may be before the jury. *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; *Dawson v. State*, 62 Miss. 241; *Thompson on Trials*, vol. 2, par. 2433. An inspection of the above authorities will disclose that it was error to give this instruction. The last paragraph of the instruction was misleading, also, and should not have been given."

7—*People v. Donlan*, 135 Cal. 489, 67 Pac. 761 (763).

that at the time of the commission of such crime, the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty, even though you should believe from the evidence that at the time of the commission he was not entirely and perfectly sane.⁸

(d) If the jury believe, from the evidence, that at the time when the fatal blow is alleged to have been struck, the defendant was so far affected in his mind and memory that he was not able to distinguish right from wrong, and had not knowledge and understanding of the character and consequences of his act and power of will to abstain from it, then he was not a legally responsible being, and the jury should find him not guilty.⁹

(e) The law does not excuse unless the insanity is of such a character that it actually renders the person incapable of distinguishing between right and wrong in respect to the particular act charged, at the time of its commission.¹⁰

§ 2574. Knowledge of Right and Wrong the Test. (a) If you should find beyond a reasonable doubt that the defendant took the life of Ella Q. as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then, and in that event, it will be your duty to find the defendant guilty of murder as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty.¹¹

8—*Hornish v. People*, 142 Ill. 620 (624), 32 N. E. 677. Charged assault with intent to murder.

9—The same instructions were approved in *Dunn v. People*, 109 Ill. 635, 4 Am. Cr. Rep. 52; *State v. Mewherter*, 46 Iowa 88; *Com. v. Rogers*, 7 Metc. 500; *Freeman v. People*, 4 Denio 10; *State v. Huting*, 21 Mo. 464; *Willis v. People*, 5 Tiffany 715; *Anderson v. State*, 45 Ga. 11; *People v. Coffman*, 24 Cal. 230.

10—*State v. Coats*, 174 Mo. 396, 74 S. W. 864 (870).

The jury are instructed, as a matter of law, that if a person has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act in question—that is, if he has knowledge and is conscious that the act he is doing is wrong and would deserve punishment—he is, in the eye of the law,

of sound mind and memory, and capable of committing crime.

Brinkley v. The State, 58 Ga. 296, is authority for the above instruction, but it ignores the fact that an insane person may be able to distinguish, but not to choose, between right and wrong. *State v. Keerl*, 29 Mont. 568, 75 Pac. 362 (363); a like instruction was approved in *State v. Mewherter*, 46 Iowa 88, as follows:

* * * This would not exempt him from liability for his acts, if the jury believe, from the evidence, beyond a reasonable doubt, that he intentionally fired the shot which killed the deceased, and that he knew and was conscious at the time, that the act he was doing was wrong and punishable by the laws of the land.

11—*Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218 (225), 61 L. R. A. 324. Homicide case.

(b) If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such act.¹²

(c) If, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.¹³

(d) If, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the act of which he is accused, in the manner and form as charged in the indictment, and that at the time of the commission of said crime the defendant knew that it was wrong to commit it, and that he was mentally capable of choosing either to do or not to do the act constituting such crime, and of governing his conduct according to such choice, then it is your duty, under the law, to find him guilty.¹⁴

§ 2575. **Obliterating the Sense of Right and Wrong.** You are instructed, if you believe from the evidence, that the act charged against the defendant in the indictment was committed by him as therein charged, but that at the time of committing the same the defendant was a lunatic or insane to the extent of obliterating the sense of right or wrong as to the particular act done, you should so find your verdict.¹⁵

§ 2576. **Defendant Not Conscious of Nature of Act Must Be Acquitted.** The court instructs you that, if this prisoner was of unsound mind to such an extent that he was not conscious of the nature of the act he was committing, then you ought to acquit him on the ground of insanity.¹⁶

§ 2577. **Want of Power to Realize Nature and Quality of Act.** If you find from the evidence that at the time of the alleged commission of the offense, the defendant was suffering from mental aberration

"We think that this instruction fairly and correctly states the law applicable to this case, and comes within the rule announced by this court in *Maas v. Territory*, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814."

12—*Queenan v. Oklahoma*, 190 U. S. 548 (550), 23 S. Ct. 762. Homicide case.

13—*Dunn v. People*, 109 Ill. 635, 4 Am. Cr. Rep. 52.

14—*State v. Lyons*, 113 La. 959, 37 So. 890 (903-4).

15—*Hornish v. People*, 142 Ill. 620 (624), 32 N. E. 677; assault with intent to kill.

16—*Commonwealth v. Hollinger*, 190 Pa. 155, 42 Atl. 548 (550).

tion or sickness of mind produced by any cause, and by reason thereof his judgment, memory and reason were so perverted that he did not realize the nature and quality of the act he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty.¹⁷

§ 2578. Want of Will Power by Reason of Some Insane Impulse, Sufficient Defence. (a) The law presumes every man sane until the contrary is shown by the evidence; and, before the defendant can be excused on the ground of insanity, the jury must believe from the evidence that the defendant was at the time of the killing without sufficient reason to know what he was doing, or had not sufficient reason to know right from wrong, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his actions, by reason of some insane impulse which he could not resist or control.¹⁸

(b) Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong; or not conscious at the time of the nature of the act which he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control.¹⁹

§ 2579. Excitement, Passion and Revenge Distinguished from Insanity. The jury are further instructed that excitement, passions and angered feeling, or revenge, produced by motives of anger hatred or revenge, is not insanity, and that the law holds the wrongdoer of an act under such conditions responsible for his acts, and the jury have no right to excuse or in any wise justify or mitigate defendant's act in the taking of W.'s life, except they can so do under and according to the law.²⁰

§ 2580. Excitement, Frenzy, Irresistible Impulse to Avenge No Defence. In order to hold the defendant criminally responsible for taking the life of W., it is only necessary that the jury be satisfied from all the evidence [beyond a reasonable doubt] that he had sufficient mental capacity to distinguish between right and wrong as to the particular act with which he so stands charged. * * * Excitement or frenzy arising from the passion of anger, hatred or revenge,

17—Schissler v. State, 122 Wis. 365, 99 N. W. 593 (599).

18—Abbott v. Commonwealth, 107 Ky. 624, 55 S. W. 196 (198).

19—"Such ruling has been expressly sanctioned by this court." Lowe v. State, 118 Wis. 641, 96 N. W. 417 (424). Citing Butler v. State, 102 Wis. 364 (366, 367), 78 N.

W. 590; Eckert v. State, 114 Wis. 160 (163-164), 89 N. W. 826. Substantially the same instruction was approved in Davis v. United States, 165 U. S. 373 (378), 17 S. Ct. 360.

20—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (459).

no matter how furious, if not the result of a diseased mind, is not legal insanity, and the jury should not confound excitement, anger or wrath, or acts done or committed in either or both, or in revenge, with actual insanity—insanity recognized by law, because it is only legal insanity, a disease of the brain, rendering a person incapable of distinguishing between right and wrong with respect to the offense charged, that excuses the commission of such act. The doing of such act in frenzy, hatred or revenge, or by reason of some irresistible impulse to avenge some former wrong or grudge, does not excuse.²¹

§ 2581. **Uncontrollable Impulse.** The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed H. had a diseased brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he cannot be punished by law.²²

§ 2582. **Irresistible Impulse—Essential Elements of.** Again, if the accused knew that he was doing wrong, yet, acting under an irresistible impulse, having lost his power of self-control, kills the party, he will not be criminally liable. It must be the irresistible impulse of a lunatic, and not the violent passion of a sane man, prompted by revenge, hatred, jealousy, envy, etc., which does not exempt from criminal liability nor confer irresponsibility.²³

§ 2583. **Irresistible Impulse Must Result from Mental Disease—Knowing Right and Wrong.** If the defendant did shoot A. B., but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if at the time he had will power sufficient to enable him to choose between shooting and refraining from shooting said A. B., the defendant was of sound mind; and if the defendant did shoot A. B., but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said A. B., no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind.²⁴

21—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (459-460), homicide. It is suggested that the words in brackets should be inserted in this instruction.

22—Hotema v. U. S., 186 U. S. 413 (416), 22 Sup. Ct., 895; charge of homicide.

23—State v. Lyons, 113 La. 959,

37 So. 890 (903); charge of homicide.

24—In McCarty v. Commonwealth, 24 Ky. Law Rep. 1427, 71 S. W. 656 (657); homicide.

The court said of this instruction:

"It must be the contention of appellant's counsel, that any impulse

§ 2584. **Whether Mere Weakness of Mind May Amount to Insanity—Irresistible Impulse.** Depression or weakness following from physical illness, and such as in all respects ordinarily takes place with men possessing fair average mental power, is not of itself insanity, but if disease, of whatever kind or character, leave the patient in such weakened mental condition that he cannot resist the impulse to commit a crime, he is not of sound mind. A person may have sufficient mental capacity to know right from wrong, and be able to comprehend the nature and consequences of his act, and yet not be criminally responsible; for to make him criminally responsible, he must not only be able to know and apprehend right from wrong, but also to have the will power to control and resist an impulse to commit crime.²⁵

§ 2585. **Emotional Insanity Defined.** Emotional insanity depends upon the mere emotions of the time arising from some defective or perverted moral sense, which begins on the eve of the crime and ends when it is finished.²⁶

§ 2586. **Partial Insanity—Laboring under Mental Delusion.** (a) The court instructs the jury that the law recognizes partial as well as general insanity; that a person may be insane upon one or more subjects, and sane as to others; that he may be laboring under a mental delusion upon some particular matter, or regarding a particular person, and generally sane upon all other subjects; and that the law made no difference, as regards the guilt of the party charged, whether the act charged was produced by general insanity or by mental delusion regarding some particular subject or person.²⁷

that at the time may be irresistible, will excuse homicide. Happily for society, this is not the law. * * * The irresistible impulse recognized by the law is that only resulting from mental diseases,—from the derangement of the mind caused by a disease of the mind. It is not material how recently the derangement may have occurred. A person acts under an insane, irresistible impulse when, by reason of the durance of mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question, his free agency being at the time destroyed. 1 Bish. Cr. Law, par. 387; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Portwood v. Com., 104 Ky. 496, 47 S. W. 339; Graham v. Com., 16 B. Mon. 587; Brown v. Com., 14 Bush. 398; Moore v. Com., 92 Ky. 637, 18 S. W. 833."

In *McCarthy v. Commonwealth*, supra, the following instruction was also approved:

If the defendant did shoot A. B., but at the time he shot her the defendant did not have mental capacity sufficient to enable him to know and understand that it was wrong to shoot said A. B., the defendant was of unsound mind; or, if the defendant did shoot said A. B., but at the time he shot her the defendant was prompted to do such shooting by an impulse, resulting from a diseased mind, of such violence that it overcame the will of the defendant, and constrained him to shoot said A. B., when he did not wish to shoot her, the defendant was of unsound mind.

25—*Wheeler v. State*, 158 Ind. 687, 63 N. E. 975 (1900).

26—*Genz v. State*, 58 N. J. L. 482, 34 Atl. 816.

27—*Thurman v. State*, 32 Neb. 224, 49 N. W. 338 (1892). Charge: Assault with intent to murder, approves the above, supplemented with the following:

Something has been said in the

(b) The court further instructs you that if you find the accused was possessed of a partial delusion only, and was not in other respects insane, then he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposed another man to be in the act of attempting to take away his life, and he killed that man, as he supposed, in self-defense, he would be exempt from punishment, but if his delusion was that the deceased had done a serious injury to his character or person, and he killed him in revenge for such supposed injury, he would be liable to punishment.²⁸

§ 2587. When Insane Delusion Is a Sufficient Defense. (a) When a monomania or insane delusion is the species of insanity set up by the accused, it may operate as an excuse for a criminal act only when the delusion is such that the person under its influence has a real and firm belief in some fact, not true in itself, but which, if it were true, would excuse the act, as when the belief is that the party killed has an immediate design on his life, and under that belief the insane man kills his supposed enemy in supposed self-defense.

(b) But if the delusion held by the defendant was that the party whom he killed had acted dishonestly towards him, or had not properly attended to his business—in fact, had committed any act which did not expose defendant's life to imminent danger or did not subject his person to great bodily harm—such delusion would not justify an acquittal, as, even though such delusion existed, it would not be of such a character, even if it were true, as to justify homicide.²⁹

(c) The court further instructs you that, if you find that the accused was possessed of a delusion or delusions, you are carefully to bear in mind that it is not every delusion that can be considered an

instructions about insane delusions. It is not every delusion that can be considered an insane delusion. The delusion must be of such a character, that, if things were as the delusion imagined them to be, they would justify the act springing from the delusion. To illustrate: If a person be under the insane delusion that he is the Almighty himself, or is directly commissioned or commanded by the Almighty himself to shoot a particular person that the Almighty has decided must be shot, and is moved by such delusion alone to do the shooting, that would be an insane delusion, because, if true, it would justify the shooting. But if a person be under the delusion that some man has done him a mean trick, and that he ought to be shot for it, and the delusion moves the person to shoot the man, that is no ex-

cuse on the ground of insane delusions, because, if the fact had really been that the man had done the person a mean trick, just imagined, it would not justify the shooting. An insane delusion is like a waking dream; the subject can neither be reasoned into nor out of it. I may throw some light on the application of the subject to this case to consider whether a conviction in this case would have a tendency to prevent repetition of such acts.

Citations: 1 Whart. Cr. Law, Sec. 37; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500; *Hadfield's Case*, 27 How., St. Fr. 1282; *Steffens Dig. Crim. Law*, 160.

28—*State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (363).

29—*State v. Lyons*, 113 La. 959, 37 So. 890 (903); charge of homicide.

insane delusion. The delusion must be of such a character that, if things were as the person possessed of such delusion imagined them to be, they would justify the act springing from the delusion.³⁰

§ 2588. Erroneous Conclusion Distinguished from Insane Delusion. There is evidence in this case tending to show that H. believed in witches, and that such belief was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant H. believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and he would be punished therefor, in that event it would not be an insane delusion upon the part of H., but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act.³¹

§ 2589. Distinction between Permanent and Temporary Insanity—Delirium Tremens. Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears; but where delirium tremens is set up as a defense, the delirium must exist at the time the act was committed, as there is no presumption of its existence from antecedent fits from which the party has recovered, for this is a mere transient derangement of the mind, and there is no presumption of its recurrence or continuance.³²

§ 2590. Insanity—From Use of Drugs—Requisites—Burden of Proof. The court instructs the jury that if you further believe it has been shown by a preponderance of the evidence that at the time of the killing defendant, by the continued or recent use of morphine or cocaine or both, or by such use of either or both of said drugs, combined with whiskey, or from any other cause, except the voluntary recent use of ardent spirits alone, as heretofore explained to you, was rendered temporarily insane, and while in such state of insanity killed deceased, and that defendant's mind was at the time of such killing so affected with insanity that he did not understand the nature

30—State v. Keerl, 29 Mont. 508, 75 Pac. 362 (363).

31—Hotema v. United States, 186 U. S. 413 (419), 22 S. Ct. 895; homicide.

32—Wagner v. State, 116 Ind. 181, 18 N. E. 833 (836). Affirming conviction for assault with intent to kill. The court said that,

"With the exception of the last two sentences, the foregoing is a

literal copy of an instruction approved in the case of Goodwin v. State, 96 Ind. 550 (560)," and the fact that the evidence showed frequent attacks of delirium tremens and that such frequent attacks would have the effect of weakening the mind did not render it inapplicable or so erroneous as to require a reversal of the judgment.

and quality and character of the act of killing deceased and its consequences, or if his mind at the time of such killing was in such diseased and unsound condition that for the time being his reason, conscience, and judgment was overwhelmed to such an extent that he did not know such act was wrong and criminal, and would subject him to punishment, or create in the mind of the defendant an uncontrollable and irresistible impulse to kill deceased, which because of such unsound condition of his mind, he had not sufficient reason, judgment, and will power to resist, then you will acquit defendant.³³

§ 2591. **Insanity or Idiocy—Must Be “Clearly Proved”**—**Requisites of Defense.** Among other defenses made in this case is that of insanity or idiocy. You are charged that only a person with a sound memory and discretion can be punishable for a crime, and that no act done in a state of insanity or idiocy can be held punishable as an offense. Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts; and to establish a defense on the ground of insanity or idiocy it must be clearly proved that at the time of committing the act the party accused was laboring under such defect of reason, from diseases of mind, as not to know the nature or quality of the act he was doing; or, if he did know that, he did not know he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity or idiocy must have existed at the very time of the commission of the offense, and the mind must have been so dethroned of reason as to deprive the person accused of a knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity or idiocy, it being a question of fact, controlled, so far as the law is concerned, by the instructions herein given you. In case you find from the evidence that the defendant was insane or an idiot at the time of the commission of the act, and you acquit him under the instructions heretofore given you, you will state in your verdict that you have acquitted defendant on the grounds of insanity or idiocy; and the burden of proof to establish his plea of insanity or idiocy devolves upon defendant.³⁴

§ 2592. **Killing Must Be the Direct Consequence of.** Insanity will only excuse the commission of a criminal act when it is made to appear, affirmatively, by a preponderance of the evidence, that the person committing it was insane, and that the offense was the direct consequence of his insanity.³⁵

33—“This charge is correct, and is the law of this state.” Cannon v. State, 41 Tex. Cr. App. 467, 56 S. W. 351 (361); citing Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; King v. State, 9 Tex. App. 515.

34—“The charge of the court is correct.” Nugent v. State, 46 Tex. Cr. App. 67, 80 S. W. 84.

35—State v. Stickley, 41 Iowa 232. This states the law only in those jurisdictions where the defence of insanity must be established by a

§ 2593. Insanity Once Shown Presumed to Continue Until Disproved beyond Reasonable Doubt. The jury are instructed that a reasonable doubt as to the sanity of the defendant may arise upon the evidence of the state, whether the defendant introduce any evidence on the subject or not, and, wherever insanity has once been shown to exist, it will be presumed to have continued until the contrary has been shown by the evidence (beyond a reasonable doubt).³⁶

§ 2594. Reasonable Doubt as to Sanity of Defendant Acquits Him.

(a) But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was a product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power to control his actions, but simply slew V. C. because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal.³⁷

(b) Every person is presumed to be sane until the contrary is shown. If no evidence of insanity had been given, then you would presume the respondent to be responsible for her acts. When evidence is introduced upon that question, then the question of whether or not the respondent is responsible for her act becomes a question for you to determine from all the evidence bearing upon it; and if, after carefully considering all of such evidence, there should remain any reasonable doubt as to whether or not she was responsible, then your verdict should be "Not guilty, because of insanity."³⁸

(c) It is claimed by the defendant that at the time of the commission of the act he was insane, and therefore not legally responsible for the act. You are instructed that where the defense of insanity is set up, it does not devolve upon the defendant to prove that he was insane at the time of the commission of the alleged offense by the preponderance of the evidence introduced on the trial, together with all the legal presumptions as explained in these instructions; but if, under the evidence the jury entertains a reasonable doubt as to whether the defendant was sane or insane, then in that case he must be acquitted.³⁹

(d) The court instructs the jury that, if the evidence in the case is

preponderance of the evidence. *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

36—*Blume v. State*, 154 Ind. 343, 56 N. E. 771 (774); citing *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465. It was argued that this instruction was erroneous, because it did not, as given, contain the words in brackets.

The court said: "In view of the full and careful instructions upon the issue of insanity, and the

proof concerning the same, we cannot believe that the failure of the court to repeat the words 'beyond a reasonable doubt' operated to the prejudice of appellant. *Goodwin v. State*, 96 Ind. 562."

37—*Hotema v. United States*, 186 U. S. 413 (416), 22 Sup. Ct. 895.

38—*People v. Quimby*, 134 Mich. 625, 96 N. W. 1061 (1065).

39—*State v. McCoy*, 70 Kan. 672, 79 Pac. 156 (158); homicide.

sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty.⁴⁰

(e) The law presumes every man who has reached the years of discretion to be of sound mind; and this presumption continues until arrested by evidence tending to establish insanity, which evidence should be sufficient, to raise in the minds of the prudent, careful juror a reasonable doubt of the sanity of the accused. When, however, evidence of insanity has been introduced, the burden of proof is upon the state to satisfy the jury, by competent evidence, beyond any reasonable doubt, that the accused was possessed of a sound mind at the time he committed the act complained of. You should bear in mind, gentlemen, however, that the burden of proof in criminal cases is always upon the state, and never shifts from the state to the defendant; that is, the making out of a *prima facie* case against the defendant does not shift the burden of proof to the defendant. In such a case it is only necessary for the defendant to offer proof sufficient to create in the minds of the jury a reasonable doubt of his guilt.⁴¹

§ 2595. Prisoner Need Only Create Reasonable Doubt to Cast Burden on State. (a) While the law presumes all men to be sane, yet this presumption may be overcome by evidence tending to prove insanity existed at the time of the commission of the alleged offense. When such evidence is introduced, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So in this case where the defense of insanity is interposed, if the jury after considering all the evidence entertain a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted.⁴²

(b) In order to sustain the defense of insanity it is not necessary that the insanity of the accused be established, by a preponderance of evidence; if, upon the whole evidence, the jury entertain a reasonable doubt as to the sanity of the accused they must acquit him.⁴³

(c) While it is true the law presumes every man to be sane and

40—*Jamison v. People*, 145 Ill. 357 (330), 34 N. E. 486.

41—*Hill v. State*, 42 Neb. 503, 60 N. W. 916 (920); *People v. Wells*, 145 Cal. 138, 78 Pac. 470 (472); assault.

42—*Jamison v. People*, 145 Ill. 357 (330), 34 N. E. 486; affirming conviction and sentence of death.

"The instruction is in harmony with what is laid down in *Dacey v. People*, 116 Ill. 555, 6 N. E. 165, 6 Am. Cr. Rep. 461, where it was said: 'The presumption of sanity inheres at every stage of the trial until insanity is made to appear by the evidence. The law in this state undoubtedly is that this

legal presumption may be overcome by evidence tending to prove insanity of the accused which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. When that is done, the presumption of sanity ceases, and the burden shifts to the prosecution, and it is then required to prove his sanity as an element necessary to constitute crime beyond a reasonable doubt.'"

43—*Hopps v. People*, 31 Ill. 385; *People v. Wilson*, 49 Cal. 13; *State v. Bruce*, 48 Ia. 530; See *State v. Wingo*, 66 Mo. 181.

responsible for his acts until the contrary appears, from the evidence, still, if there is evidence in the case tending to rebut this presumption sufficient to raise a reasonable doubt upon the issue of insanity, then the burden of proof is upon the people to show, by the evidence, beyond a reasonable doubt, that the defendant was sane, as explained in these instructions, at the time the alleged offense was committed.⁴⁴

§ 2596. Sanity Presumed Unless Evidence "Clearly Establishes" Insanity. (a) You are instructed that every person is presumed to be sane and rational, unless the fact is proven otherwise by a preponderance of the evidence, and you are to treat the acts of the defendant at and subsequent to the fire, as shown by the evidence, as the acts of a sane and rational man, unless the evidence shows not only a possibility that his mental condition was otherwise, but further shows by a fair preponderance of the evidence in the case, that the defendant was then in fact irrational, or suffering from mental [!] aberration of the mind. You are not required to find that the defendant was irrational or insane at such time, unless the evidence clearly establishes such fact, and should only find him insane or irrational at the time of the fire and subsequent thereto, upon evidence of a reliable character, which convinces you that such fact is proven by a fair preponderance of all the evidence in the case bearing thereon.⁴⁵

(b) It devolves upon defendant to establish his defense of insanity by a preponderance of the evidence, clearly to the satisfaction of the jury.⁴⁶

§ 2597. Insanity—Defendant Must Establish by Preponderance. The presumption is that at the time of committing this crime, W. was sane, and the burden of proof of insanity being upon him, the defendant, he must satisfy the jury by a fair preponderance of the evidence submitted to them that, at the time he committed the act, he was insane to such an extent that insanity controlled his will, and made the commission of the act he committed appear to him a duty of overruling necessity, or deprived him of all freedom of agency.

44—Cone v. McKie, 1 Gray 61; Greenl. Ev., 13 Ed. § 81.

45—State v. Novak, 109 Iowa 717, 79 N. W. 465 (475); homicide.

The court said: "In People v. Hamilton, 62 Cal. 377, in considering the weight of evidence to establish insanity, and in passing upon an instruction in which the words 'clearly established' were used, it is said: 'In the connection in which they are used, to say that insanity must be clearly established is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent.' In State v. Felter, 32 Iowa 49, it is said that the fact of sanity cannot be avoided, it being in the

nature of an affirmative defense, 'except by a preponderance of proof, or (which is the same) satisfactory evidence of his sanity.' That preponderance which amounts to satisfactory evidence of a fact must be such as clearly establishes the fact. We discover no error in the instruction."

46—Carlisle v. State, — Tex. Cr. App. —, 56 S. W. 365 (366). "There is no error in this charge, as it is the law." Citing Webb v. State, 5 Tex. App. 595; Glebel v. State, 28 Tex. App. 151, 12 S. W. 591; Smith v. State, 22 Tex. App. 317, 3 S. W. 684; Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719.

If he fail to do so,—if the fair preponderance of the testimony does not satisfy the jury of such insanity, but only creates a doubt of his sanity, or reasonable doubt of his sanity,—it is insufficient to justify an acquittal, and the jury should return a verdict of guilty in such case.⁴⁷

§ 2598. Burden of Proof—Alabama Statutory Plea of Insanity. In the trial of a homicide case, where the plea of not guilty and the statutory plea of not guilty by insanity are both interposed, the burden of proof as to the first plea is upon the state to satisfy the jury beyond a reasonable doubt of the guilt of the defendant; but, as to the second plea, the burden of proof is upon the defendant to establish the plea of not guilty by reason of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence, and a reasonable doubt is not sufficient to acquit the defendant under this plea. The rule as to the weight and sufficiency of the evidence as to the one plea is that the state must satisfy the jury beyond a reasonable doubt, whereas, as to the other, the defendant must reasonably satisfy the jury by a preponderance of the evidence.⁴⁸

§ 2599. Insanity—Need Not Be Proven by Direct Evidence. The court instructs the jury that, to establish the insanity of the defendant with respect to the act charged against him in the information, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity at the time of the killing of said W. by defendant, circumstantial evidence which reasonably satisfies the mind of its existence is sufficient. As the law presumes the defendant innocent, the burden of proving him guilty rests with the state; and before you should convict him his guilt must be established beyond all reasonable doubt.⁴⁹

§ 2600. Insanity at Time of Trial—Jury Not to Determine. You are not required to decide whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. The law presumes that he was sane, and therefore the burden of proving his insanity at the time rests upon him.⁵⁰

§ 2601. Evidence as to Ancestors' Insanity Admissible Only in Corroboration. It is never allowed to infer insanity in the accused

47—Commonwealth v. Wireback, 190 Pa. 138, 42 Atl. 542 (547), 70 Am. St. 625. In some jurisdictions this instruction would be erroneous, as they hold that it is only necessary to raise a reasonable doubt of the sanity of the accused. See § 2596 post.

48—From the opinion in Parrish v. State, 139 Ala. 16, 36 So. 1012 (1017-8-9).

49—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (460).

50—Held that this was not on invasions of the province of the jury in a case where no question was made as to the sanity of the defendant at the time of the trial. People v. Donlan, 135 Cal. 489, 67 Pac. 761 (763), citing People v. Schmidt, 106 Cal. 50, 39 Pac. 205.

from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore it is that the defense has been allowed to introduce evidence to you covering the whole life of the accused and reaching to his family antecedents.⁵¹

§ 2602. Insanity of Defendant's Mother Must Be Considered. If the jury believe that the defendant's mother, in her lifetime, was insane, and that insanity is hereditary, they must take that fact into consideration in determining the question of defendant's insanity at the moment of shooting.⁵²

§ 2603. Insanity—Suicide Not Necessarily Evidence of. Now, evidence has been introduced here tending to show that the father and brother of this respondent committed suicide. Suicide of itself alone, is not evidence of insanity. It may be considered with other facts and circumstances in determining the question of sanity.⁵³

§ 2604. Children Poisoned by Mother of Suicidal Tendency. The only question is, if she administered morphine to those children with the intent to cause their death, did she, at the time of doing it, know it was wrong to so kill them, and could she have refrained from doing it if she had chosen to do so.⁵⁴

§ 2605. Insanity—Hypothetical Case Put to Experts. Whether the hypothetical case upon which the opinions of the experts are based corresponds to and coincides with the case of the defendant, the jury alone must determine, in the light of the testimony presented on this trial. And whenever it supposes facts not given in evidence, it should be disregarded by the jury.⁵⁵

INTOXICATION.

§ 2606. Voluntary Drunkenness No Excuse. (a) The jury are instructed, that under our law voluntary drunkenness is no excuse for the commission of a crime. Where, without intoxication, the law would impute a criminal intent, proof of drunkenness will not avail to disprove such intent.⁵⁶

(b) The jury are instructed, that voluntary intoxication or drunkenness is no excuse for crime committed under its influence, nor is any

51—This extract from the charge of Judge Cox in the Guiteau case, 10 Fed. Rep. 161, was held error in Montana, where the trial judge is prohibited from commenting on the evidence. *State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (365). Citing *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. 655, 10 Am. Cr. Rep.

46; *State v. Mason*, 24 Mont. 341, 61 Pac. 861.

52—*People v. Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548 (543).

53—*People v. Quimby*, 134 Mich. 625, 96 N. W. 1061 (1065).

54—*People v. Quimby*, 134 Mich. 625, 96 N. W. 1061 (1065-6).

55—*State v. Coats*, 174 Mo. 396, 74 S. W. 864 (870).

56—*Rafferty v. The People*, 66 Ill. 118.

state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act.⁵⁷

(c) The court instructs the jury that drunkenness or voluntary intoxication is no excuse for crime, although such drunkenness may be the result of long-continued and habitual drinking without any purpose to commit crime, and may have produced a temporary insanity, during the existence of which the criminal act is committed; in other words, a person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness.⁵⁸

(d) It is immaterial in this case whether the defendant was drinking or intoxicated at the time of the homicide spoken of in the evidence, as drunkenness neither excuses, palliates nor affects a crime.⁵⁹

§ 2607. Getting Intoxicated with a View of Committing Crime. If a person voluntarily becomes intoxicated, with a view of committing a crime, and while so intoxicated, commits the crime, total insanity, if the immediate result of such intoxication, would not excuse the criminal act committed while under the influence of such intoxication; for the law will not permit a person to so shield himself under the cloak of drunkenness for the purpose of violating the law of the land.⁶⁰

§ 2608. Intoxication Procured by Artifice of Deceased, Not Voluntary. You are instructed that if you find that the defendant, at the time of the alleged shooting, was intoxicated, but that his intoxication had been procured by the artifice or fraud of the deceased or other persons, then, and in such event, it would not be a voluntary intoxication in the eye of the law; and in such event, if you so find, if the intoxication was to such an extent as to absolutely destroy the reason for the time being, so far as his knowledge of his acts is concerned,—that is, place the defendant in such a mental condition that he had no knowledge of the nature or character of his acts, or whether right or wrong,—then, and in such event, you are instructed that you should acquit the defendant.⁶¹

§ 2609. Irresistible Impulse from Voluntary Drunkenness No Defense. The court instructs the jury that although they may believe from the evidence that the defendant at the time of the killing of E. W. was without sufficient power to govern his action by reason of

57—State v. Coleman, 27 La. Ann. 691; Beasley v. State, 50 Ala. 149; State v. Thompson, 12 Nev. 140; Fitzpatrick v. People, 98 Ill. 270; Cobbath v. State, 2 Tex. App. 391.

58—Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339 (340); State v. Wright, 112 Iowa 436, 84 N. W. 541 (544). But see instructions in People v. Fellows, 122 Cal. 333, 54 Pac. 830. § 2613 post.

59—State v. May, 172 Mo. 630, 72 S. W. 918 (920). Murder case.

60—Hill v. State, 42 Neb. 503, 60 N. W. 916 (920).

61—State v. Wright, 112 Iowa 436, 84 N. W. 541 (545). The court said: "We think this states correctly the law relating to voluntary intoxication, and that the mention made of this subject by the court in its own charge was not broad

some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the grounds of insanity.⁶²

§ 2610. Insanity—Not the Immediate Effect of Intoxicants. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the act charged, in manner and form as charged in the indictment, still, if the jury further believe, from the evidence, that the defendant, at the time, was in such a state of mental insanity (not produced by the immediate effects of intoxicating drink) as not to have been conscious of what he was doing, or that the act itself was wrong, then they should find the defendant not guilty.⁶³

§ 2611. Delirium Tremens. The jury are instructed, that although they may believe, from the evidence, that the defendant committed the criminal act, in manner and form as charged in the indictment, still, if the jury further believe, from the evidence, that at the time he so committed the act he was so affected by what is known as delirium tremens that he did not know the nature of the act, nor whether it was wrong or not, and that such delirium was induced by antecedent and long-continued use of intoxicating drinks, and not as the immediate effect of intoxication, then the defendant cannot be held criminally responsible for such act, and the jury should find the defendant not guilty.⁶⁴

§ 2612. Intoxication Not Amounting to Insanity No Defense—Presumption. (a) If the evidence as a whole fails to show beyond a reasonable doubt, that H. was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming

and full enough to cover the fact here presented."

62—*Mathley v. Commonwealth*, 120 Ky. 389, 86 S. W. 988 (1899).

"This instruction is criticised because it is said that it takes from the jury the right to find the defendant insane, although his mind may have been so diseased by long drunkenness as to deprive him of the power of knowing right from wrong, or of will power sufficient to govern his actions, provided this condition was superinduced alone from voluntary drunkenness. If the inference which counsel draw from the language of this instruction is correct, their objection to it is well founded; but an analysis of it shows that it clearly distinguishes between the lack of reason or will power arising from voluntary drunkenness

and the want of these mental powers arising from unsoundness of mind. The instruction tells the jury plainly that if appellant's lack of reason or will power arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit him on the grounds of insanity. This instruction is copied from one approved by this court in *Wright v. Commonwealth*, 24 Ky. Law Rep. 1838, 72 S. W. 340, and we adhere to it as a sound exposition of the law on the subject of which it treats."

63—*U. S. v. Drew*, 5 Mason U. S. Rep. 28; *Carter v. State*, 12 Tex. 500; *Maconnehey v. State*, 5 Ohio St. 77; *Bales v. State*, 3 W. Va. 685; *Fisher v. State*, 64 Ind. 435.

64—*Bailey v. State*, 26 Ind. 422.

and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whiskey he had drunk; but, in arriving at that conclusion, the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew V. by reason of the whiskey he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him.⁶⁵

(b) The court instructs the jury that if the person is sober enough and has mind enough to form a design to take the life of another, and in pursuance of such design does actually shoot and kill, without any justification therefor, then the law presumes that such person is sober enough and of sufficient mind to form the specific intention to kill, and in such case, where he attempts to take life or does take life, he is criminally responsible for his acts.⁶⁶

(c) The court instructs the jury that voluntary intoxication or drunkenness is no excuse for crime committed under its influence, short of actual insanity or loss of reason; and if a person is sober enough to intend to shoot at another, and actually does shoot at and hit him, without justification therefor, then the law presumes that such person is sober enough to form the specific intent to kill the one shot at, and in such case is criminally responsible for his act. If, therefore, you find from the evidence that the defendant was in such a state of intoxication or drunkenness at the time of the shooting as to be incapable of forming an intent, or of distinguishing between right and wrong, it is a defense for a crime committed while in that condition as to all degree of the crime wherein an intent was necessary to complete the degree of the offense. But if you find from the evidence that the defendant was sufficiently sober at the time of the shooting to distinguish right from wrong, and to form a specific intent, then the defense of drunkenness cannot avail him.⁶⁷

(d) The court instructs you that you should bear in mind that under our law voluntary drunkenness is no excuse for the perpetration of crime, and that where, without intoxication, the law would impute a criminal intent, mere proof of drunkenness will not avail to disprove such intent, and that it is only in cases where the constant and excessive use of alcoholic stimulants has produced actual insanity, resulting in derangement of the mental and moral faculties to such an extent as to render the person so afflicted incapable of distinguishing right from wrong that crime may be excused thereby.⁶⁸

65—Hotema v. United States, 186 U. S. 413 (418), 22 S. Ct. 895.

66—Hill v. State, 42 Neb. 503, 60 N. W. 916 (920).

67—Commonwealth v. McGowan, 189 Pa. 641, 42 Atl. 365 (366), 69 Am. St. 830.

68—State v. Williams, 122 Iowa

115, 97 N. W. 992 (995). Estes v. State, 55 Ga. 31, 1 Am. Cr. Rep. 596, is authority for the following instruction, which is really a part of the instruction given in the text:

In relation to the question of drunkenness as an excuse for crime,

§ 2613. **Insanity Produced by Intoxication an Excuse.** (a) Insanity produced by intoxication does not destroy responsibility where the party, when sane and responsible, made himself voluntarily intoxicated.

(b) The jury is further instructed that, while mere voluntary intoxication is no excuse or justification for the commission of a crime, still insanity although produced immediately by intoxication is a defense. Under our Code an insane person is incapable of committing a crime; that is to say, if a man kills another while insane, or if his mind is unsound it is no crime, and this is so whether his insanity is produced or brought on by intoxication or the use of intoxicating liquors, or by any other cause.⁶⁹

(c) Although drunkenness, in itself, is no excuse or palliation for crime committed while under its influence, yet mental unsoundness, superinduced by excessive drunkenness, and continuing after the intoxication has subsided, may be an excuse; provided such mental derangement be sufficient to deprive the accused of the ability to distinguish between right and wrong.⁷⁰

§ 2614. **Temporary Insanity Produced by Use of Intoxicating Liquors in Mitigation—Murder.** (a) Now, if you believe from the evidence in this case that the defendant, at the time of the commission of the offense for which he is on trial, if you find him guilty of

the court instructs the jury, that if a person is sober enough to intend to shoot at another, and actually does shoot at and hit him, without any justification therefor, then the law presumes that such person is sober enough to form the specific intention to kill the one shot at, and, in such case, he is criminally responsible for his act.

69—Hill v. State, 42 Neb. 503, 60 N. W. 916 (920); People v. Fellows, 122 Cal. 333, 54 Pac. 830 (832).

"Upon the subject of intoxication as an excuse for crime the court of its own motion gave the instruction first considered in People v. Lewis, 36 Cal. 531, and since then reviewed and approved upon many recurrent occasions. People v. Williams, 43 Cal. 344; People v. Jones, 63 Cal. 168; People v. Ferris, 55 Cal. 588; People v. Blake, 65 Cal. 275, 4 Pac. 1; People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Vincent, 95 Cal. 425, 30 Pac. 581."

See to the contrary, Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339.

In Wagner v. State, 116 Ind. 181,

18 N. E. 833 (836), the following instruction was given:

Mental incapacity produced by voluntary intoxication existing only temporarily, but at the time of the commission of the offense, is no excuse for crime, nor a defense for a prosecution therefor. But where the habit of intoxication, though voluntary, has been long continued, and has produced disease which has perverted or destroyed the mental faculties of the accused so that he was incapable at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or distinguishing right from wrong,—in short, insane,—he will not be held accountable for the act charged as a crime committed while in such condition.

Held, that while not couched in the most specific and appropriate language, defendant could not complain of giving the above instruction. "The proof is conclusive that at the time he did the shooting he was not in such a condition of intoxication as that his knowledge of right and wrong was affected thereby."

70—Beasley v. The State, 50 Ala. 149.

such offense, was laboring under temporary insanity as above defined, produced by the voluntary recent use of ardent spirits, you will take such temporary insanity into consideration in determining the grade of the offense, if any, that the defendant may be found guilty of, and in mitigation of the penalty attaching to the offense, if any.⁷¹

(b) If you believe that at the time of the commission of the act with which defendant is charged, and is on trial before you, that he was temporarily insane, and that such temporary insanity, if such there was, was produced by the voluntary recent use of ardent spirits, it would afford no excuse for the commission of the act charged against him, if the act was otherwise criminal. But such temporary insanity produced by voluntary recent use of ardent spirits alone, if you find there was such insanity so produced, should be considered in mitigation of the penalty attached to the offense of which you will find him guilty.⁷²

§ 2615. Intoxication Not Inconsistent with Premeditation. A man may be intoxicated, and still have mind enough to plan, deliberate, and premeditate. If the intention to kill is deliberately formed,—is premeditated, then the mere fact that defendant was drunk will not make the crime murder in the second degree.⁷³

§ 2616. Intent—Intoxication as Affecting Intention—Larceny. (a) The intent just referred to and explained can only exist when the party is competent to form an intent, and purposely takes the property alleged to have been stolen. Testimony has been received in this case tending to show that these defendants were intoxicated at the time of the alleged larceny. While mere intoxication is not an excuse for crime, nor a defense to a criminal charge, yet when a specific intent is necessary, as in the case of larceny, the question of intoxication becomes important, in determining whether the person charged was or was not in such a state of mind as to be able to form such specific intent. As already explained, the mere taking of property of another does not constitute larceny, unless the intent permanently to deprive the owner thereof existed at the time of its taking. You may therefore consider whether or not the defendants or either of them, were so intoxicated at the time of the alleged larceny as to be incapable of forming the felonious intent which is a necessary element of the crime. If you find that they were, or if you have a reasonable doubt as to whether they were or not, then they are not guilty of the charge and must be acquitted.⁷⁴

(b) The defendant claims that, at the time he disposed of the ring in question, he was so under the influence of liquor that he was in-

71—Campos v. State, — Tex. Cr. App. —, 97 S. W. 100.

The court said this "charge given was in accordance with the rule laid down in Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811."

72—Edwards v. State, — Tex. Cr. App. —, 54 S. W. 589 (590), homicide.

73—State v. McDaniel, 115 N. C. 807, 20 S. E. 622 (623).

74—Collins v. State, 115 Wis. 596, 92 N. W. 266 (268), 95 Am. St. 954.

capable of forming an intent to steal, and for that reason he claims he is not guilty. Drunkenness is no excuse for crime. If the state has proved, beyond a reasonable doubt, that defendant, at and within the county of Douglas, and state of Nebraska, at or about the time named in the information, temporarily obtained the property in question from the said B., that, while holding the possession of the property, he unlawfully and feloniously converted said property to his own use, without the consent of the said B., by disposing of said property at a pawn shop, with the intent feloniously to permanently appropriate the same to his own use, against the will of said B., then the burden would rest upon the defendant to satisfy you by evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind to steal said property, or raise a reasonable doubt in your minds, after careful weighing and considering all the evidence in the case, whether he is guilty, because of such a state of intoxication at the time as not to be able to form an intent to steal. You are to determine this matter from all the evidence in the case.⁷⁵

§ 2617. Voluntary Intoxication Will Not Excuse Any Grade of Homicide Except Murder in First Degree. (a) Voluntary intoxication will not excuse the commission of any grade of unlawful homicide below murder in the first degree, and you will consider the evidence with reference to determining the defendant's guilt or innocence as to all grades of unlawful homicide below murder in the first degree, without reference to whether he was or was not intoxicated, or as to the degree of intoxication, if any.⁷⁶

(b) Drunkenness voluntarily produced does not excuse crime. Yet when a homicide, admitting of different degrees of punishment under the law, has been committed by a person in such a condition of drunkenness as to render him incapable of a willful, deliberated and premeditated purpose, the jury cannot find the prisoner guilty of murder in the first degree.

(c) If the jury believe from the evidence that L. killed B. as charged in the indictment, and at the time of such killing, L. was under the influence of liquor voluntarily taken by him, then said intoxication so produced is in law no excuse for the act done by L., unless they believe from the evidence that such intoxication was such as did in fact deprive him at the time of killing of the mental capac-

75—Ford v. State, 46 Neb. 390, 64 N. W. 1082 (1085).

In comment the court said: "Objection is made to the sentence 'Drunkenness is no excuse for crime.' The soundness of this statement cannot be successfully controverted. 3 Rice, Cr. Ev. para. 387; Hopt v. Utah, 104 U. S. 631; Hill v. State, 42 Neb. 503, 60 N. W. 916. Drunkenness was urged as

a defense, and the fact that the court informed the jury that it was no excuse for crime in no manner tended to belittle the prisoner's defense, as in the brief suggested."

76—Thomas v. State, 47 Fla. 99, 36 So. 161 (164). The court said: "This charge is correct under the decision in Garner v. State, 23 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232."

ity to form a malicious purpose to kill, in which event they may find L. guilty of murder in the second degree or manslaughter.⁷⁷

(d) If you find from the evidence that defendant fired the shot which killed his wife, and if when he did so he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated intent to kill her, then you should consider the question of intoxication and you cannot convict him of murder in the first degree. But if he was able to form that intent to kill, willfully, deliberately, and premeditatedly, when he fired the shot, then you must have nothing more to do with the question of his drinking, and you should give it no further thought or consideration in the case, for then it cuts no further figure.⁷⁸

§ 2618. Intoxication May Reduce from Murder to Manslaughter.

(a) There is some evidence as to the drunkenness of defendant at the time of the killing. If the defendant, at the time of the killing, was so intoxicated as not to be capable of forming the design to take life, or of entertaining malice, such drunkenness would then reduce the offense which might otherwise be murder to manslaughter. The mere fact that a party is drunk or intoxicated alone will not reduce the crime of murder to manslaughter, but it must be to the extent of depriving the party of the capacity of malice or intent to take life.

77—Approved in *Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (340), in which case, the following instructions on intoxication were given upon request of the prosecution:

Drunkenness or voluntary intoxication is no excuse for crime, although such drunkenness may be the result of long-continued and habitual drinking without any purpose to commit crime, and may have produced a temporary insanity during the existence of which the criminal act is committed. In other words a person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. * * * In cases like this, where the prisoner sets up the defense of insanity or irresponsibility produced by voluntary intoxication, he cannot rely simply on having raised a rational doubt in the minds of the jury as to whether he was so drunk at the time he committed the crime as not to be responsible therefor, for the burden is upon him to prove this fact to the satisfaction of the jury as fairly results from all evidence.

As to the Commonwealth's in-

structions compare *Ragsdale v. State*, 134 Ala. 24, 32 So. 674 (677); *Henson v. State*, 112 Ala. 41 (46), 21 So. 79.

78—*Hempton v. State*, 111 Wis. 127, 86 N. W. 596 (600), 12 Am. Cr. Rep. 657; *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009; *Cross v. State*, 55 Wis. 261, 12 N. W. 425; *Terrill v. State*, 74 Wis. 278, 42 N. W. 243; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 482.

Approving this, the court said, in the *Hempton* case: "Courts have been very slow to break down the old common-law doctrine as regards the effect of voluntary intoxication of a person at the time of the commission of a criminal offense by him. Formerly it was held to aggravate rather than to mitigate the offense. Now, if from passion stimulated by intoxication or from any other cause, a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible, he is uncontrollably moved thereby to and does wrongfully kill another, he cannot be convicted of murder in the first degree. *Clifford v. State*, 58 Wis. 477, 17 N. W. 304.

"It is the condition, no matter

(b) Slight drunkenness or intoxication might tend to aggravate a crime, instead of to lessen it.⁷⁹

(c) It is a general principle of law that intoxication is no excuse for crime, but this general principle has this important qualification or modification, so far as it relates to murder in the first degree. A particular or specific intent is absolutely essential to the commission of this crime, and if the mind of the person doing the killing is unable, because of intoxication, at the time of the killing to form this particular or specific intent, there can be no murder in the first degree, unless the person doing the killing became voluntarily intoxicated for the purpose of killing while intoxicated.⁸⁰

§ 2619. **Drunkenness—Evidence as to Must Raise a Reasonable Doubt as to Mental Capacity.** (a) You are further instructed that, as a rule of law, voluntary intoxication is no excuse for crime committed under its influence, and that, to excuse the commission of a crime, or in a case like the one now on trial before you, where deliberation and premeditation are elements charged in the information, to be available as a defense or excuse, the evidence of drunkenness or intoxication at the time of the killing should be sufficient to raise in the minds of the jury a reasonable doubt as to whether the defendant or person charged with crime was capable of forming in his mind, before the killing, a willful, deliberate and premeditated design to take the life of another, and that in cases where drunkenness is interposed as a defense, before the same can be considered, there should be evidence in support of such defense sufficient to create a reasonable doubt in the minds of the jury of the accused's ability to distinguish between right and wrong at the time of the commission of the crime charged.⁸¹

(b) While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if, upon the whole evidence in this cause, you shall have such reasonable doubt whether, at the time of the killing,—if you should find from the evidence accused did kill A. B.,—he had sufficient mental capacity to deliberately think upon and rationally to determine so to kill deceased, then you cannot find him guilty of murder in the first degree, although such inability was the result of intoxication.⁸²

(c) You are instructed that on the question of the intoxication

how caused, overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide."

79—*Winter v. State*, 123 Ala. 1, 26 So. 949 (950).

80—*Cook v. State*, 46 Fla. 20, 35 So. 665 (669), citing *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. 232.

81—*Hill v. State*, 42 Neb. 503, 60 N. W. 916 (920).

82—*In Aszman v. State*, 123 Ind.

347, 24 N. E. 123 (124), 8 L. R. A. 33, judgment of conviction was reversed because the above instruction was refused and because the trial court told the jury, that "The condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law." To like effect, see *Carr v. State*, 23 Neb. 749, 37 N. W. 630 (634).

of the defendant at the time of the alleged killing, if you find from the evidence he was intoxicated, you must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate purpose to kill the deceased; and if you have any reasonable doubt on this question, you must give the prisoner the benefit of such doubt, and find him not guilty of murder in the first degree.⁸³

JURY JUDGES OF LAW AND FACT IN SOME STATES.

§ 2620. Duty of Jury to Receive the Law from the Court. (a) You should receive the law as I state it to be, notwithstanding you may firmly believe that I am wrong, and that the law is or should be, otherwise.⁸⁴

(b) The credibility of witnesses and the conclusions of fact which you will draw from the evidence are questions which you must settle. The law of the case you must take from the court. If the court lays down the law incorrectly, the defendant will have his remedy by appealing to a higher court. But, if jurors disregard the law as laid down by the court, the administration of justice would soon become a mockery, and no man would be safe in his person or property.⁸⁵

(c) It is the duty of the court to instruct you on all questions of law arising in this case, and it is your duty to receive such instructions as the law of the case, and find the defendant guilty or not guilty, according to the law as declared by the court and the evidence as you have received it under the instructions of the court.⁸⁶

(d) The law you will take from the court, but you are the sole judges of the facts in this case. You will determine the facts from the testimony in the case, and render a true verdict upon the facts found by you, regardless of all other considerations. While you are the sole judges of the facts found by you, the law has left the penalty to be imposed with the court alone to determine, and this responsibility is with the judge after your verdict has been found. It is your duty only to determine the guilt or innocence of the defendant.⁸⁷

§ 2621. Instructions—Same Weight for Both State and Defendant—Adoption by Court of Instructions. The court instructs the jury that instructions asked and given by the court upon the motion of

83—Carr v. State, *supra*.

84—People v. Worden, 113 Cal. 569, 45 Pac. 844 (845).

"The latter part of the sentence was unnecessary, but it in no way affects the correctness of the proposition that the jury must take the law from the court, as declared in section 1126 of the Penal Code, which provides that, although the jury have the power to return a

general verdict, 'they are bound, nevertheless, to receive as law what is laid down as such by the court.'"

85—Roesel v. State, 62 N. J. 216, 41 Atl. 408 (417-418).

86—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (458).

87—State v. Vance, 29 Wash. 435, 70 Pac. 34 (45).

the state, or upon the motion or request of the defendant, should have the same weight with the jury, and the jury should be guided thereby just the same as if given by the court.⁸⁸

§ 2622. Jury Judges of the Law as Well as of the Facts—Georgia.

(a) I charge you that you are the judge of the law and the facts in this case; that is, you are the exclusive judges of the evidence. With that I have nothing to do. I give you the law in charge, and you take the court's construction of the law, and apply it to the facts, and pass upon the case. While you are the judges of the law, you take the court's construction of the law, and then apply it to the facts.⁸⁹

(b) The court cannot express an opinion, and has no official opinion, and has no personal care about what you find in this case to be the truth. The court cannot give you any help in that,—cannot do anything but give you in charge certain rules of law, which are to aid you in the consideration of the evidence and in arriving at your verdict; and, after you get those rules, you are the judges of the law and the fact,—that is to say, you determine how the law, as given you in charge, is to be applied to the facts under the evidence, and when you so determine the facts you make your verdict.⁹⁰

§ 2623. Same Subject—Illinois. If the jury can say, upon their oaths, that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths it is their duty to reflect whether from their habits of thought, their study and experience, they are better qualified to judge of the law than the

⁸⁸—Dixon v. State, 46 Neb. 298, 64 N. W. 691 (1904).

"It is argued that in a criminal case the prosecuting attorney has no right to request instructions, and that, therefore, this instruction should not have been given. We know no principle of law, of no statute, and of no consideration of policy, which prevents the prosecuting attorney, in a criminal case, from submitting to the court a request for any instruction which he thinks well founded in law and applicable to the evidence. A prosecuting attorney, with proper sense of his duty, stands, of course, not entirely in the attitude of counsel in a civil action. It is his duty to enforce the criminal law. It is not his duty to procure a wrongful determination of questions of criminal law, or to urge a wrongful conviction. It is not

the duty of counsel even in civil cases to endeavor to procure a distortion of the law; but a prosecuting attorney may, owing to his independent position, be expected to exercise a more dispassionate judgment, and assume a less partisan attitude. But he has the right and it is his duty to request such instructions as he believes present the principles of law applicable to the evidence, and, having requested them, the court, in giving them, adopts such instructions as its own. Instructions given at the request of counsel should have the same,—no less and no more,—force as the instructions given by the court of its own motion, and it is not error to so tell the jury."

⁸⁹—Powell v. State, 101 Ga. 9, 29 S. E. 309 (1903), 65 Am. St. 277.

⁹⁰—Ford v. State, 97 Ga. 365, 23 S. E. 996.

court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them the right.⁹¹

§ 2624. **Same Subject—Indiana.** (a) You are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason.⁹²

(b) In this case you are the sole judges of the law, and the right to determine the law goes to this extent: that, even if all the facts alleged in the indictment are established by the evidence beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offense, under the laws of this state, and if you determine they do not, you have the right to acquit the defendant. You are not bound by the instructions given you by the court as to the law, but are at liberty to disregard such instructions, if you see fit to do so, and determine the law for yourselves.⁹³

§ 2625. **Jury Should Give Instructions of Court Respectful Consideration—Indiana.** If, however, you have no well-defined opinion or convictions as to what the law is relating to any particular matter or matters at issue in the case, then, in determining what it is, you should give the instructions of the court respectful consideration.⁹⁴

91—Schnier v. The People, 23 Ill. 17; see also, Mullinix v. The People, 76 Ill. 211; Spies v. The People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570.

92—Blaker v. State, 130 Ind. 203, 29 N. E. 1077.

"This instruction is fully sustained by Anderson v. State, 104 Ind. 467, 4 N. E. Rep. 63 and 5 N. E. Rep. 711, 5 Am. Cr. Rep. 601, and is correct on principle. The constitution gives to juries in criminal cases the right to determine the law as well as the facts. It does not, however, give to them the right to disregard the law. To aid them in correctly determining the law, it is made the duty of the court to instruct them. They have no more right in determining the law to disregard and ignore the court's instructions arbitrarily and without cause, than to disregard and ignore the evi-

dence, and determine the facts arbitrarily and without cause."

93—Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. Cr. Rep. 601.

94—Bird v. State, 107 Ind. 154, 8 N. E. 14 (15).

"It is undoubtedly true that in this state the jury may disregard the instructions of the court in a criminal case, and follow their own convictions; but it must be true, also, that the jury should give the instructions of the court a respectful consideration in all cases, and especially if they are in doubt as to what the law in the case may be. It is made the duty of the court to instruct the jury. It would seem to follow that the jury should at least give to the instructions a respectful consideration. Kelser v. State, 83 Ind. 234; Lynch v. State, 9 Ind. 541; Powers v. State, 87 Ind. 144; Nuzum v. State, 88 Ind. 599; Long v. State, 95 Ind. 481."

MALICE.

Note.—In this subdivision there are only a few general instructions on malice. For further instructions on this subject, see the chapters on Specific Crimes, viz., Homicide, etc.

§ 2626. **Definition of Malice.** (a) The jury are instructed that malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart.⁹⁵

(b) Malice is not confined to ill-will towards an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty, and fully bent on mischief, indicates malice within the meaning of the law; hence, malice is implied from any deliberate and cruel act against another, however sudden, which shows an abandoned and malignant heart.⁹⁶

(c) The court instructs the jury, that malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive.⁹⁷

(d) Malice is that state or condition of mind indicated by a wicked and malicious purpose, which characterizes the perpetration of a wrongful act intentionally committed, and without lawful excuse or justification. It is that quality or frame of mind which prompts the unlawful, premeditated and intentional act, and which shows a heart regardless of social duty and fatally bent on mischief.⁹⁸

(e) I charge you, gentlemen of the jury, that malice, in its common acceptation, means ill will against a person, but in its legal sense means a wrongful act, done intentionally without just cause or excuse.⁹⁹

95—Parsons v. People, 218 Ill. 386 (395), 75 N. E. 993.

"This instruction was approved by this court in Jackson v. People, 18 Ill. 269, and McCoy v. People, 175 id. 224, 51 N. E. 777."

96—Archey v. State, 64 Ind. 56.

97—State v. Goodenow, 65 Me. 30; State v. Weeners, 66 Mo. 13.

98—Territory v. Gutierrez, — N. M. —, 79 Pac. 716 (717).

99—Boulden v. State, 102 Ala. 78, 15 So. 341 (344). Held that this

"correctly defines malice in its legal sense and was properly given. Clark, Man. Cr. Law, p. 75, § 470 and cases cited. Roscoe Cr. Ev. (7th Ed.) p. 21; Broom, Leg. Max., top of page 315."

In People v. Borgetts, 99 Mich. 336, 58 N. W. 328, the following instruction was given:

Malice is here used in a technical sense, including not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It

§ 2627. **Malice Aforethought Defined.** (a) The jury are instructed that the deliberate intention, called malice aforethought, need be only such deliberation and thought as enables a person to appreciate and understand, at the time the act was committed, the nature of his act and its probable results.

(b) To constitute malice aforethought, no particular time need intervene between the formation of the intention and the act; it is enough if the intent to commit the act, with a full appreciation of the result likely to follow, was present at the time the act was committed, and that the act was not the result of some sudden heat of passion, provoked by some cause calculated to override the judgment, and before sufficient time elapsed for reason to resume its sway.¹⁰⁰

(c) Malice aforethought is a condition of mind in which one man does an intentional injury to another in the willful disregard of the legal rights of the other, and it is to be inferred from acts committed or words spoken. It exists when one does a cruel act voluntarily, and without excuse, justification or extenuation, and does not necessarily include hatred towards the person injured.¹

§ 2628. **Malice Aforethought a Question of Fact.** Whether the defendant does or does not act with malice aforethought is always to be inferred from the circumstances surrounding the case.²

§ 2629. **Malice—Express and Implied.** Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or

is not confined to particular ill will to the deceased, but it is intended to denote an action flowing from a wicked and corrupt motive; a thing done, as the books say, "malo animo."

The court said:

"Unlike the case of *Nye v. People*, 35 Mich. 16, the court, in this case, did not stop with the bare definition of 'malice' contained in the first part of the quotation, ending with the word 'motive,' but it included the qualification of that language by what followed. In the case of *Nye*, the jury were told that the offense would be murder if *Nye* and *Betts*, or *Betts* alone, began the attack. Again, the charge in the case of *Nye* lost sight of the distinctions between murder and manslaughter, which here were carefully described. This definition of 'malice' is one common to the books, being enunciated by a celebrated judge in a celebrated case, and the use

of the term 'malo animo' is so explained by the context that it was not likely to mislead an unlearned juror. We discover no error in the charge."

Note. Latin words in an instruction have been held to be error, except such common words as "prima facie."

100—*Nye v. People*, 35 Mich. 16.

1—*Stevens v. State*, 42 Tex. Cr. App. 154, 59 S. W. 545 (549).

"The usual definition (and we specially commend the same, because it has been frequently approved by this court) is as follows: 'Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.' We think the definition given in the court's charge substantially agrees with the definition just quoted."

2—*People v. Glover*, 141 Cal. 233, 74 Pac. 745 (749).

when the circumstances attending the killing show an abandoned and malignant heart.³

§ 2630. **Express Malice Defined.** The term malice means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term "express malice," are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the terms "express malice," and any homicide that is shown to have been the result of willful intent and committed without legal excuse is said to be a killing upon express malice.⁴

§ 2631. **Malice—Difference Between Implied or Constructive Malice and Express Malice.** Implied or constructive malice is an inference or conclusion of law from the facts found by the jury; and, among these, the actual intention of the prisoner becomes an important and material fact for, though he may not have intended to take away life or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act from which the law raises the presumption of malice. It is the difference between express and implied or constructive malice aforethought which distinguishes murder of the first from murder of the second degree, except, however, that under our statute murder of the first degree may be committed when the malicious killing is done in perpetrating or attempting to perpetrate any crime punishable with death, as rape or arson is in this state, although from such a felonious act malice is merely implied or presumed by law. Therefore murder of the second degree is held to be proved where it is not satisfactorily shown by the evidence submitted to the jury that the killing was done with a deliberately formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is so shown that it was done suddenly, without justification or excuse, and without any provocation, or without provocation sufficient to reduce the homicide to the grade of manslaughter, or was done in perpetrating or attempting to perpetrate a felony not capitally punishable, or any unlawful act of violence from which the law raises the presumption of malice.⁵

§ 2632. **Defining "Deliberately, Feloniously, Premeditatedly, Malice, and Malice Aforethought"—Missouri.** As used in the indictment and these instructions, "feloniously" means wrongfully and

3—People v. Mendenhall, 135 Cal. 344, 67 Pac. 325.

4—Hotema v. United States, 186 U. S. 413 (414), 22 S. Ct. 895.

5—State v. Brinte, — Del. —, 58 Atl. 253 (262).

wickedly, and also refers to the punishment imposed by law. "Willfully" means intentionally, and not done by accident. "Premeditatedly" means thought of beforehand, for any length of time, however short. "Deliberately" means done in a cool state of the blood, not in sudden passion engendered by lawful or some just cause of provocation. And the court instructs the jury that in this case there is no evidence tending to show the existence of any passion or provocation. "Malice" means that condition of the mind which prompts one to do a wrongful act intentionally, and to take the life of another without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but it signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief, and "malice aforethought" means that the act was done with malice and premeditation. "Malice," as used here, may be presumed from the intentional use of a deadly weapon in a manner likely to produce death.⁶

§ 2633. Malice Presumed from Use of Deadly Weapon. (a) The law presumes malice from the use of a deadly weapon and casts on the defendant the onus of repelling the presumption unless the evidence which proves the killing, shows also that it was done without malice.⁷

(b) "Malice" means that condition of mind which prompts one to do a wrongful act intentionally, without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but signifies that state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and "malice aforethought" means that the act was done with malice and premeditation. "Malice," as used here, may be presumed from the intentional use of a deadly weapon in a manner likely to produce death.⁸

(c) Malice may be implied from an unlawful use of a deadly weapon—not from the mere circumstance that a deadly weapon is used, because a man may use it in self-defense; but it is the unlawful use of a deadly weapon, whereby life is taken, from which the law presumes malice.⁹

6—State v. Vaughan, 200 Mo. 12, 98 S. W. 2.

Substantially the same instructions, slightly differently worded were approved in: State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Darling, 199 Mo. 168, 97 S. W. 592; State v. Todd, 194 Mo. 377, 92 S. W. 674.

7—Karr v. State, 106 Ala. 1, 17 So. 328 (329).

8—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (458).

9—State v. Foster, 66 S. C. 469, 45 S. E. 1 (4).

The court said:

"The charge complained of was in accordance with the law as declared in State v. Levelle, 34 S. C.

120, 13 S. E. 319, 27 Am. St. 799. As every sane person is presumed to intend the ordinary and probable consequences of his acts, an intent to kill is presumed from the unlawful use of a deadly weapon whereby life is taken. The use of a deadly weapon in taking human life is unlawful, when it is without legal excuse or justification. In the law of homicide, malice is implied from 'a wrongful act done intentionally without just cause or excuse.'"

Implied malice may be explained away by countervailing evidence.

Harris v. State, 155 Ind. 265, 58 N. E. 75 (77).

CHAPTER XC.

CRIMINAL—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2634. Presumed to be innocent until contrary appears beyond a reasonable doubt—Every reasonable doubt construed in defendant's favor.</p> <p>§ 2635. Same subject—Must be a substantial doubt—Not a mere possibility of innocence.</p> <p>§ 2636. Presumption of innocence—Defendant to be given full benefit of.</p> <p>§ 2637. Presumption—Matter of evidence.</p> <p>§ 2638. Presumption of innocence overcome only by proof—Proof required.</p> <p>§ 2639. Presumption of innocence—Continues until every material element is proven.</p> <p>§ 2640. Presumption of innocence—Every ingredient must be proven.</p> <p>§ 2641. Duty of jury to infer innocence rather than guilt.</p> <p>§ 2642. Presumption of innocence—Not a mere form—Defendant must be given benefit.</p> <p>§ 2643. Jury compelled to bear the presumption of innocence in mind.</p> <p>§ 2644. Presumption of innocence not a shield from conviction.</p> <p>§ 2645. Refusal to instruct on the presumption of innocence is error in many states.</p> <p>§ 2646. Presumption of innocence continues throughout the trial.
REASONABLE DOUBT.</p> <p>§ 2647. Reasonable doubt defined and explained—Reason for rule.</p> <p>§ 2648. Reasonable doubt defined—Alabama.</p> <p>§ 2649. Reasonable doubt defined—Arkansas.</p> | <p>§ 2650. Reasonable doubt defined—California.</p> <p>§ 2651. Reasonable doubt defined—Delaware.</p> <p>§ 2652. Reasonable doubt defined—Florida.</p> <p>§ 2653. Reasonable doubt defined—Georgia.</p> <p>§ 2654. Reasonable doubt defined—Illinois.</p> <p>§ 2655. Reasonable doubt defined—Indiana.</p> <p>§ 2656. Reasonable doubt defined—Iowa.</p> <p>§ 2657. Reasonable doubt defined—Kansas.</p> <p>§ 2658. Reasonable doubt—Kentucky.</p> <p>§ 2659. Reasonable doubt defined—Louisiana.</p> <p>§ 2660. Reasonable doubt defined—Massachusetts.</p> <p>§ 2661. Reasonable doubt defined—Michigan.</p> <p>§ 2662. Reasonable doubt defined—Mississippi.</p> <p>§ 2663. Reasonable doubt defined—Missouri.</p> <p>§ 2664. Reasonable doubt defined—Nebraska.</p> <p>§ 2665. Reasonable doubt defined—New York.</p> <p>§ 2666. Reasonable doubt defined—Oklahoma.</p> <p>§ 2667. Reasonable doubt defined—South Carolina.</p> <p>§ 2668. Reasonable doubt defined—South Dakota.</p> <p>§ 2669. Reasonable doubt defined—Tennessee.</p> <p>§ 2670. Reasonable doubt—Texas.</p> <p>§ 2671. Reasonable doubt—Virginia.</p> <p>§ 2672. Reasonable doubt defined—West Virginia.</p> <p>§ 2673. Reasonable doubt defined—Wisconsin.</p> <p>§ 2674. Reasonable doubt defined—U. S. courts.</p> |
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- § 2675. Presumption of innocence—Reasonable doubt—Suspicion of probability of guilt not sufficient to convict—Insanity or irresponsibility must be proven.
- § 2676. Reasonable doubt—Presumption of innocence—Circumstantial evidence—Links in the chain of circumstances.
- § 2677. Reasonable doubt—Rule where evidence is circumstantial.
- § 2678. Every material fact or link in the chain of circumstances must be proved beyond a reasonable doubt.
- § 2679. Reasonable doubt—Evidence required to convict.
- § 2680. Absolute certainty not required to convict.
- § 2681. Reasonable doubt—Not one produced by undue sensibility or trivial and fanciful suppositions.
- § 2682. Reasonable doubt abiding conviction to a moral certainty.
- § 2683. Must be an actual, substantial, fixed and reasonable doubt, not imaginary, conjectural, vague or whimsical.
- § 2684. Reasonable doubt must not be mere speculation.
- § 2685. Reasonable doubt should be a substantial doubt arising from the evidence.
- § 2686. Reasonable doubt defined—Compared to conduct in important affairs of life.
- § 2687. Reasonable doubt—Conscientious belief.
- § 2688. Caution against conviction from prejudice.
- § 2689. Appealing to individual jurors.
- § 2690. Reasonable doubt by one jurymen will prevent conviction.
- § 2691. Reasonable doubt—Doctrine does not apply to mere subsidiary evidence.
- § 2692. Reasonable doubt—Arising from part of the evidence after consideration of the whole.
- § 2693. Reasonable doubt should arise from the evidence as a whole—Possibility of the defendant's innocence will not warrant an acquittal.
- § 2694. Reasonable doubt as to any material fact.
- § 2695. Reasonable doubt—May arise from want of evidence.
- § 2696. Reasonable doubt—"Doubt" must be within the evidence.
- § 2697. Reasonable doubt—Probability of innocence.
- § 2698. Reasonable doubt—May arise from evidence of previous good character.
- § 2699. Reasonable doubt—Independent circumstances identifying defendant.
- § 2700. Reasonable doubt—Where testimony is limited by election.
- § 2701. Reasonable doubt to acquit must relate to precise crime charged.
- § 2702. Reasonable doubt — Guilty only as to count proven.
- § 2703. Only allegations of indictment need be proven beyond reasonable doubt.
- § 2704. Reasonable doubt as to which of several killed deceased.
- § 2705. Doubting as a juror what one believes as a man.
- § 2706. If reasonable doubt of degree of offense, verdict should be guilty of the less offense.
- § 2707. If reasonable doubt whether murder or manslaughter, verdict should be manslaughter—First or second degree.
- § 2708. Reasonable doubt — Every reasonable hypothesis of innocence excluded.
- § 2709. Duty of jury to adopt hypothesis of defendant's innocence.
- § 2710. Proof—Must be inconsistent with any reasonable hypothesis of defendant's innocence.
- § 2711. Jury must acquit if evidence consistent with defendant's innocence.
- § 2712. Proof of every fact necessary to establish guilt beyond reasonable doubt, and inconsistent with every other reasonable hypothesis.
- § 2713. Reasonable doubt defense of alibi established by.
- § 2714. Reasonable doubt as to sanity acquits.

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| <p>§ 2715. Reasonable doubt that charge was caused by hallucinations.</p> <p>§ 2716. Reasonable doubt as to malice.</p> <p>§ 2717. Reasonable doubt—Self defense—Instruction may assume admitted facts.</p> | <p>§ 2718. Self defense—Defendant need only create reasonable doubt.</p> <p>§ 2719. Reasonable doubt—Conspiracy.</p> <p>§ 2720. Reasonable doubt—Homicide.</p> <p>§ 2721. Larceny—Husband and wife.</p> <p>§ 2722. Reasonable doubt—Slander.</p> |
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§ 2634. **Presumed to Be Innocent Until Contrary Appears Beyond a Reasonable Doubt—Every Reasonable Doubt Construed in Defendant's Favor.** (a) You are further instructed that the defendants are presumed to be innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in their favor.¹

(b) The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.²

(c) Defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict, "Not guilty."³

(d) The defendant is presumed by the law to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and if you have a reasonable doubt as to his guilt you will acquit him.⁴

(e) Every person charged with crime is presumed to be innocent until his guilt has been established beyond a reasonable doubt.⁵

1—Cochran v. United States, 157 U. S. 286 (298), 15 S. Ct. 628.

2—Hopt v. Utah, 120 U. S. 430 (439), 7 S. Ct. 614.

3—Adams v. State, — Tex. Cr. App. —, 84 S. W. 231 (233).

"The objection to this charge is that it is not a correct statement of the law, and is prejudicial to the defendant. How or in what way it could possibly be prejudicial to defendant, or is not a correct statement of the law, we are at a loss to know, it being the stereotyped statement of the reasonable doubt approved by this court in many cases."

4—Hughes v. State, 43 Tex. Crim. App. 511, 67 S. W. 104 (105).

5—Dalzell v. State, 7 Wyo. 450, 53 Pac. 297; a larceny case.

"It is urged that the failure of the court to insert in this and simi-

lar instructions the statement that such guilt must be established by 'competent evidence' or equivalent words was misleading, and left the jury to indulge presumptions against the defendant not warranted by the evidence. It is of course true that the guilt of the defendant can be established lawfully only by competent evidence; and if anything in the progress of the trial or the circumstances of the case should cause it to appear necessary that the attention of the jury should be particularly called to this principle, or the defendant should request that the jury be specially instructed in regard to it, it might be error to refuse it. But it is not necessary that a jury shall be informed as to the whole scope of their duties in each instruc-

(f) You are instructed that the defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to acquittal.⁶

§ 2635. Same Subject—Must Be Substantial Doubt, Not a Mere Possibility of Innocence. (a) The court declares the law to be that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt; but a doubt, to authorize an acquittal, must be substantial doubt of defendant's guilt and not a mere possibility of his innocence.⁷

(b) The defendant is presumed to be innocent, and this presumption remains until the state, by evidence, establishes his guilt to your satisfaction, and beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should give him the benefit of such a doubt, and acquit him; but, to authorize an acquittal on the ground of doubt alone, it must be a reasonable doubt, and not the mere possibility of defendant's innocence.⁸

(c) The court instructs the jury that, before they can convict the defendant, they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon a reasonable doubt, must be substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence.

(d) The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant, throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence

tion or even in each case. Much is safely left to their intelligence and knowledge of their duties."

A similar instruction was approved in *State v. Harness*, 10 Idaho 18, 76 Pac. 788 (792).

In *Winfield v. State*, 44 Tex. Crim. App. 475, 72 S. W. 182, the jury were instructed that:

The defendant is presumed to be innocent until his guilt is established to the satisfaction of the jury beyond a reasonable doubt, and unless you are so satisfied, you will find him not guilty.

6—*State v. Martin*, 29 Mont. 273, 74 Pac. 725 (727).

The court said:

"In another instruction the court gave the definition of reasonable doubt as contained in *Territory v. McAndrews*, 3 Mont. 158, and which was taken from *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, and *Commonwealth v. Costley*, 118 Mass. 1, and which has been repeatedly indorsed by this court

in subsequent decisions. *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. 655, 10 Am. Cr. Rep. 46; *State v. Harrison*, 23 Mont. 79, 57 Pac. 647; *State v. Bristol*, 21 Mont. 578, 55 Pac. 107; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267; *State v. Vineyard*, 16 Mont. 138, 40 Pac. 173.

"The above quoted instruction is a verbatim copy of section 2072 of the Penal Code, and is, when read in connection with instruction No. 4, substantially the same in form and meaning as the instruction requested by defendant. This instruction is therefore not open to the objection made by appellant."

7—*State v. Davis*, 194 Mo. 485, 92 S. W. 484; *State v. Bond*, 191 Mo. 555, 90 S. W. 830.

8—*State v. Weber*, 156 Mo. 249, 56 S. W. 729.

in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions.⁹

§ 2636. Presumption of Innocence—Defendant to Be Given Full Benefit of. (a) The law presumes that the defendant is innocent of the crime charged against him in this indictment, and it is your duty, in considering this case, to give him the full benefit of that presumption. If he is convicted at all of either of such crimes, it must be upon the testimony which has been produced here upon this trial.¹⁰

(b) The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.¹¹

(c) The jury are instructed that the law is, that a defendant charged with a criminal offense is presumed to be innocent until his guilt is established by the evidence, beyond a reasonable doubt.¹²

(d) The law presumes every man innocent, and desires no conviction if the jury, or any one of them, entertains a reasonable doubt of his guilt; for while the jury, or any one of them, entertains a reasonable doubt as to the guilt of the defendant of the crime charged he cannot, without a great violence to his conscience and sense of right, agree upon a verdict of conviction.¹³

9—State v. Hudspeth, 159 Mo. 178, 60 S. W. 136 (139, 144).

In State v. Fisher, 162 Mo. 169, 62 S. W. 690 (691), the court instructed as follows:

"The law presumes the defendant to be innocent of the offense charged. It devolves upon the state to prove him guilty beyond a reasonable doubt. If you have a reasonable doubt of his guilt, you should acquit him; but a doubt, to authorize an acquittal on that ground, should be a substantial doubt founded upon the evidence and not a mere possibility of 'innocence.'"

The court said:

"This is substantially the instruction given in State v. Nueslein, 25 Mo. 111, which has been so often commended by this court. There was no error in giving it."

In State v. Lentz, 184 Mo. 223 (232), 83 S. W. 970 (971), the court instructed the jury that:

The law presumes the defendant innocent of the crime charged against him in this information, and the burden of proving him guilty thereof beyond a reasonable doubt rests upon the state. Now,

if, after a full and fair review of all the evidence in the cause, you entertain a reasonable doubt of the defendant's guilt, you should give him the benefit of such doubt and acquit him; but such doubt, to authorize you to acquit him on that ground alone, should be a substantial doubt founded on the evidence, and not a mere possibility of his innocence.

In State v. Hale, 156 Mo. 102, 56 S. W. 881 (882), the court instructed the jury:

The law presumes the defendants' innocence until the state has proven their guilt beyond a reasonable doubt, and, unless the state has so proven their guilt, you will acquit them. But such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt, and not a mere possibility of their innocence.

10—Boykin v. People, 22 Colo. 496, 45 Pac. 419 (420).

11—Coffin v. United States, 156 U. S. 432 (452), 15 S. Ct. 396.

12—Padfield v. People, 146 Ill. 660 (662), 35 N. E. 469.

13—Franklin v. State, 92 Wis. 269, 66 N. W. 107.

§ 2637. **Presumption—Matter of Evidence.** (a) In the absence of evidence to the contrary, the law presumes every one charged with the commission of a crime to be innocent; and this legal presumption of innocence is a matter of evidence, to the benefit of which the defendants are entitled in this case.¹⁴

(b) In the absence of evidence to the contrary, the law presumes every one innocent; and this legal presumption of innocence is a matter of evidence, to the benefit of which the party is entitled. The burden of proof is on the state to satisfy the jury of his guilt. Even if he introduces no evidence at all to overcome or explain that against him, the jury should acquit him, unless the evidence introduced by the state satisfies you, beyond a reasonable doubt, that he is guilty, as charged in this indictment.¹⁵

(c) Gentlemen of the jury, the legal presumption of innocence is to be regarded by the jury in every case as a matter of evidence, to the benefit of which the accused is entitled, and as a matter of evidence it attends the accused until his guilt is by the evidence, placed beyond all reasonable doubt.¹⁶

§ 2638. **Presumption of Innocence Overcome Only by Proof—Proof Required.** (a) All persons accused of crime are presumed by law to be innocent until they are proven to be guilty. The consequence

"We are constrained to hold that the refusal to give such instruction, or its equivalent, was error. 'The true rule is that the burden of proof is upon the state to prove the guilt of the defendant, and that he is presumed innocent unless the whole evidence in the case satisfies the jury, beyond a reasonable doubt, that he is guilty.' *Crilly v. State*, 20 Wis. 232; *Baker v. State*, 80 Wis. 421, 50 N. W. 518; *Fossdahl v. State*, 89 Wis. 482, 486, 62 N. W. 185. This rule was sanctioned by Shaw, C. J., in *Com. v. Kimball*, 24 Pick. 366, 374. See also *State v. Flye*, 26 Me. 312; *State v. Tibbetts*, 35 Me. 81; *Ogletree v. State*, 28 Ala. 693. Thus it was held error to refuse an instruction to the effect that the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption. *Farley v. State*, 127 Ind. 419, 26 N. E. 898. True, the court charged the jury to the effect that they could not convict unless, from all the evidence, there was left in their minds no reasonable doubt of the guilt of the accused. But this is not equivalent to the instruction refused. *People v. Macard*, 73 Mich. 15, 40 N. W. 784; *People v.*

Potter, 89 Mich. 353, 50 N. W. 994."

14—*McVey v. State*, 57 Neb. 471, 77 N. W. 1111 (1113); *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, following *Garrison v. People*, 6 Neb. 285.

15—*Long v. State*, 23 Neb. 33, 38 N. W. 310 (319).

"The jury were not informed that the legal presumption of innocence was a matter of evidence, to the benefit of which plaintiff in error was entitled. This part of the instruction was evidently copied from the syllabus of the opinion written by the present chief justice in *Garrison v. People*, 6 Neb. 275. It should have been given."

16—*Harris v. State*, 123 Ala. 69, 26 So. 515 (516).

"This charge was copied from the case of *Bryant v. State*, 116 Ala. 446, 23 So. 40, where it was held to assert a correct proposition of law on the authority of *Newsom v. State*, 107 Ala. 134, 18 So. 206. The court erred in refusing it."

It was likewise held error to refuse this instruction in *Amos v. State*, 123 Ala. 50, 26 So. 524 (525), compare *Long v. State*, 42 Fla. 612, 28 So. 775, where the court doubted whether this presumption is to be regarded as evidence.

of this rule of law is that they are not required to prove their innocence, but may rest upon the presumption in their favor until it is overcome by positive affirmative proof. It is therefore the duty of the state to establish to your satisfaction, beyond a reasonable doubt, every essential ingredient necessary to constitute the guilt of the prisoners of the crime charged.¹⁷

(b) The court instructs the jury, that the defendant is presumed to be innocent until his guilt is established by such evidence as will exclude every reasonable doubt. Therefore, the law requires that no man shall be convicted of a crime, until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of every reasonable doubt, that the defendant is guilty as charged. If anyone of the jury, after having duly considered all the evidence, and after having consulted with his fellow jurymen, should entertain such reasonable doubt, the jury cannot in such case find the defendant guilty.¹⁸

(c) The jury are instructed that the indictment contains the formal statement of the charge, but is not to be taken as any evidence of defendant's guilt. The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt. And the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence.¹⁹

(d) The court instructed the jury that the defendants are presumed to be innocent until their guilt is established by proof, and that they are entitled to the benefit of any and all reasonable doubts, and cannot be convicted of any crime unless the jury are convinced by the evidence in the case beyond all reasonable doubt, etc.²⁰

§ 2639. Presumption of Innocence Continues Until Every Material Element Is Proven. (a) The law in its humanity, presumes all

17—State v. Nicholls et al., 50 La. 699, 23 So. 980 (1982).

In *People v. Stewart*, 75 Mich. 21, 42 N. W. 662, the following instruction was given:

You will start out in the trial of this case with the presumption that the defendant is wholly innocent of the crime charged, and that presumption must be overcome by evidence so convincing that you can say, beyond any reasonable doubt, that the defendant is guilty as charged.

18—*Painter v. People*, 147 Ill. 444 (470), 35 N. E. 64.

19—*State v. Miller*, 190 Mo. 449, 89 S. W. 377.

20—*People v. Miles*, 143 Cal. 636, 77 Pac. 666 (668).

"The objection to this instruction is that the word 'reasonable' before the word 'satisfaction' therein should have been added. The instruction is correct without the addition of that word, and has uniformly received the sanction and approval of this court."

persons charged with the commission of crime to be innocent, and this humane presumption continues until every material element that constitutes the crime is proven to the satisfaction of the jury trying such persons, beyond a reasonable doubt.²¹

(b) The defendant, in the first instance, is presumed to be innocent of the offense charged until he is proven guilty according to the forms of law. His plea of "not guilty" puts in issue every material allegation of the indictment, and he cannot be rightfully convicted unless the state, by the evidence, has overcome the presumption of innocence in defendant's favor and has made out every material allegation of the indictment to your satisfaction, and beyond all reasonable doubt. Clear and satisfactory proof is required. No mere weight or preponderance of testimony will be sufficient to warrant a conviction herein, unless it be so strong and convincing as to remove from your minds all reasonable doubt of the defendant's guilt.²²

(c) The court instructs the jury, that the law raises no presumption against the prisoner, but every presumption of the law is in favor of his innocence; and, in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon a single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt, and acquit him.²³

§ 2640. Presumption of Innocence—Every Ingredient Must Be Proven. The law presumes every man to be innocent until his guilt is proven beyond a reasonable doubt. Every ingredient necessary to constitute an offense must be proven beyond a reasonable doubt before you can return a verdict of guilty against the defendants.²⁴

§ 2641. Duty of Jury to Infer Innocence Rather than Guilt. (a) Gentlemen of the jury, I charge you, that if the testimony in this case in its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence,

21—Kirby v. State, 44 Fla. 81, 32 So. 837.

22—State v. Brown, 100 Iowa 50, 69 N. W. 277. (The charge was larceny.)

"The instruction is said to be erroneous because of the expression, 'mere weight or preponderance of evidence.' And it is said that the jury might infer that the court means just the opposite of what it said, for in plain terms the instruction forbids a conviction upon a weight or preponderance of evidence not strong enough to exclude all reasonable doubt of guilt. The thought of counsel, likely, is that

no mere weight or preponderance is ever strong enough to exclude such doubt; but it is not so stated in argument. The instruction is not open to a meaning other than that the weight or preponderance must be sufficient to exclude all reasonable doubt. The jury doubtless so understood it."

23—Snyder v. State, 59 Ind. 105.

24—Bassett et al. v. State, 44 Fla. 2, 33 So. 262 (263).

"The form of this charge has been approved by this court in Lovett v. State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705."

and the other tending to establish her guilt, law, justice and humanity alike demand that the jury shall adopt the former, and find the accused not guilty.²⁵

(b) Where two conclusions can be drawn from a single circumstance, one tending to establish guilt and the other tending towards the innocence of the accused, the law makes it your duty to accept the conclusion tending towards innocence, rather than the one tending towards guilt.²⁶

(c) The jury are instructed that, when a man's conduct may be as consistently and as reasonably, from the evidence, referred to one of two motives, one criminal and the other innocent, it is your duty to presume that such conduct is actuated by the innocent motive and not by the criminal.²⁷

(d) Where the act or language of a person may be attributed to two motives, one criminal, the other not, the law will ascribe it to that which is innocent. This is a general rule, and applies in this case, unless the testimony convinces the jury the criminal motive is the true one.²⁸

§ 2642. Presumption of Innocence—Not a Mere Form—Defendant Must Be Given Benefit. The jury are further instructed that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces them of his guilt as charged, beyond all reasonable doubt.²⁹

§ 2643. Jury Compelled to Bear the Presumption of Innocence in Mind. The defendant comes before you clothed with the presumption of innocence, and this presumption is a substantial part of the law of the land; and you are compelled under your oaths, to carry this presumption in your minds during every stage of the trial, and give the defendant the benefit of it until such time as you may be con-

25—*Bryant v. State*, 116 Ala. 445, 23 So. 40 (41).

Compare *Miller v. State*, 107 Ala. 40, 19 So. 37.

26—*People v. Gilmore*, — Cal. —, 53 Pac. 806 (807). Not reported.

27—*McCoy v. People*, 175 Ill. 224 (233), 51 N. E. 777.

28—*State v. Jackson*, 129 N. C. 558, 40 S. E. 41.

29—*People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014 (1017).

The following, which is nearly similar to the text instruction, was approved in *Allen v. State*, 70 Ark. 337, 68 S. W. 28 (29-30):

The defendant is presumed to be

innocent of the charge until proven beyond a reasonable doubt to be guilty. This presumption of innocence is not a mere form, to be disregarded by the jury at pleasure. It is an essential, substantial part of the law of the land, and binding upon the jury in this case; and it is the duty of the jury to give to the defendant the full benefit of this presumption, and to acquit him, unless you feel compelled to find him guilty as charged, and the evidence so convinces you beyond all reasonable doubt of his guilt.

vinced by the sworn testimony in this case, and beyond all reasonable doubt, of his guilt, as charged in the indictment.³⁰

§ 2644. **Presumption of Innocence Not a Shield from Conviction.** The rule of law which throws around the defendant the presumption of innocence, and requires the state to establish beyond a reasonable doubt every material fact averred in the indictment, is not intended to shield those who are actually guilty from just and merited punishment; but it is a humane provision of the law, which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime.³¹

§ 2645. **Refusal to Instruct on the Presumption of Innocence Is Error in Many States.** The law presumes the defendant innocent, and this presumption of innocence attends and surrounds him through every stage of the case, until the jury shall finally render its verdict.³²

30—Kennard v. State, 42 Fla. 581, 28 So. 858 (861).

31—Anderson v. State, 104 Ind. 467, 4 N. E. 64 (66), 5 N. E. 711, 5 Am. Cr. Rep. 601.

"The above instruction is nothing more than a substantial repetition of what has heretofore in some form received the approbation of this court, and notably so in the recent case of Stout v. State, 90 Ind. 1. See also Turner v. State, 102 Ind. 425, 1 N. E. Rep. 869, 5 Am. Cr. Rep. 360."

32—State v. Kennedy, 154 Mo. 268, 55 S. W. 293 (299).

"No doubt, we take it, can no longer exist that the presumption of innocence is indulged in favor of every person charged with crime, and that his guilt must be established beyond a reasonable doubt; but the question is, if the court properly and fully instructs the jury on reasonable doubt, will its failure to instruct the jury that the defendant is presumed to be innocent until his guilt is established constitute reversible error, in and of itself? On the side of the defendant is to be found the supreme court of the United States in Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, on writ of error to the district court of the United States for Indiana. In an opinion by Justice White, the refusal of an instruction in all respects similar to the one refused in this case was held reversible error. The learned justice traced the history of the presumption of innocence, and drew the distinction between reasonable doubt and

the presumption of innocence. As indicating the want of unanimity of judicial opinion, he says: 'The authorities upon this question are few and unsatisfactory.' He cites cases from Texas and Indiana holding it necessary to state to the jury the presumption of innocence, but concedes that in both states statutes required it. In Michigan it has been ruled error to refuse it when asked, but a failure to give it when not prayed was not error. People v. Potter, 89 Mich. 353, 50 N. W. 994; People v. Graney, 91 Mich. 646, 52 N. W. 66. On the other hand, it has been expressly ruled, after full consideration, in Ohio, that it is not error to refuse to charge the presumption of innocence, where the court correctly instructed on the doctrine of reasonable doubt. In Morehead v. State, 34 Ohio St. 212, Judge McIlvaine, for the court, said: 'Unquestionably, the defendant was entitled to the benefit of the legal presumption of innocence. We think, however, it was given to him. The benefit of the presumption of innocence was fully and practically secured to him in the instruction that the state must prove the material elements of the crime beyond a reasonable doubt.' The court of appeals of Kentucky also had the identical proposition before it in Stevens v. Com. 45 S. W. 76, and held, just as the Ohio court did, that, while the presumption of innocence might have properly been stated to the jury, he had the full practical benefit in the requirement that his guilt must be

§ 2646. Presumption of Innocence Continues Throughout the Trial.

(a) The defendant is presumed to be innocent of the crime charged against him, and so strong is this presumption that it clings to him, surrounds, shields and protects him, through the entire trial of this case, and until such presumption is overcome by evidence which proves him guilty beyond a reasonable doubt.³³

(b) The court instructs the jury that you must presume the defendant to be innocent until his guilt is fully established by legal evidence, beyond a reasonable doubt, and the presumption of innocence prevails throughout the trial, and it is your sworn duty as jurors trying this case, to reconcile, if possible, the evidence in this case with this presumption.³⁴

proved beyond a reasonable doubt. In Alabama and California, the presumption of innocence and reasonable doubt are seemingly treated as synonymous. *Ogletree v. State*, 28 Ala. 693; *Moorer v. State*, 44 Ala. 15; *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

"In this state it has been ruled, in at least three cases, that it is not reversible error to refuse an instruction stating the presumption of innocence, when the court had fully instructed on the doctrine of reasonable doubt. *State v. Young*, 105 Mo. 640, 16 S. W. 408; *State v. Harper*, 149 Mo. 514, 51 S. W. 89; *State v. Heinze*, 66 Mo. App. 136. While it is now usual, and we think the proper course, to instruct the jury that the law presumes the innocence of the defendant, and before the jury can convict him they must find him guilty beyond a reasonable doubt, yet when the court has, as in this case, fully instructed in his favor on the doctrine of reasonable doubt, and the evidence so abundantly sustains the verdict of the jury, we do not think the sentence should be reversed solely for the failure to state the presumption. We cited *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; in *State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483, *arguendo*, to show that the trial court in that case erroneously required the defendant to prove his innocence, but the question now before us did not arise in that case. We adhere to our previous decisions on this point. It is not easy to determine when the courts of this state first began to state this presumption in their instruction to juries, but it is true that for many years it was

the opinion of both bench and bar that the instruction that 'before the jury could convict, they must be satisfied of the guilt of the defendant beyond a reasonable doubt,' secured to him the full benefit of the presumption. *Baldwin v. State*, 12 Mo. 223; *Gardiner v. State*, 14 Mo. 98; *State v. Nuelsein*, 25 Mo. 111; *State v. Lewis*, 69 Mo. 92; *State v. Edwards*, 71 Mo. 312."

33—*State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (461).

34—*Parsons v. The People*, 218 Ill. (386, 396), 75 N. E. 993.

In the same case the following was approved:

The court instructs the jury that the defendant at the outset of the trial is presumed by the law to be an innocent man, and he is not required to prove himself innocent or to put in any evidence at all upon that subject. And in considering the testimony in this case, you must look at the testimony and view it in the light of the presumption with which the law clothes the defendant, that he is innocent, and it is a presumption that abides with him throughout the entire trial of the case until the evidence convinces you beyond a reasonable doubt to the contrary.

In *Edwards v. State*, 69 Neb. 386, 95 N. W. 1038 (1039), the court instructed the jury as follows:

The law raises no presumption against the defendant. On the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt.

(c) The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions.³⁵

(d) The court instructs the jury that the defendants are presumed to be innocent, and this presumption attends them throughout the progress of the whole trial, until it is overcome by evidence proving their guilt beyond any reasonable doubt; and, before the jury can convict, the state must establish the guilt of the defendants beyond a reasonable doubt that the defendants are guilty as charged.³⁶

An instruction similar to the foregoing was approved in the earlier case of *Bartley v. State*, 53 Neb. 310, 73 N. W. 744 (760).

In *McVey v. State*, 57 Neb. 471, 77 N. W. 1111 (1113), the instruction contained this clause:

The law presumes the defendant innocent, and this presumption continues throughout the trial until they are proven guilty beyond a reasonable doubt.

In *Aszman v. State*, 123 Ind. 347, 24 N. E. 123 (127), the following instruction was given:

The law presumes the defendant to be innocent of the commission of any crime, and this presumption continues in his favor throughout the trial of the cause, step by step; and you cannot find the accused guilty of any of the crimes covered by the indictment until the evidence in the cause satisfies you beyond a reasonable doubt of his guilt. And so long as you, or any one of you, have a reasonable doubt as to the existence of any of the several elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime.

The court said:

"In *Castle v. State*, 75 Ind. 146, a judgment of conviction for an assault and battery with intent to commit murder was reversed for no other reason than the refusal of the court to give an instruction substantially like the above. While we might hesitate to reverse a judgment which was correct in all other respects, we can see no good reason why such an instruction should be refused, when seasonably requested, unless the subject of the individual responsibility of each juror has been adequately covered in some other charge."

35—*State v. Hottman*, 196 Mo. 110, 94 S. W. 242.

36—*State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (197).

"The court simply did what it was appropriate for it to do, and made the instruction follow the old beaten path and conform to the recognized and approved form of instructions on that subject."

In *State v. Milligan*, 170 Mo. 215, 70 S. W. 473 (475), the following instruction was approved:

The court instructs the jury that the law presumes the defendant to be innocent of the crime charged, and this presumption surrounds and protects him throughout the entire trial, until it is overcome by the evidence in the case that establishes and proves his guilt to your satisfaction, beyond a reasonable doubt. A juror is understood to entertain a reasonable doubt when he does not have an abiding conviction of the truth of the charge to a moral certainty, and, unless you are thus convinced, you must find the defendant not guilty.

In *Campbell v. State*, 100 Ga. 267, 28 S. E. 71 (72), the court instructed the jury as follows:

Notwithstanding the indictment in this case, the defendants enter into this trial with the presumption of innocence in their favor, which presumption rests with them throughout the trial until the state, by satisfactory evidence, overcomes that presumption, and establishes their guilt upon each material allegation contained in the indictment, and beyond all reasonable doubt.

The court said the exception to "this charge is by the use of the word 'until' in this connection, and followed by the subsequent clauses

(e) The court instructs the jury that the defendant is presumed to be innocent, and that this presumption continues throughout the trial and until overthrown by the evidence, and that it is the duty of the jury, if it can consistently be done, to reconcile the evidence upon the theory that the defendant is innocent.³⁷

REASONABLE DOUBT.

§ 2647. Reasonable Doubt Defined and Explained—Reason for Rule. The rule of law which clothes every person accused of crime

set out, the court intimated to the jury an opinion that this presumption of innocence had been overcome. We do not think the exception well taken. It would have been better to have used the word 'unless' instead of 'until,' but the evident meaning of the charge is that the presumption of innocence rests or remains with the defendants throughout the trial, or until or up to the time that the state overcomes it, etc. The present, and not the past, tense, is used throughout this part of the charge. It says that the defendants enter (not entered) into their trial with the presumption of innocence in their favor; and this presumption rests (not rested) with them until the state overcomes (not overcame) it, and establishes (not established) their guilt beyond all reasonable doubt. This language is not the construction that the presumption of innocence has been overcome by the evidence of the state, and the jury could not have so erroneously understood."

37—*Musser v. State*, 157 Ind. 423, 61 N. E. 1 (8).

In *Connor v. Commonwealth*, 26 Ky. 398, 81 S. W. 259, the following was approved:

The court instructs the jury that the defendant is presumed innocent until proven guilty to the exclusion of a reasonable doubt, and this presumption attends him at every stage of the trial, and, if the jury entertain a reasonable doubt as to whether the defendant is proven guilty, they should acquit him.

In *Murphy v. State*, 108 Wis. 111, 83 N. W. 1112 (1114), the jury were instructed as follows:

The defendant in this case entered upon this trial with the presumption of innocence in his favor, and that presumption remains in his favor through the entire trial, and up to the time you shall agree upon your verdict.

In comment the court said: "The

subject was fully considered in *Emery v. State*, 101 Wis. 627, 78 N. W. 145, where it is said that strict accuracy may be attained by stating that the presumption of innocence attends the accused from the beginning to the end of the trial and must prevail unless overcome by evidence so as to establish guilt of the offense charged beyond a reasonable doubt. The instances where courts have held that a refusal to instruct the jury in that regard, in addition to the general instruction that the accused is entitled to an acquittal unless the jury are satisfied from the evidence beyond a reasonable doubt that he is guilty, is error, are grounded upon the omission to give the accused the benefit of the legal presumption of innocence. That principle was fully stated to the jury in this case, unlike *Franklin v. State*, 92 Wis. 269, 66 N. W. 107, upon which counsel for plaintiff in error seems to reply. The jury having been told that there was a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to repeat the idea in different language suggested by counsel for the accused, though such language might have more definitely impressed such idea upon the minds of the jurors, was not reversible error. However, it would have been better to have so given it. *Buel v. State*, 104 Wis. 132, 80 N. W. 78."

In *Suckow v. State*, 122 Wis. 156, 99 N. W. 440 (441), the court gave this instruction:

The accused came into court and entered upon the trial with the presumption that he was innocent, and such presumption of innocence attended him throughout the trial of the case and should prevail unless overcome by evidence sufficiently strong and convincing to satisfy you beyond a reasonable doubt of his guilt.

with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.³⁸

§ 2648. **Reasonable Doubt—Defined—Alabama.** (a) A probability of innocence is the equivalent of a reasonable doubt, and requires the acquittal of the defendant.³⁹

38—*Willis v. State*, 43 Neb. 102, 61 N. W. 254 (256).

"In *Polin v. State*, 14 Neb. 540, 16 N. W. 898, Polin was prosecuted for murder. The district court instructed the jury that 'the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs in life.' And this court held the instruction to be correct. In *May v. People*, 60 Ill. 119, a reasonable doubt was defined as follows: 'A reasonable doubt, beyond which the jury should be satisfied in a criminal case before finding the accused guilty, is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable man to hesitate and pause.' See, also, *Dunn v. People*, 109 Ill. 635, 4 Am. Cr. Rep. 52. The instruction assailed was correct."

39—*Whitaker v. State*, 106 Ala. 30, 17 So. 456 (457).

The court said: "The sixth (a) instruction requested by the defendant ought to have been given. It merely reaffirms the proposition which ought now to be familiar, that a probability of innocence is the equivalent of a reasonable doubt and requires the acquittal of the defendant. *Bain v. State*, 74 Ala. 38; *Winslow v. State*, 76 Ala. 42, 52 Am. Rep. 314, 5 Am. Cr. Rep.

43; *Smith v. State*, 92 Ala. 30, 9 So. 408, 25 Am. St. Rep. 20; *Croft v. State*, 95 Ala. 3, 10 So. 517."

See also *Shaw v. State*, 125 Ala. 80, 28 So. 390.

In *Hicks v. State*, 123 Ala. 15, 26 So. 337 (338), the court approved a charge that:

The state is not required to prove the guilt of defendant to a mathematical certainty.

In *Jackson v. State*, 136 Ala. 22, 34 So. 188 (190), homicide, the following instructions were approved:

I charge you, gentlemen of the jury, if you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible that he is not guilty, you must convict him. Citing *Prater v. State*, 107 Ala. 27, 18 So. 238:.

I charge you, gentlemen of the jury, that the doubt must be, that which will justify an acquittal, actual and substantial, not a mere possible doubt. Because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Citing *McKleroy v. State*, 77 Ala. 95; *Winter v. State*, 123 Ala. 1, 12, 26 So. 949:

I charge you, gentlemen of the jury, that if, after considering all the evidence, you have fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, and it is your duty to convict the defendant.

Citing *Prater v. State*, *supra*; *Thomas v. State*, 106 Ala. 19, 17 So.

(b) The court charges the jury that a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or speculation. It is not a mere possibility or possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt.⁴⁰

460; *Rhea v. State*, 100 Ala. 119, 14 So. 853; *Heath v. State*, 99 Ala. 179, 13 So. 689.

In *Jackson v. State*, 136 Ala. 22, 34 So. 188 (190), the instruction as requested was given:

I charge you, gentlemen of the jury, that you must find the defendant not guilty, unless the evidence against him is such as to exclude to a moral certainty every reasonable hypothesis save that of his guilt. After giving this charge, the court of its own motion instructed the jury as follows: "Gentlemen, that means that the defendant should not be convicted unless you are convinced of defendant's guilt beyond a reasonable doubt."

Held, "There was no error in the court's explaining the written charges given at the request of the defendant as to the meaning of 'reasonable doubt.' This was not a violation of the statute, which requires that charges moved for in writing by either party must be given or refused in the terms in which they are written. Section 3328, Code 1896; *Williams v. State*, 98 Ala. 22, 12 So. 808; *Fuller v. State*, 117 Ala. 200, 23 So. 73; *Lowe v. State*, 88 Ala. 8, 7 So. 97; and authorities cited in note to above section of the Code."

In *Rogers v. State*, 117 Ala. 192, 23 So. 82, the following was approved:

The court charges the jury, if the evidence is in such a state of confusion and uncertainty as that the jury are not convinced of defendant's guilt beyond all reasonable doubt, the jury must acquit the defendant.

In *Walker v. State*, 117 Ala. 42, 23 So. 149 (151), held error to refuse the following:

Before the jury are authorized to convict the defendant in this case, they must believe from the evidence to a moral certainty that he is guilty of the things charged in the indictment, and, unless the jury are so satisfied from the evi-

dence, they should acquit the defendant.

40—*Jimmerson v. State*, 133 Ala. 18, 32 So. 141 (142).

In *White v. State*, 103 Ala. 72, 16 So. 63 (65), an instruction approved was:

The court charges the jury that, if you are reasonably doubtful as to the proof in this case of any material allegation of the indictment you must acquit the defendant.

In *Spraggins v. State*, 139 Ala. 93, 35 So. 1000 (1002), homicide, it was held error not to give the following:

The court charges the jury a probability that some other person may have done the shooting is sufficient to create a reasonable doubt of the guilt of the defendant and therefore for his acquittal.

Orr v. State, 117 Ala. 69, 23 So. 696 (697), approved the following:

If, upon the whole evidence, the guilt of the defendant is not established beyond a reasonable doubt, the jury must acquit.

Littleton v. State, 128 Ala. 31, 29 So. 390 (391), approves the following:

The state is not required to prove defendant's guilt beyond all doubt, but only to prove guilt beyond a reasonable doubt.

Turner v. State, 124 Ala. 59, 27 So. 272 (275), approves the following:

If there is generated in the minds of the jury by the evidence in this case, or any part of the same, after a consideration of the whole of such evidence, a well-founded doubt of the defendant's guilt, then the jury must acquit him.

Citing *Forney v. State*, 98 Ala. 19, 13 So. 540; *Hurd v. State*, 94 Ala. 100, 10 So. 528.

In *Bohlman v. State*, 135 Ala. 45, 33 So. 44, the court gave this instruction:

The court further charges the jury that in whatever form the question of reasonable doubt may be couched, and however it may

§ 2649. **Reasonable Doubt—Defined—Arkansas.** The defendant is entitled to the benefit of every reasonable doubt, and by a "reasonable doubt" is meant that unless you have a firm and abiding conviction, to a moral certainty, of the truth of the charge, you must acquit the defendant. This benefit of a reasonable doubt is a substantial right of the defendant, and applies to the whole case.⁴¹

§ 2650. **Reasonable Doubt—Defined—California.** But by a reasonable doubt is not meant every possible or fanciful conjecture that may be suggested. Everything relating to human affairs, and depending upon moral evidence, is open to some possible doubt or fanciful conjecture. By reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.⁴²

be twisted by words, a reasonable doubt is no more than a reasonable doubt, and that in considering the case you are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely imaginary or conjectural. A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and if, after considering all the evidence, you can say that you have a fixed conviction of the truth of this charge, you are satisfied beyond a reasonable doubt.

Willis v. State, 134 Ala. 429, 33 So. 226 (235), holds that the trial court erred in refusing the following where the charge was embezzlement:

The court charges the jury that if the evidence is not so convincing as to lead the minds of the jury to the conclusion that he is guilty, they must find him not guilty.

Citing *Walker v. State*, 117 Ala. 42, 23 So. 149 (151).

41—*Mitchell v. State*, 73 Ark. 291, 83 S. W. 1050 (1051). See also *Thomas v. State*, 74 Ark. 431, 86 S. W. 404 (406), homicide charge.

In *Tanks v. State*, 41 Ark. 459, 75 S. W. 851 (852), the court said the following instruction was proper, and should have been given as asked:

You are instructed that the burden is on the state to prove that the defendant is guilty as charged in the indictment, and, if the evidence fails to satisfy your minds beyond a reasonable doubt of the

guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit. If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit.

42—*People v. Davis*, 135 Cal. 162, 67 Pac. 59 (60).

In *People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087 (1088), the following was approved:

If you entertain a reasonable doubt upon any one single material fact, which is inconsistent with the defendant's guilt and arises from the evidence in this case, it is your duty to give the benefit of such doubt to the defendant and acquit him.

The court said: "The criticism of this instruction is that it dealt only with facts which are inconsistent with guilt, but does not include facts which are consistent with guilt, and is therefore erroneous and misleading. As the court had fully instructed the jury elsewhere it is quite apparent that the jury could not have been misled by the above instruction."

In *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676 (679), the following was approved:

The jury are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant, must be proved by the evidence beyond a reasonable doubt, and if the jury are not entirely satisfied, beyond all reasonable doubt, that such fact and cir-

§ 2651. **Reasonable Doubt—Defined—Delaware.** "Proof beyond a reasonable doubt" does not mean that the guilt of the accused, or any other fact, shall be established with the absolute certainty of a mathematical demonstration. Matters of fact are required to be proved merely to a moral certainty. To require more in dealing with human conduct and the ordinary affairs of life would be impracticable and therefore unreasonable. It is sufficient that any disputed fact relating to these shall be established by that amount of competent or appropriate evidence which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a man of common sense and ordinary discretion, and so convince him that he would act upon that conviction in matters of the highest concern and importance to his own interest. "Reasonable doubt," in the legal sense, therefore, does not mean a vague, speculative, or whimsical doubt or uncertainty, nor a merely possible doubt of the truth of the fact to be proved.⁴³

§ 2652. **Reasonable Doubt—Defined—Florida.** A reasonable doubt is a doubt for which you can give a reason; in other words, if the evidence of defendant's guilt satisfies you to such an extent as to leave you without a doubt that he may be innocent, for which you can give an intelligent reason, then it would be your duty to convict. Such a doubt may arise either from affirmative evidence tending to show the defendant's innocence, or from the lack of evidence sufficient to establish his guilt.⁴⁴

cumstance has been proven, it is your duty to find a verdict of not guilty.

People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014 (1017), approves this:

The court instructs the jury that, under the law, no jury should convict a citizen of a crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there is a strong reason to suspect that he is guilty; but before the jury can lawfully convict, they must be convinced of the defendant's guilt beyond a reasonable doubt.

People v. Manning, 146 Cal. 100, 79 Pac. 856 (857), charge homicide, approves this:

If there is a reasonable doubt whether the defendant threw the lamp, in this case, your verdict should be not guilty. If you are in reasonable doubt whether the defendant intended to throw the

lamp at anybody, your verdict should be not guilty.

43—State v. Brinte, — Del. —, 58 Atl. 258 (264).

44—Judgment was affirmed in a case in which this instruction was given in Wallace v. State, 41 Fla. 547, 26 So. 713 (723). The court said it had not been able to find that "the exact language here used has ever been passed upon by an appellate court. An instruction to the effect that a 'reasonable doubt' is a doubt for having which the jury can give a reason based upon the testimony, was disapproved in Cowan v. State, 22 Neb. 519, 35 N. W. 405, and Carr v. State, 23 Neb. 749, 37 N. W. 630, because, as the court said, it failed to correspond with the definition given by Chief Justice Shaw in Com. v. Webster, 5 Cush. 295, though the court did not undertake to state the difference in the substantial meaning of the two definitions. In Morgan v. State, 48 Ohio St. 371, 27

§ 2653. **Reasonable Doubt—Defined—Georgia.** (a) A reasonable doubt must arise from a candid and impartial consideration of the evidence in the case, and then it must be such a doubt as would cause a reasonably prudent and considerate man to hesitate and pause before

N. E. 710, an instruction that by 'reasonable doubt is not meant a captious or whimsical doubt, but a doubt that you, as a juror, can give a reason for,' was held to be inaccurate. The court asked: 'What kind of reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? To whom is the reason to be given? To the juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict.' Judge Minshall, however, dissented from these criticisms upon the instruction insisting that it was free from error. In *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, an instruction that 'a reasonable doubt is such a doubt as the jury are able to give a reason for,' was condemned, upon the ground that it puts upon a defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction, and that we sometimes have doubts in relation to things for which we can give no reason, and of which we have imperfect knowledge. The accuracy of instructions of this nature was doubted in *State v. Sauer*, 38 Minn. 438, 38 N. W. 355, and *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 833. See, also, 3 Rice Ev., p. 437, § 270. On the other hand, instructions to the effect that a reasonable doubt is 'a doubt for which a reason could be given' or one 'for which some good reason arising from the evidence may be given,' or a 'serious sensible doubt, such as you could give a good reason for,' or one 'for which some fair, just reason can be given,' have been approved in *Hodge v. State*, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; *Ellis v. State*, 120 Ala. 333, 25 So. 1; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *State v. Jefferson*, 43 La. Ann. 995, 10 So. 199; *U. S. v. Johnson*, 26 Fed. 682; *Same v. Jones*, 31 Fed. 718; *State v. Rounds*, 76 Me. 123. The authorities pro and con are very fully considered in *State v. Morey*, 25 Ore. 241, 35 Pac. 655 and

36 Pac. 573, and the court declined to reverse a conviction because the trial judge in his definition of 'reasonable doubt,' stated that 'it was such a doubt as a juror can give a reason for.' It was admitted that this language was subject to the criticism that it did not define, but needed defining, but the court held that, in connection with other instructions given upon the same subject the jury were not mislead; and that case is approved in *State v. Serenson*, 7 S. D. 277, 64 N. W. 130; 2 Thomp. Trials § 2476. In *People v. Barker*, 153 N. Y. 111, 47 N. E. 31, it is said that 'a reasonable doubt' must be founded in reason, and must survive the test of reasoning or the mental process of a reasonable examination. In this state we have held that the doubt authorizing an acquittal is a reasonable, sensible one, not an unreasonable, capricious, whimsical, speculative, imaginary or forced one, or a mere possible one, or one which is suggested or engendered by something outside of the evidence. *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; *Woodruff v. State*, 31 Fla. 320, 12 So. 653. We are of opinion that the instruction complained of does no more than to state, in a different form, the same thing as that defined in other language in the *Lovett* and *Woodruff* cases. It tells the jury that the burden is upon the state to establish the defendant's guilt beyond a reasonable doubt,—that is, beyond a doubt for which they can give an intelligent reason; that this doubt may arise either from affirmative evidence tending to show innocence, or from lack of evidence sufficient to establish guilt; but that if the evidence of guilt satisfies them to such an extent as to leave them without a doubt that defendant may be innocent for which they can give an intelligent reason, they should convict. This instruction puts no burden upon the defendant to furnish the jury with a reason, but it requires the state to satisfy the jury of defendant's guilt to such an extent as to leave their minds without a doubt that

acting in the graver and more important affairs in life. After a careful and impartial consideration of the entire case, if you can see and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt.⁴⁵

defendant may be innocent, for which they can give an intelligent reason. Of course the jury are not required to state reasons for their verdict, but they are nevertheless required by the law and by their duties as jurors, to act in the jury box as reasonable beings, and to exercise their reasoning facilities in passing upon the life and liberty of accused persons. If they entertain a doubt, they must, as reasonable men, know upon what that doubt is based, and they are required to examine into the nature and origin of the doubt far enough to ascertain that it is a reasonable one. And if it be found that no intelligent reason can be given for entertaining a doubt, how can the conscience of the jury be satisfied with a verdict for acquittal, resting as it does, under a solemn duty to convict, where the evidence convinces them of guilt to that extent as to leave no reasonable doubt upon their minds? To authorize an acquittal because of some vague undefined, unintelligible, or inexplicable misgiving is to eliminate the word 'reasonable' from the definition."

In *Bryant v. State*, 34 Fla. 291, 16 So. 177 (178), one approved instruction was:

Before you find the defendant guilty you (must) believe that he is guilty beyond a reasonable doubt.

See, also, *Kirby v. State*, 44 Fla. 81, 32 So. 837, homicide.

In *Brown v. State*, 46 Fla. 159, 35 So. 82 (84), homicide case, this charge was approved:

The defendant is presumed to be innocent until she is proved to be guilty beyond a reasonable doubt. She is entitled to every reasonable doubt arising from the evidence, and a reasonable doubt is one conformable to reason—a doubt which a reasonable man would entertain. It does not mean a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which,

after the entire comparison and consideration of all the evidence, leaves the mind of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truths of the charge.

The court further instructs you that if, after a consideration of all the evidence in this case, you cannot say that every material allegation of the indictment has been proved beyond a reasonable doubt, it will be your duty to acquit the defendant.

In *Adams v. State*, 34 Fla. 185, 15 So. 905 (909), the following was approved:

But if, after a careful consideration of all the evidence, you feel an abiding conviction in your minds to a moral certainty that the accused is guilty as charged, then, in law, you should have no reasonable doubt, and you should find a verdict of guilty.

45—*Hayne v. State*, 99 Ga. 212, 25 S. E. 307 (309).

Bone v. State, 102 Ga. 387, 30 S. E. 845 (846), larceny case, approved the following:

I have charged you that what you believe in this case against the defendants you must believe beyond a reasonable doubt. That means what it says. It must be a reasonable doubt as opposed to one that is unreasonable. It is such a doubt as you can give a reason for and based upon reason. It is not a mere guess or a vague conjecture that possibly the defendants may not be guilty, but it is such a doubt as leaves your mind in an uncertain condition where you are unable to say with reasonable and moral certainty that the defendants are guilty. If your minds should be in that condition,—wavering, uncertain, where you are not satisfied to a moral certainty that the defendants are guilty,—then you have the reasonable doubt that the law contemplates and you should find them not guilty. But if, on the other hand, you are satisfied of their guilt to a reasonable and

(b) A reasonable doubt is not any doubt which may visit the mind of a juror during the investigation of a case, and in making up his verdict. A mere passing hesitation of the mind, if it is not of such gravity as to amount to a reasonable doubt, will not justify a juror in finding the defendant not guilty. If the testimony satisfies him of the guilt of the defendant beyond a reasonable doubt, he should find the defendant guilty. A reasonable doubt is one that is based upon some ground in the testimony or the want of testimony in the case. When a juror has that sort of doubt, he ought to acquit. But if he has not a doubt of that gravity, he ought to convict, if the testimony satisfies him of his guilt beyond a reasonable doubt.⁴⁶

§ 2654. **Reasonable Doubt—Defined—Illinois.** The court instructs the jury, that in considering this case you should not go beyond the evidence to hunt for doubts, nor should you entertain such doubts as are merely chimerical or based upon groundless conjecture. A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case; and then it must be such a doubt as would cause a reasonable, prudent and considerate man to pause before acting in the graver and more important affairs of life. If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt.⁴⁷

moral certainty then it would be your duty to find them guilty.

Jackson v. State, 118 Ga. 780, 45 S. E. 604, approved the following:

The state is not required to demonstrate to a mathematical certainty his guilt, but it does have to show to a moral and reasonable certainty his guilt. If the state has succeeded in doing this, then this presumption in his favor is removed, and it is your duty to convict. If the state has failed to do this then it is your duty to acquit the defendant.

The court said: Cone v. State, 102 Ga. 387, 30 S. E. 845, that there was no error in giving such a charge after having correctly charged the law of reasonable doubt. See also Davis v. State, 114 Ga. 104, 39 S. E. 906 (907).

46—O'Dell v. State, 120 Ga. 152, 47 S. E. 577 (578).

47—Miller v. The People, 39 Ill. 457; People v. Finley, 38 Mich. 482; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 n, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570; State v. Pierce, 65 Ia. 85, 21 N. W. 195.

In May v. People, 60 Ill. 119, the following was approved:

The court instructs the jury, that a reasonable doubt, within the meaning of the law, is such a doubt as would cause a reasonable, prudent and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged or alleged.

In Gorgo v. People, 100 Ill. App. 130 (131), assault, the following was approved:

A reasonable doubt is that state of mind which, after a full consideration and comparison of all the evidence both for the state and the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty from the evidence in the case that the defendant, —, is guilty of the charge laid in the indictment. If you have such a doubt, if your conviction of the defendant's guilt, as alleged in the indictment, does not amount to a moral certainty from the evidence in this case, then the court in-

§ 2655. **Reasonable Doubt—Defined—Indiana.** The defendant in a criminal case is not required to satisfy the jury of the existence of any fact, which, if true, is a complete defense. It is sufficient if he creates in the minds of the jury a reasonable doubt of the existence of such fact.⁴⁸

§ 2656. **Reasonable Doubt—Defined—Iowa.** A reasonable doubt is such a doubt as fairly and naturally arises in your minds, after fully and carefully weighing and considering all the evidence introduced upon the trial of this cause, when viewed in the light of all the facts and circumstances surrounding the same.⁴⁹

structs you that you must acquit the defendant, —.

Schintz v. People, 178 Ill. 320 (328), 52 N. E. 903, approves the following:

The jury is instructed that it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendants. The law presumes them innocent of the crime with which they are charged until they are proven guilty by competent evidence beyond a reasonable doubt; and if the evidence in this case leaves upon the mind of the jury any reasonable doubt of the defendants' guilt, the law makes it your duty to acquit them.

Painter v. People, 147 Ill. 444 (469), 35 N. E. 64, homicide case, approves the following:

The jury are instructed that if there is any reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit.

Bressler v. The People, 117 Ill. 424, 8 N. E. 62, is authority for the following:

The court instructs the jury, that before a conviction can be rightfully claimed by the people, in this case, the truth of every material averment contained in the indictment must be proved to the satisfaction of the jury, beyond any reasonable doubt.

48—Hinshaw v. State, 147 Ind. 334, 47 N. E. 157 (172), the court said:

"The instruction is correct as an abstract proposition of law. It is a correct statement of the law as applicable to an affirmative defense in a criminal case, and not to the law arising upon a defense negative in its character. An affirmative defense is such as where

the defendant attempts to establish his insanity, when he did the act with which he is charged, or that he was acting in his necessary self-defense when he did it, and the like. In such cases he is not required to satisfy the jury of the existence of either of those facts, but it is sufficient if the evidence tending to prove such fact create in the minds of the jury a reasonable doubt of the existence of any such fact. That is, if the defendant, in seeking to prove his insanity as a defense at the time he did the act charged, fails to satisfy the jury of the existence of that fact, yet, if, by such evidence, he creates a reasonable doubt in the mind of the jury of his sanity at the time he did the act, it is sufficient to make out his defense. Trogon v. State, 133 Ind. 1, 32 N. E. 725."

In Walker v. State, 136 Ind. 663, 36 N. E. 356 (358), the following was given:

To entitle the state to a conviction, it must prove beyond a reasonable doubt the material allegations of the indictment. If the state has done this, you should convict; if not, you should acquit.

Held that this was not erroneous in taking away from the jury the right to determine the sufficiency of the indictment. Citing Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. Cr. Rep. 601.

49—State v. Case, 96 Ia. 264, 65 N. W. 149.

In State v. Van Tassel, 103 Ia. 6, 72 N. W. 497 (501), the trial judge charged:

If, after a careful comparison of the evidence and a full consideration of the whole case, your minds are brought to an abiding conviction beyond a reasonable doubt etc.

§ 2657. **Reasonable Doubt—Defined—Kansas.** A reasonable doubt is such a doubt as the jury are able to give a reason for. By a reasonable doubt is not meant a mere possible or imaginary doubt arising from caprice or groundless conjecture; it is that state of the case which, after a comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant.⁵⁰

§ 2658. **Reasonable Doubt—Kentucky.** If, from all the evidence in the case, the jury have a reasonable doubt of the defendant having been proven guilty, they ought to find him not guilty.⁵¹

§ 2659. **Reasonable Doubt—Defined—Louisiana.** This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon a mere caprice, fancy or conjecture. It must be such a doubt as would induce action without hesitation in an important matter by reasonable men in the exercise of an ordi-

Held that a criticism "that the instruction is faulty because it fails to use the words 'to a moral certainty' is captious. When the mind is brought to an abiding conviction beyond a reasonable doubt that a thing exists, it is a 'moral certainty.'" *Com. v. Costley*, 118 Mass. 23."

State v. Judiesch, 96 Ia. 249, 65 N. W. 157, seduction case, approves the following:

The court instructs the jury that to warrant a conviction, the defendant must be proved to be guilty so clearly and conclusively that there is no reasonable theory on which he can be innocent, when all the evidence in the case is considered together.

50—*State v. Patton*, 66 Kan. 486, 71 Pac. 840.

"The requirements of a reason for doubt is set over against capriciousness, conjecture, the indulgence of speculation upon possibilities, and the invasion of the realm of imagination. Instructions presenting such a contrast have been approved in the following cases: *Hodge v. The State*, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *State v. Jefferson*, 43 La. Ann. 995, 10 So. 199; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *State v. Harras*, 25 Wash. 416, 65 Pac. 774; *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Butler v. State*, 102 Wis. 364, 78 N. W. 590; *State v. Rounds*, 76 Me. 123; *State v. Serenson*, 7 S. D. 277, 64 N. W. 130. And judges

of the federal courts have frequently employed equivalent phrases in charging juries in criminal cases. *United States v. Butler*, 1 Hughes 457, Fed. Cas. No. 14, 700; *United States v. Johnson*, — C. C. —, 26 Fed. 682; *United States v. Jackson*, — C. C. —, 29 Fed. 504; *United States v. Jones*, — C. C. —, 31 Fed. 718. Similar instructions have been criticised, however, in a number of states. *State v. Morey*, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573; *State v. Sauer*, 38 Minn. 438, 38 N. W. 355; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 833; *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710; *Klyce v. State*, 78 Miss. 450, 28 So. 827. And like charges have been declared to be erroneous in the following states: *Silberry v. State*, 133 Ind. 677, 33 N. E. 681; *Avery v. State*, 124 Ala. 20, 27 So. 505; *State v. Cohen*, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213; *Carr v. State*, 23 Neb. 749, 37 N. W. 630."

51—*Benge v. Com.*, 24 Ky. L. 1466, 71 S. W. 648 (650).

Clark v. Com., 23 Ky. L. 1029, 63 S. W. 740 (747), homicide case, holds that it was error to refuse this:

If, upon the entire case, you have a reasonable doubt of defendant's being guilty, or as to any fact necessary to establish his guilt, you should acquit him; or, if you have such doubt as to the degree of the offense, you will find him guilty of manslaughter only.

nary, yet prudent judgment. It must be such a doubt as would make you feel you had not an abiding conviction as to the prisoner's guilt. If, after a fair and impartial consideration to all the facts in the case, you find the evidence unsatisfactory upon any point, indispensably necessary to constitute the prisoner's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. You are not permitted to go beyond the evidence to seek for doubts, but must confine yourselves strictly to a dispassionate and impartial consideration of the testimony given upon the trial. You should not resort to extraneous facts or circumstances in reaching your verdict.⁵²

§ 2660. **Reasonable Doubt—Defined—Massachusetts.** Then what is a reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of the proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the

⁵²—State v. Nicholls, 50 La. 699, 23 So. 980 (1885), homicide case. The court said:

"We have read and considered the objection to this part of the charge. The expression is questioned in the argument, that it 'must be such a doubt as would induce action without hesitation, in an important matter, by reasonable men, in the exercise of ordinary but prudent judgment.' The comment is that the reasonable doubt is not that which induces, but that which deters, action. Between the doubt that deters and that which induces action, the difference is metaphysical. Taking this whole charge, we do not think it could have been misunderstood by the jury. We should find it extremely difficult on this ground to set aside this verdict and the difficulty in thus setting it aside would not be as serious as giving a satisfactory reason for it."

In State v. Martin, 47 La. Ann. 1540, 18 So. 508 (509), a charge was approved:

That the jury may be said not to entertain a reasonable doubt, when, after the entire comparison and consideration of all the evidence, they can say that they feel an abiding conviction, to a moral certainty, of the truth of the charge; that proof beyond reasonable doubt is such proof as precludes every reasonable hypothesis except that which it tends to support; it is proof to a moral certainty, as distinguished from an absolute certainty; that the two phrases "proof beyond a reasonable doubt" and "proof to a moral certainty" are synonymous and equivalent. Each signifies such proof as satisfies the judgment and conscience of the jury as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and

evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because, if the law, which mostly depends upon consideration of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.⁵³

§ 2661. Reasonable Doubt—Defined—Michigan. Now the court will define to you what is meant by a reasonable doubt. It is a doubt that grows out of the evidence in the case, if it exists at all. It cannot originate anywhere else. It is not an imaginative doubt, not a speculative doubt, not a doubt based upon a fancy. It is a doubt based upon reason; such a doubt as you can give a reason for. And as you investigate this case along the lines of evidence (and nowhere else) you are to say whether you find that kind of doubt in the proof which causes you to hesitate and halt in your deliberations. The court does not say to you in these instructions that if you hesitate in your deliberations until by discussion you harmonize these differences, that each place where you hesitate is a reasonable doubt; but if you reach a point beyond which you cannot go conscientiously, and say that this respondent is guilty, then your deliberations come to a halt. It is such an obstruction that you cannot, as conscientious men, get by. The train of facts and circumstances in the case moves along, and, though there be obstructions here and there on the track, if they can be removed by fair, dispassionate discussion, and you reach the end of the journey, and then become satisfied in your minds that this respondent is guilty, then you have removed these obstructions, and they are not reasonable doubts, or any one of them. But if, as I say, the train of circumstances stops, and you are unable, after fair, calm, unprejudiced discussion, to get by that stopping place, then there is such a reasonable doubt, growing out of the evidence in the case, that you cannot get over or get by, and you should

so satisfies them as to leave no other reasonable conclusion possible.

53—Shaw, C. J., in *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295 (320), 52 Am. Dec. 711, in which case the evidence was circumstantial.

In *Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (714), the Supreme Court of Nebraska said of this instruction, that the only reasonable ground of criticism is to that portion of it which says that if the law, "which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would defeat criminal prosecutions alto-

gether." It is claimed that this portion of the instruction is argumentative, and for that reason vicious. It is somewhat argumentative, but only in the way of giving a reason for a rule of law. It is not argumentative upon the evidence, nor was it at all prejudicial to the rights of the accused. This instruction has been approved in the following Nebraska cases: *Polin v. State*, 14 Neb. 540, 16 N. W. 898; *Langford v. State*, 32 Neb. 782, 49 N. W. 766; *Willis v. State*, 43 Neb. 102, 61 N. W. 254; *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, and *Carr v. State*, 23 Neb. 749, 37 N. W. 630. See § 2164.

say then that the respondent should have the benefit of that reasonable doubt, and be acquitted by your verdict.⁵⁴

§ 2662. **Reasonable Doubt—Defined—Mississippi.** Where there is a probability of the innocence of the defendant, there is a reasonable doubt of his guilt, and you should then find him not guilty.⁵⁵

§ 2663. **Reasonable Doubt—Defined—Missouri.** If, after fully and deliberately weighing and considering all the evidence before them in this case, the jury entertain any reasonable doubt of the defendant's guilt, they must give him the benefit of such doubt, and acquit him. A juror is understood to entertain a reasonable doubt when he has an abiding conviction of mind, founded on the evidence, to a moral certainty, that the defendant is guilty as charged.⁵⁶

54—*People v. Rich*, 133 Mich. 14, 94 N. W. 375 (377).

In *People v. Stewart*, 75 Mich. 21, 42 N. W. 662 (665), homicide, it was held error to refuse the following requests:

A reasonable doubt is such a doubt arising out of the evidence that you cannot say to a moral certainty that the defendant is guilty; and, if there is any other reasonable explanation of the death of the stranger than the guilt of the defendant, you are bound to acquit. The prosecution claim that the evidence in this case is made up of a chain of circumstances of facts or links so connected together that they lead up, with all reasonable certainty, to the defendant's guilt; and, gentlemen, I charge you that, in order to convict the defendant upon that class of evidence, you must be satisfied, beyond any reasonable doubt, that each material fact or necessary link in the chain has been proven, and, if you have any reasonable doubt about any one of the necessary facts or links constituting the chain of circumstances, then you should acquit the defendant. To illustrate: The first material fact or link is the death; the second, death by violence at the hand of some person. The first fact, the death, is not disputed; the second is contested; and, if you have any reasonable doubt as to either one of them, then you must acquit.

People v. Albers, 137 Mich. 678, 100 N. W. 908 (912).

55—*Strother v. State*, 74 Miss. 247, 21 So. 147 (148), 34 L. R. A. 472.

In *Hammond v. State*, 74 Miss. 214, 21 So. 150, homicide, the charge was:

The court instructs the jury for the state, that you are not required to know that defendant inflicted wounds on the child by violence, nor is it necessary for you to know that the child died from such wounds. All that is required is for you to take into consideration all the facts and circumstances in evidence, and from them to conscientiously believe beyond a reasonable doubt, that he made wounds on the child from which he died.

The court said "that 'conscientiously,' is a word of quality and not of quantity, and ought not to be used in charges as to reasonable doubt. But in the charge here it was mere surplusage, for the jury are not only told that they must 'conscientiously' believe, but that they must 'conscientiously believe beyond a reasonable doubt.'"

See also *Wells v. State*, — Miss. —, 18 So. 117.

56—*State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (460), homicide case.

In *State v. Pyscher*, 179 Mo. 140, 77 S. W. 836 (842), forgery, the following was approved:

The court instructs the jury that the law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by evidence which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt, as charged, must be clear, positive and abiding, and fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case to justify a verdict of guilty that there may be strong suspicions or even strong probabilities of guilt, but the law requires proof by legal and credible

§ 2664. **Reasonable Doubt—Defined—Nebraska.** You are instructed that by the words "reasonable doubt," as used in these instructions, is meant an actual, substantial doubt of guilt arising from the evidence, or want of evidence, in the case.⁵⁷

evidence, of such nature that, when it is all considered, it produces a clear, undoubting and entirely satisfactory conviction of defendant's guilt; and the burden of establishing the guilt of the defendant, as above referred, is upon the prosecution.

In *State v. Mitligan*, 170 Mo. 215, 70 S. W. 473, the following was approved:

The court instructs the jury that, if they have a reasonable doubt of the defendant's guilt, they must acquit him; but such a doubt of an acquittal, must be a substantial doubt, arising from a full and fair consideration of all the facts and circumstances in proof, and not a mere possibility of his innocence.

In *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (197), homicide case, the following was approved:

The court instructs the jury that in criminal cases, even when the evidence is so strong as to demonstrate the probability of the guilt of the party accused, still, if it fails to establish beyond a reasonable doubt the guilt of the defendant in manner and form as charged in the indictment, then it is the duty of the jury to acquit.

State v. Nueslein, 25 Mo. 111, and *State v. Knock*, 142 Mo. 524, 44 S. W. 235, and *State v. Maupin*, 196 Mo. 164, 93 S. W. 379 (383), are authority for the following:

The court instructs the jury that, before you can convict the defendant, you must believe him guilty beyond a reasonable doubt, but a doubt to authorize an acquittal must be a substantial doubt based on the evidence, and not a mere possibility of innocence.

In *State v. McCarver*, 194 Mo. 717, 92 S. W. 684, this was approved:

The court instructs the jury that the defendant is presumed to be innocent, and this presumption attends and protects him at every stage of the case until it is overcome by testimony which proves his guilt beyond a reasonable doubt; and it is not enough in a criminal case to justify a verdict of guilty that there may be a

strong suspicion or even strong probabilities of the guilt of the defendant, but the law requires proof so clear and satisfactory as to leave no reasonable doubt of defendant's guilt.

See, also, *State v. Hottman*, 196 Mo. 110, 94 S. W. 240; *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (197).

State v. Moore, 156 Mo. 204, 56 S. W. 883 (884), homicide case, approves the following:

The court instructs you that the burden of proving the defendant's guilt beyond a reasonable doubt rests upon the state, and if, upon the evidence considered as a whole, the jury should entertain a reasonable doubt as to defendant's guilt, you should give him the benefit of such doubt and find him not guilty; but a doubt, to authorize an acquittal on that ground alone, should, as stated, be a reasonable doubt, and one fairly arising from the evidence as a whole, and the possibility that the defendant may be innocent will not warrant you in acquitting him on the ground of reasonable doubt.

57—*Ferguson v. State*, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512. "The objection raised by counsel for the accused to this instruction is that 'it is impossible to tell from the instruction whether the doubt or guilt must arise from the evidence on the part of the state or want of evidence on the part of the defendant.' The court's definition of a reasonable doubt will not bear any such interpretation. The idea plainly conveyed by this portion of the charge is that, if the jury, on the consideration of the evidence introduced by the state and defense, or for any lack of evidence in the case, entertain a reasonable doubt of the guilt of the accused, there must be an acquittal. The court's definition of a 'reasonable doubt' was, in form, approved by this court in *Langford v. State*, 32 Neb. 782, 49 N. W. 766." See, also, *O'Brien v. State*, 69 Neb. 691, 96 N. W. 649 (650).

In *Whitney v. State*, 53 Neb. 287,

§ 2665. **Reasonable Doubt—Defined—New York.** A reasonable doubt, gentlemen, is not a mere whim, or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case. It is a doubt founded in reason and coming from reason, or, as the learned counsel for the defense has well expressed it, a doubt coming from reason, and which survives reason.⁵⁸

§ 2666. **Reasonable Doubt—Defined—Oklahoma.** (a) You are further instructed that if you entertain a reasonable doubt of the guilt of the defendant, which arises from the incomplete or unsatisfactory character of the evidence offered on behalf of the territory, or from the evidence offered on the part of the defendant, or if you entertain such reasonable doubt from a consideration of all the evidence, and facts and circumstances in evidence, in the case, then it is your duty as jurors to give the defendant the benefit of such doubt, and acquit him.

(b) If, after considering all the evidence, you can say on your oaths as jurors and your conscience as men that you have an abiding

73 N. W. 686 (699), the same instruction was approved with the following addition thereto:

That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitled to an acquittal is a doubt reasonably arising from all the evidence or want of evidence in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life.

The court said: "The foregoing states the law correctly. Instructions either in the identical language or in substance the same have been approved by this court in the following cases: Polin v. State, 14 Neb. 540, 16 N. W. 898; Langford v. State, 32 Neb. 782, 49 N. W. 766; and Lawhead v. State, 46 Neb. 607, 65 N. W. 770."

In Martin v. State, 67 Neb. 36, 93 N. W. 161 (162), the following was approved:

Unless the doubt is such that, were the same kind of doubt interposed in the graver transactions

of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty.

In numerous Nebraska cases the charge of Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, has been approved. *Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (714); *Savarg v. State*, 62 Neb. 166, 87 N. W. 34 (37); *Polin v. State*, 14 Neb. 540, 16 N. W. 898; *Willis v. State*, 43 Neb. 102, 61 N. W. 254; *Maxfield v. State*, 54 Neb. 44, 74 N. W. 401; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (795), homicide; *Lawhead v. State*, 46 Neb. 607, 65 N. W. 779, larceny. See § 2660, n. 53.

58—*People v. Barker*, 153 N. Y. 111, 47 N. E. 31 (32).

"It must be admitted that this [the last] sentence lacks clearness of expression, but it is quite obvious that the idea sought to be conveyed is that a reasonable doubt must be found in reason, and must survive the test of reasoning, or the mental process of a reasonable examination. Taken in connection with the sentence which preceded it, and already quoted, we are of opinion that the jury were sufficiently instructed upon the question of reasonable doubt."

conviction of the truth of the charge, amounting to a moral certainty, you are satisfied beyond a reasonable doubt.⁵⁹

§ 2667. Reasonable Doubt—Defined—South Carolina. So, gentlemen, in all cases on the criminal side of the court, the law is still charitable and it says that, if you have a reasonable doubt on any material fact necessary to make the case of the state, you will solve that doubt in favor of the defendant; that is, where the facts are so evenly balanced, or where your reason and your judgment is in such doubt, that you cannot form a satisfactory judgment as to the result, if it is in that state, the law, taking a charitable view, says solve it in favor of the defendant.⁶⁰

§ 2668. Reasonable Doubt—Defined—South Dakota. You are further instructed that the reasonable doubt which entitles an accused to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their own most important concerns or affairs of life. In other words, in a legal sense, a reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.⁶¹

59—Hodge v. Territory, 12 Okl. 108, 69 Pac. 1077 (1080).

60—State v. Hutto, 66 S. C. 449, 45 S. E. 13 (15), homicide case.

In State v. Petsch, 43 S. C. 132, 20 S. E. 993 (994), the court charged:

Reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they are unable to say that they feel an abiding conviction, to a moral certainty, as to the guilt of the accused. Now, Mr. Foreman, the law says that this doubt, to which every prisoner is entitled when charged with a crime, must be a reasonable doubt. It must be a doubt arising from the consideration of the testimony for which the juror can conscientiously give himself a reason why he cannot sign the verdict of guilty. If, after a fair and impartial consideration of all the testimony in the case, you have such a doubt, then the state has failed to establish the guilt of the party, and your verdict should be not guilty. It must be a substantial doubt, arising from the consideration of the testimony, as distinguished from a

speculative or imaginary doubt; and I can charge you safely that it must not be a doubt influenced by your sympathy for the accused, or by your prejudice against him; because the law contemplates that in the trial of this cause you, so far as you can, will divest yourselves of all feeling of human sympathy as certainly as of all prejudice, and that you will be guided in reaching your verdict, whatever it may be, by your honest conviction, derived from a consideration of the testimony.

61—State v. Serenson, 7 S. D. 277, 64 N. W. 130 (132).

It seems almost unnecessary to undertake to explain and elucidate to the average juror, who is presumed to possess ordinary intelligence, the meaning of the expression 'reasonable doubt,' which appears to have been chosen by the common-law judges, and adopted by text writers, on account of the simplicity of the phrase. While the language employed by the courts to define the expression, and assist jurors in its application, is often beyond their comprehension, if not misleading, we see nothing in the foregoing instructions that could result in

§ 2669. **Reasonable Doubt—Defined—Tennessee.** "Reasonable doubt" is such a doubt as will create in the minds a feeling of unrest or misgiving on the part of the jury, and which will not permit their minds to rest easy upon a verdict of guilty.⁶²

§ 2670. **Reasonable Doubt—Texas.** Defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, if you have a reasonable doubt of his guilt, you will find him not guilty.⁶³

any prejudice to the defendant, and we would therefore be reluctant to reverse the case upon the assignment of error relating thereto. In the recent case of *State v. Morey*, 25 Ore. 241, 36 Pac. 573, the trial court defines a reasonable doubt as 'such a doubt as a juror can give a reason for,' and in the opinion, sustaining a conviction, upon rehearing, the court said: 'If every criminal case is to be reversed for some technical inaccuracy in the definition of a reasonable doubt, then, indeed, the administration of justice becomes impracticable.' Mr. Starkie, in the 9th American edition of his work on Evidence, at page 865, says: 'A juror ought not to condemn, unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused, and unless he be so convinced by the evidence that he would venture to act upon the conviction in matters of the highest concern and importance as to his own interest.' The able law writer, Austin Abbott, in his Brief for Criminal Cases, at page 487, discusses 'a reasonable doubt,' and says: 'The gist of the rule is that the law contemplates a doubt for which a good reason, arising on the evidence, can be given,' and cites *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493. Instructions have been frequently sustained on appeal which admonish the jury that a 'reasonable doubt' is not a capitious doubt, a possible doubt, a conjectural doubt, an imaginary doubt, a far-fetched doubt, because everything relating to human affairs and depending on moral evidence is open to conjecture and speculation, and because the law does not require absolute certainty. 2 *Thomp. Trials*, p. 1832, and numerous cases there cited."

⁶²—*Wilson v. State*, 109 Tenn. 167, 70 S. W. 57 (58).

"While we think that no defini-

tion of 'reasonable doubt' is so plain and unambiguous and easily understood as the mere words themselves, we think there is nothing in the definition given that would constitute error."

⁶³—*Huggins v. State*, 42 Tex. Crim. App. 364, 60 S. W. 52.

"We have specifically held this charge to be sufficient, and that it is not necessary to give the charge requested by appellant. *Day v. State*, 21 Tex. App. 213, 17 S. W. 262; *Lewis v. State*, 42 Tex. Cr. App. 278, 59 S. W. 1116."

In *McNamara v. State*, — Tex. Cr. App. —, 55 S. W. 823 (824), the following was approved:

The evidence on the whole must produce in your minds to a reasonable and moral certainty that the accused, and none other, committed the offense.

The court said:

"We think this clause of the charge clearly covers the phrases of law insisted upon by appellant."

In *Head v. State*, 40 Tex. Cr. App. 265, 50 S. W. 352 (353), homicide case, the following was approved:

If you do not believe beyond a reasonable doubt, from the evidence, that L. is dead; that the defendant unlawfully killed him,—you will find defendant not guilty.

In *Williams v. State*, — Tex. Cr. App. —, 55 S. W. 500 (501), the charge approved ended with the words:

In case you have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict, "Not guilty."

In *Giles v. State*, 44 Tex. Cr. App. 435, 71 S. W. 961, homicide, held the court should not have refused the following:

If, under the evidence, you have a reasonable doubt as to whether the witness B. killed the said G., you should acquit defendant.

In *Boersh v. State*, — Tex. Crim. App. —, 62 S. W. 1060, the court charged the jury that the circum-

§ 2671. **Reasonable Doubt—Virginia.** The court instructs the jury that, to warrant the conviction of the prisoner, every fact necessary to establish his guilt must be proved beyond a reasonable doubt, and especially so where the evidence is wholly circumstantial. The accused is entitled to acquittal unless his guilt is proved to the exclusion of every reasonable hypothesis of his innocence. And, although the jury believe that the evidence is sufficient to create a strong suspicion of guilt, yet this is insufficient to warrant the conviction of the accused of any offense.⁶⁴

§ 2672. **Reasonable Doubt—Defined—West Virginia.** The court instructs the jury that, after they shall have compared and considered all the evidence in the case, if they have a reasonable doubt as to the guilt of the prisoner, V. S., as charged in the indictment, they cannot convict; that by reasonable doubts is meant such doubts based upon the evidence as they may honestly and reasonably entertain as to any material fact essential to prove the crime charged. It must not be an arbitrary doubt, without evidence to sustain it, but must be serious and substantial in its nature, in order to warrant an acquittal, and one which men may honestly and conscientiously entertain.⁶⁵

§ 2673. **Reasonable Doubt—Defined—Wisconsin.** (a) The reasonable doubt mentioned, beyond which guilt must be affirmatively proved, in order to justify a verdict of guilty, means, as its name implies, a doubt resting in reason, and it must arise from the whole evidence fairly and rationally considered.

(b) When after a full and impartial consideration of the whole

stances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that accused, or accused acting with some other person, committed the offense charged.

Held: "Considering the latter portion of the charge, it is a correct application of the law to this case; it being shown that accused and his co-defendant were acting together. Under this state of facts the charge above copied, as given by the court, is correct. See *Moore v. State*, 39 Tex. Cr. App. 266, 45 S. W. 809."

64—*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (341).

See also *McCue v. Commonwealth*, 103 Va. 870, 49 S. E. 623 (629).

65—*State v. Staley*, 45 W. Va. 792, 32 S. E. 198 (199), homicide case.

In *State v. Sheppard*, 49 W. Va.

582, 39 S. E. 676 (687), the following was approved:

The court instructs the jury that reasonable doubt, to warrant acquittal in criminal cases, is not a mere possible doubt, but is such a doubt as, after mature comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, or for which reason can be given.

In *State v. Dodds*, 54 W. Va. 289, 46 S. E. Rep. 228 (230), homicide case, the following was approved:

The court instructs the jury that a reasonable doubt, such as is contemplated in law, is not a mere fanciful or imaginary doubt, but is a fair and substantial doubt, based on the evidence or lack of evidence in the case, and one for which a man who entertains such doubt should be able to give a good and substantial reason arising from the

evidence the judgment of the jury is convinced to a moral certainty that the accused are guilty—that there is no reasonable explanation of the facts proved except upon the hypothesis that the accused committed the crime charged, then every reasonable doubt is removed and a verdict of guilty should follow.

(c) A mere fanciful or speculative doubt, such as a skeptical mind may suggest, does not amount to a reasonable doubt within the meaning of the law. A doubt such as this, one that ignores a reasonable construction of the whole evidence and proceeds upon mere speculation or suspicion, is unreasonable, and would acquit one proven guilty as easily as one not so proven and so does not justify a verdict of not guilty.

(d) If, after a careful and thorough view of the evidence, there arise in your mind a doubt for which a good reason arising from the evidence can be given, it is your duty to give the defendants the fullest and amplest benefit of this, and acquit them.⁶⁶

§ 2674. **Reasonable Doubt—Defined—U. S. Courts.** I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.⁶⁷

§ 2675. **Presumption of Innocence—Reasonable Doubt—Suspicion or Probability of Guilt Not Sufficient to Convict—Insanity or Irresponsibility Must Be Proven.** (a) The court further instructs the jury that the law presumes the accused to be innocent until he is proved guilty beyond a reasonable doubt, and, if there is upon the minds of the jury any reasonable doubt of the guilt of the accused, the law makes it their duty to acquit him; and that mere suspicion or probability of his guilt, however strong, is not sufficient to con-

evidence or a lack of evidence in the case.

66—*Emery v. State*, 101 Wis. 627, 78 N. W. 145 (152).

"It is not necessary to say whether the explanation of the rule of reasonable doubt given by the learned judge who presided at the trial is the best that can be made. It is sufficient to say that it is free from error, and we may properly add, it is a clearer explanation than many that may be found referred to in reported cases as models."

Murphy v. State, 108 Wis. 111, 83 N. W. 1112 (1114), approves the following:

Defendant is entitled to the benefit of any reasonable doubt existing in the evidence in this case. If, after a full consideration of the testimony, you shall have any reasonable doubt, you will give him the benefit of that doubt by an acquittal.

Cupps v. State, 120 Wis. 504, 97 N. W. 210 (218), 102 Am. St. 996, approves the following:

If there then remains in your mind no reasonable doubt of the defendant's guilt you should convict him; otherwise you should acquit him.

67—*Dunbar v. U. S.*, 156 U. S. 185 (189), 15 S. Ct. 325.

viet, nor is it sufficient if the greater weight or preponderance of evidence supports the charge in the indictment. But, to warrant his conviction, his guilt must be proved so clearly, and the evidence thereof must be so strong, as to exclude every reasonable hypothesis of his innocence. But in this connection the court further tells the jury that in cases like this, where the prisoner sets up the defense of insanity or irresponsibility produced by voluntary intoxication, he cannot rely simply on having raised a rational doubt in the minds of the jury as to whether he was so drunk at the time he committed the crime as not to be responsible therefor, but the burden is upon him to prove this fact to the satisfaction of the jury, as fairly results from all evidence.⁶⁸

(b) The court instructed the jury that the law presumes the defendants in this case to be innocent of murder in the first degree, and clothes him or them with such presumption of innocence throughout the trial; and you should act on such presumption, and acquit the defendant unless the state, by evidence, satisfies you of his or their guilt beyond a reasonable doubt.⁶⁹

§ 2676. **Reasonable Doubt—Presumption of Innocence—Circumstantial Evidence—Links in the Chain of Circumstances.** (a) The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction, but does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment.

(b) You are further instructed that the law raises no presumption whatever against the defendant, but that every presumption of law is in favor of his innocence until he is proven guilty beyond all reasonable doubt, and, in order to convict him of the alleged crime, every material fact necessary to constitute such crime must be proven beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any single essential element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt, and acquit him.

(c) Where the prosecution lies wholly or in part upon circumstantial evidence for a conviction, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt. All the facts—that is, the necessary facts to the conclusion—must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable

68—Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339 (341).

69—State v. Vaughan, 200 Mo. 1,

98 S. W. 2; Connor v. Commonwealth, 26 Ky. Law Rep. 398, 81 S. W. 259 (260), homicide.

and moral certainty that the accused committed the offense in the manner charged in the indictment.⁷⁰

§ 2677. **Reasonable Doubt—Rule Where Evidence Is Circumstantial.** (a) The jury are instructed as a matter of law that when a conviction for a criminal offense is sought upon circumstantial evidence alone, the prosecution must not only show, by a preponderance of the evidence, that the alleged facts and circumstances are true, but they must show by such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendant, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the defendant.⁷¹

(b) The court charges the jury that a person charged with a felony should not be convicted, unless the evidence excludes to a moral certainty every reasonable hypothesis but that of her guilt; no matter how strong the circumstances are, they do not come up to the full measure of proof, which the law requires, if they can be reasonably reconciled with the theory, that the defendant is innocent.⁷²

(c) You are instructed that, in order to warrant a conviction on

70—Hodge v. Territory, 12 Okla. 108, 69 Pac. 1077 (1079).

"Case of State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262. In this case the Supreme Court of Kansas reversed the cause upon two instructions identical to this instruction. The court in the syllabus, which is the law of the case, says: 'Where circumstantial evidence constituting a single chain is relied upon by the state for a conviction, each essential fact in the chain of circumstances must be found to be true by the jury beyond a reasonable doubt to warrant a conviction.' In State v. Hayden, 45 Iowa 12, the court, in its syllabus, uses the following language: 'Where the evidence is circumstantial, the jury need not be satisfied beyond a reasonable doubt of every link in the chain of circumstances necessary to establish the defendant's guilt; it is a reasonable doubt of guilt, arising from a consideration of all the evidence in the case, which entitled the defendant to an acquittal.' In Bressler v. People, 117 Ill. 422, 8 N. E. 67, the supreme court of Illinois had this identical question before it for consideration. The instruction of the court given in that case was as follows: 'The jury are instructed that the rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt of each link in the chain

of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty.' It is insisted that this is erroneous, because it is essential that the circumstances be proved beyond a reasonable doubt, and it is just as essential that the connecting facts be established beyond a reasonable doubt. It has often been said by this court (and its correctness is obvious, although it might never have been said) that whether, in a given case, there should be reversal for error in giving an instruction, depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction; and so, if it is apparent that the language of the instruction, though inaccurate, yet when applied to the evidence before the jury, it could not have misled the jury to believe that their duty was different from what it actually was, the inaccuracy can afford no reason for reversal."

71—Benton v. State, 78 Ark. 284, 94 S. W. 693, charge of homicide.

72—Bryant v. State, 116 Ala. 445, 23 So. 40 (41), citing Prater v. State, 107 Ala. 27, 18 So. 238; Howard v. State, 108 Ala. 572, 577, 18 So. 813; 3 Greenl. Ev. par. 29.

circumstantial evidence, each fact necessary for the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts, that is, the necessary facts to the conclusion, must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.⁷³

(d) You are further instructed as a matter of law, where a conviction for a criminal offense is sought upon the circumstantial evidence alone, the state must not only show by a preponderance of the evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypotheses with the innocence of the accused, and incapable of explanation upon any reasonable hypotheses, other than that of the guilt of the accused. And in this class of cases the jury must be satisfied, beyond a reasonable doubt, that the crime has been committed by some one in manner and form as charged in the indictment, and then you must not only be satisfied that all the circumstances proved are consistent with the defendant having committed the act, but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person. It is your first duty to determine from the evidence what facts and circumstances are thereby established, and then to draw from such facts and circumstances, after carefully examining and weighing them, your conclusion as to the guilt or innocence of the defendant. It is your duty to exercise great care and caution in drawing conclusions from proved facts. They should be fair and natural, and not forced or artificial, conclusions, and all the facts and circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is not sufficient that they create a probability, though a strong one, and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential therefore that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. If then all the facts and circumstances established by the evidence beyond a rea-

73—Henderson v. State, — Tex. Cr. App. —, 96 S. W. 37 (38).

"It is urged that this charge on circumstantial evidence is defective in that the jury were not informed that the case was one of circum-

stantial evidence. This was omitted from the charge. However, we take it that, the jury having been charged on circumstantial evidence, they understood it was such a case."

sonable doubt cannot be reconciled with any reasonable hypothesis of the defendant's innocence, but do concur in showing the defendant's guilt, and, when taken together, are sufficient to prove beyond a reasonable doubt the guilt of the crime charged in the indictment, or any other crime included therein, then you are instructed that it is your duty to convict the defendant of the crime so established.⁷⁴

§ 2678. **Every Material Fact, or Link, in the Chain of Circumstances Must Be Proved Beyond a Reasonable Doubt.** The prosecution claim that the evidence in this case is made up of a chain of circumstances and facts, or links, so connected together that they lead up with all reasonable certainty to the defendant's guilt. Gentlemen, I charge you that, in order to convict the defendant upon this class of evidence, you must be satisfied beyond a reasonable doubt that each material fact, or necessary link, in the chain has been proven, and if you have any reasonable doubt about any one of the material facts, or links, constituting the chain of circumstances, then you should acquit the defendant. To illustrate the first material fact or link is death. That is not disputed. Second, death by violence at the hands of some person. That is disputed. Third, death by violence at the hand of the defendant. That is denied by the defendant. If you have any doubt of whether or not the defendant inflicted any blow on the deceased, then it is your duty to acquit him. If you have any doubt that the blow claimed to have been inflicted by the defendant was the sole cause of the death of the deceased, it is still your duty to acquit him.⁷⁵

74—State v. Novak, 109 Iowa 717, 79 N. W. 465 (473).

The court said:

"The criticism upon the instruction arises largely from the use of the words 'preponderance of evidence' in the first part of it, because of which the instructions on the weight of evidence necessary to convict are said to be conflicting to such an extent as to be prejudicial. Not read with a view to criticism, there is little difficulty in harmonizing all parts of the instructions on this subject. The clearly manifest purpose of the court throughout its instructions to preserve the rights of the defendant against prejudice by a conviction on an undue weight of evidence is so plain as to be beyond peradventure. In State v. Hayden, 45 Iowa 11, we held that: 'It is not a reasonable doubt of any one proposition of fact in a case which entitled to an acquittal. It is a reasonable doubt of guilt arising from a consideration of all the evidence in the case.' See, also, State

v. Felter, 32 Iowa 53. The proposition has wide, if not general, support on authority. Clare v. People, 9 Colo. 122, 10 Pac. 799; Mullins v. People, 110 Ill. 42; Leigh v. People, 113 Ill. 372; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361. Looking to the language of the instructions under consideration it will be seen that the purpose of that part of the instruction was rather to guard against the effect of facts found by a preponderance of evidence, than to permit a conviction upon facts so found, unless the facts, when found, are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused."

75—People v. McCarron, 121 Mich. 1, 79 N. W. 944.

Compare the above with the next two instructions stating that every link need not be proved beyond a reasonable doubt. However, from the comment of the courts, it appears that the word "links" in these instructions were held to mean "facts," and therefore distinguishable from the text instruction.

§ 2679. Reasonable Doubt—Evidence Required to Convict. Evidence, in order to warrant a conviction, must be clear, satisfactory and abiding, fully satisfying the mind and conscience of each and every juror. It is not sufficient in a criminal case, to justify a ver-

In *People v. Rich*, 133 Mich. 14, 94 N. W. 375 (377), the court instructed as follows:

And when I say that the case must be proven as laid beyond a reasonable doubt before you could convict, I do not mean that every fact and every circumstance and every link in the chain must be proven beyond a reasonable doubt; I don't mean that; that would be unreasonable. I mean that the entire evidence in the case, when connected together as a whole, convinces you that it is a safe basis upon which to rest a verdict of guilty, and that you are satisfied beyond a reasonable doubt, acting upon all the evidence in the case, that this respondent is guilty of one or another of the offenses which the court has defined.

The supreme court said:

"Respondent's counsel contend that the instruction first above quoted is in conflict with the holding of this court in *People v. Aikin*, 66 Mich. 481, 33 N. W. 821, 11 Am. St. Rep. 512. It is true that in that case an instruction that the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the respondent's guilt was held erroneous. That was a case, however, depending upon circumstantial evidence, and very clearly the rule as given by the circuit court in that case was error. But in the same case, the case of *Marion v. State*, 16 Neb. 359, 29 N. W. 294, was cited, in which the following inquiry and reasoning appears, which is very pertinent to the present case: 'What is meant by the word "link," as used therein? If the jury were given to understand that it referred only to evidentiary facts which might add force or weight to other facts from which the inference of guilt could be drawn, then the instruction might be said to be correct.' We think this is precisely what the jury would have understood from the charge in this case."

In *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (795), the following like instruction was held not to necessitate a reversal:

The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish guilt. It is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged in the second count of the information. But if you have a reasonable doubt of the defendant's guilt, because of the weakness of one link of the chain of circumstances relied upon by the state to establish the defendant's guilt, when taken and weighed by you with all the evidence in the case, it may fairly be said that a reasonable doubt exists in your minds, and you should acquit the defendant of the crime charged in the second count of the information. The court said:

"This instruction is vigorously assailed upon the ground that it authorizes a conviction, although the proof may be insufficient to establish beyond a reasonable doubt one or more of the facts essential in order to warrant the conclusion of guilt,—a criticism we think wholly unmerited. The metaphor of the chain is, it must be confessed, inaccurate and misleading, inasmuch as the circumstances which the evidence tended to prove are not interdependent, i. e., each depending for its support upon the others. But the fatal weakness of the argument advanced in this connection is that it ignores the distinction between facts relied upon to sustain the particular charge, and those facts which are necessary to the conclusion sought to be established. It is permissible for the state to introduce evidence of any number of facts and circumstances tending to connect the defendant on trial with the offense charged. In so doing it may be said to rely upon each and all of the facts thus sought to be established, and, if those actually proved beyond a reasonable doubt are sufficient to ex-

diet of guilty, that there may be strong suspicion, or even strong probability, of guilt; but the law requires proof by legal and credible evidence of such nature that, when it is all considered, it produces a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. The burden of proof is upon the state to make out and establish by the evidence, beyond a reasonable doubt, and to the satisfaction of the jury, every fact and circumstance necessary to prove his guilt; and, unless his guilt is so established, the jury must find him not guilty.⁷⁶

§ 2680. **Absolute Certainty Not Required to Convict.** (a) Absolute certainty is not required, and it is rarely, if ever, possible in any case; but, to justify a conviction, the evidence when taken as a whole and fairly considered, must so satisfy your judgments and consciences as to exclude every other reasonable conclusion.⁷⁷

(b) To prove beyond a reasonable doubt does not mean that the state must make the proof by an eye witness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If from all the evidence the jury believe it is possible, or that it may be, or perhaps, the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is that the jury should from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and if you so believe, and you further believe, beyond all reasonable doubt, from the evidence that the killing occurred in this county and before the finding of this indictment, you must find the defendant guilty, although you may also believe from the evidence that it may be that he is not guilty, or that it is possible that he is not guilty.⁷⁸

§ 2681. **Reasonable Doubt—Not One Produced by Undue Sensibility or Trivial and Fanciful Suppositions.** The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt

clude to a moral certainty every reasonable hypothesis save that of the defendant's guilt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts thus relied upon."

See also *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Ia. 11; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *State v. Lucas*, 122 Ia. 141, 97 N. W. 1003 (1907); *State v. Cohen*, 108 Ia. 208, 78 N. W. 857, 75 Am. St. Rep. 213; *State v. Hossock*, 116 Ia. 194,

89 N. W. 1077; *Vaughn v. State*, 130 Ala. 18, 30 So. 669 (671).

76—*State v. Privitt*, 175 Mo. 207, 75 S. W. 457.

77—*State v. Marshall*, 105 Iowa 38, 74 N. W. 763 (766).

"This is a correct statement of the law. Certainty is seldom possible, and never required. But the conclusion must be so certain as to exclude any other reasonable hypothesis."

78—*Boulden v. State*, 102 Ala. 78, 15 So. 341 (344).

by resorting to trivial, or fanciful suppositions and remote conjectures as to possible states of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. The jury are instructed that if, after a careful and impartial consideration of all the evidence in the case, you can say you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt.⁷⁹

§ 2682. Reasonable Doubt, Abiding Conviction to a Moral Certainty. (a) As jurors charged with the solemn duty in hand, you must carefully, impartially and conscientiously consider, compare and weigh all the testimony; and if, after doing this, you find that your understanding, judgment and reason are satisfied and convinced by it to the extent of having a full, firm and abiding conviction to a moral certainty that the charge is true, then you should find the defendants guilty. If, however, after carefully considering, comparing and weighing all the testimony, both for the state and the defense, there is not an abiding conviction to a reasonable and moral certainty as to the truth of the charge, or if, after having a conviction, it is yet one which is not abiding or stable, but wavers and vacillates or is one of which there is not a moral certainty, then the truth of the charge is not made out beyond a reasonable doubt, and you should find a verdict of not guilty.⁸⁰

(b) Defendants are presumed to be innocent until they are proved to be guilty beyond a reasonable doubt. They are entitled

79—Willis v. State, 43 Neb. 102, 61 N. W. 254 (256).

The court said: "In *Dunn v. People*, 109 Ill. 635, an instruction much like the one under consideration was held by that court to be more like an argument than a proposition of law, and declared to be erroneous. There is, however, a difference between the instruction in the Illinois case and the one under consideration. For our part, we entirely approve of this instruction given by the trial court. The doubt on which a juror predicates his verdict of guilty must always be a reasonable one; and a doubt produced by undue sensibility in the mind of a juror, in view of the consequences of his verdict, is not a reasonable doubt. Nor can a juror lawfully conjecture the existence of a fact not warranted by the evidence, and say that a doubt predicated thereon is a rea-

sonable one. Jurors may not lawfully disbelieve as jurors if, from the evidence, they would believe as men; the oath taken by a juror does not impose on him an obligation to doubt where no doubt would exist if no oath had been administered; and if, from all the evidence in the case, the jury have an abiding conviction of the guilt of the defendant, and are satisfied to a moral certainty of the guilt of the defendant, and are satisfied to a moral certainty that he is guilty of the charge made against him, then the jury is satisfied beyond a reasonable doubt. These are the propositions enunciated by the instruction, and they are not arguments, they are propositions of law, as sound as they are sensible."

80—Bassett et al. v. State, 44 Fla. 2, 33 So. 262.

to every reasonable doubt arising from the evidence. A reasonable doubt is one conformable to reason—one which a reasonable man would entertain. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.⁸¹

(c) The jury are further instructed that in order to be convinced beyond a reasonable doubt, you must find, after consideration of all the evidence, that you have an abiding conviction to a moral certainty of the guilt of the defendant, and unless you are so convinced beyond a reasonable doubt you will acquit him.⁸²

(d) Before a defendant can be convicted of any criminal offense, each juror must be convinced of the guilt of the defendant beyond a reasonable doubt and the burden of proof is always upon the state to so satisfy you of his guilt before you can convict. You must also be convinced to a moral certainty of the guilt of the accused before you can convict, and each juror must be so convinced. But this doubt which the law requires to be removed, or says should not exist, to support a conviction, is a reasonable doubt, and it is a doubt which arises out of the evidence or the lack of evidence. It is not any doubt that may be imagined or conjured up, but it is a reasonable doubt. While the guilt of the accused must be proven to a moral certainty—which means the same as beyond a reasonable doubt—it does not mean it must be proven to a mathematical certainty. Everything human is subject to some kind of doubt.⁸³

§ 2683. **Must Be an Actual, Substantial, Fixed and Reasonable Doubt, Not Imaginary, Conjectural, Vague or Whimsical.** (a) I charge you, gentlemen of the jury, as a matter of law, that in considering this case, you are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely imaginary or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubts interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

(b) I charge you, gentlemen of the jury, if you believe from all the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible that he is not guilty, you must convict him.

(c) I charge you, gentlemen of the jury, that the doubt must be

81—Myers et al. v. State, 43 Fla. 500, 31 So. 275 (281).

82—Horn v. State, 12 Wyo. 80, 73 Pac. 705 (725).

83—Winter v. State, 123 Ala. 1, 26 So. 949 (950).

actual and substantial, not mere possible, doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.⁸⁴

(d) Every accused person is presumed to be innocent until he is proven to be guilty beyond a reasonable doubt. Such reasonable doubt, within the meaning of the law, is not a vague, fanciful, whimsical doubt, but a doubt naturally arising out of all the evidence in the case; and such a doubt as intelligent, impartial, fair-minded jurors may reasonably entertain after a careful consideration of all relevant evidence before them.⁸⁵

§ 2684. Reasonable Doubt—Must Not Be Mere Speculation. (a) A doubt to acquit defendants, or either of them, must be a reasonable doubt—not mere speculation or possibility. The state is not required to prove defendant's guilt beyond all doubt, but beyond all reasonable doubt.⁸⁶

(b) It is not a mere doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt.⁸⁷

§ 2685. Reasonable Doubt Should Be a Substantial Doubt Arising from the Evidence. (a) You are instructed that the law presumes the innocence, and not the guilt, of the defendants; and this presumption attends them throughout the trial, and at the end entitles them to an acquittal unless the evidence in the case, when taken as a whole, satisfies you of their guilt beyond a reasonable doubt. You are, however, instructed that a reasonable doubt of the guilt of the defendants which would warrant you in acquitting them on the ground of your having such reasonable doubt of their guilt should be a substantial doubt of their guilt upon a full and fair consideration by you of all the evidence, facts, and circumstances in the case, and not a mere possibility that they may be innocent.⁸⁸

84—Prater v. State, 107 Ala. 26, 18 So. 238 (239); Boulden v. State, 102 Ala. 78, 15 So. 341 (344).

85—State v. Davis, 3 Del. 220, 50 Atl. 99.

86—Thompson et al. v. State, 106 Ala. 67, 17 So. 512 (513), 42 Am. Rep. 101.

87—Lodge v. State, 122 Ala. 107, 26 So. 200, 82 Am. St. 23.

88—State v. Spough, 200 Mo. 571, 98 S. W. 55 (63).

"The cases of State v. Clark, 147 Mo. 22, 47 S. W. 886, and State v. Fannon, 158 Mo. 149, 59 S. W. 75, do not in the least sustain defendant's criticism of the instruction on reasonable doubt in this case. It has often been approved by this court, and is entirely sufficient."

In State v. Vaughan, 200 Mo. 1, 98 S. W. 2, the following instruction on the same subject was approved:

The court instructs the jury that the defendants are presumed to be innocent, and it devolves upon the state to prove their guilt beyond a reasonable doubt, and, unless the state has established the guilt of the defendants, as charged in the indictment, to your satisfaction and beyond a reasonable doubt, you should give the defendants the benefit of such doubt and return a verdict of not guilty. But such doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt arising from the evidence in the case, and not a mere possibility of innocence.

And in Watkins v. Commonwealth, 29 Ky. Law 1273, 97 S. W. 740, the following was approved:

The jury are further instructed that the defendant is presumed to be innocent, and this presumption

(b) The defendant is presumed to be innocent. Before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have a reasonable doubt as to his guilt, you should acquit him. But a doubt, to authorize an acquittal, should be a substantial doubt, founded on the evidence, and not a mere possibility of innocence.⁸⁹

(c) The law presumes the defendant innocent of the crime charged against him in this information, and the burden of proving him guilty thereof beyond a reasonable doubt rests upon the state. Now if, after a full and fair review of all the evidence in the cause, you entertain a reasonable doubt of the defendant's guilt, you should give him the benefit of such doubt, and acquit him; but such doubt, to authorize you to acquit him on that ground alone, should be a substantial doubt touching his guilt, and not a mere possibility of his innocence.⁹⁰

(d) The court instructs the jury that the defendant is presumed to be innocent of the offense charged. Before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have reasonable doubt of defendant's guilt, you must acquit him. But a doubt to authorize an acquittal must be substantial doubt, founded on the evidence, and not a mere possibility of innocence.⁹¹

§ 2686. **Reasonable Doubt Defined, Compared to Conduct in Important Affairs in Life.** (a) In criminal cases the defendant enters upon his trial with the presumption of innocence in his favor, and the burden of proof is upon the state to establish his guilt, and the evidence must be sufficient to establish in your judgment his guilt beyond all reasonable doubt. As long as you have a reasonable doubt of the defendant's guilt, it is your duty to acquit him. A reasonable doubt which entitles an accused person to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. Proof is said to be deemed to be beyond all reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their own most important concerns and affairs of life. And if you have any such reasonable doubt, you must give him the benefit thereof, and acquit him.⁹²

of his innocence entitles him to an acquittal at their hands, unless his guilt has been proved from the evidence beyond a reasonable doubt.

89—State v. Todd, 194 Mo. 377, 92 S. W. 674.

90—State v. Gatlin, 170 Mo. 354 (365), 70 S. W. 885 (888), homicide case.

91—State v. Smith, 164 Mo. 567,

65 S. W. 270; State v. May, 172 Mo. 630, 72 S. W. 918 (920).

92—Frank v. State, 94 Wis. 211, 68 N. W. 657 (660).

"These instructions are clearly distinguishable from the instruction criticised by Mr. Justice Winslow in Emery v. State, 92 Wis. 152, 65 N. W. 850, relied upon by counsel. We do not think the instructions here given are obnoxious to the criticisms here made."

(b) The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.⁹³

§ 2687. **Reasonable Doubt—Conscientious Belief.** The court charges the jury for the state that you are not to convict the defendant unless they believe from the evidence beyond a reasonable doubt that he is guilty. Still that does not mean that they must know that he is guilty, but if, after considering, comparing and weighing all the evidence, you conscientiously believe from all the evidence beyond a reasonable doubt that he is guilty, that is sufficient, and you should convict.⁹⁴

§ 2688. **Caution Against Conviction from Prejudice.** I further instruct you, gentlemen of the jury, and caution you against conviction from prejudice of insufficient evidence. Unless you are satisfied from the evidence beyond a reasonable doubt of the guilt of the accused, you should render a verdict of not guilty, however strong may be your prejudice, if any you have.⁹⁵

93—Hopt v. Utah, 120 U. S. 430, 7 S. Ct. 714; Williams v. U. S., 4 Ind. Ter. 269, 69 S. W. 871, approves the following instruction:

Not every doubt which may arise in your minds is of necessity a reasonable doubt, but, in order to be a reasonable doubt, it must amount to a real doubt of the guilt of the defendant. It must be such a doubt as, if arising in the solution of one of the graver affairs of life, would cause a reasonable and prudent man to hesitate and say, "I am not satisfied." In order to be a reasonable doubt as applied in this case, it must be a substantial doubt of the defendant's guilt, growing out of the contradictory or unsatisfactory nature of the testimony, or a lack of testimony, which, after considering all the facts and circumstances in proof before you, causes you to hesitate and say, "I am not satisfied of the guilt of the defendant." If you have on your mind such a reasonable doubt of the defendant's guilt, then you should resolve that doubt in favor of the defendant and acquit him; but if, after considering all the facts and circumstances in proof before you, you can say that

you feel morally certain of the guilt of the defendant as charged in the indictment, you are satisfied beyond a reasonable doubt, and should find the defendant guilty of murder or manslaughter, according to the law and evidence.

94—Moore v. State, 86 Miss. 160, 38 So. 504.

"The use of the word 'conscientiously' in this instruction is objected to as erroneously qualifying the reasonable doubt which should acquit. There is no merit in this objection. In this instruction the word is mere surplusage. If omitted altogether, the instruction is correct. Surely the defendant was not injured by an instruction to the jury informing them that, in order to a conviction, they must conscientiously believe from all the evidence, beyond a reasonable doubt, that defendant is guilty. The instruction given does not substitute conscientious belief for belief beyond a reasonable doubt, but warrants a conviction only upon a conscientious belief of guilt beyond a reasonable doubt."

95—Myers et al. v. State, 43 Fla. 500, 31 So. 275 (282), homicide case.

§ 2689. Appealing to Individual Jurors. (a) If any individual juror is not convinced of defendant's guilt beyond all reasonable doubt, and to a moral certainty, the jury cannot convict.⁹⁶

(b) The court charges the jury that before they can convict the defendant the evidence must be so strong as to convince each juror of his guilt beyond reasonable doubt; and if, after considering all the evidence, a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him.⁹⁷

(c) Unless each of you is convinced beyond a reasonable doubt of the guilt of the defendants, from the evidence in the case, then you should not convict them.

(d) Before you can convict the defendants you should each be convinced beyond a reasonable doubt of their guilt from the evidence and the evidence alone.⁹⁸

§ 2690. Reasonable Doubt by One Juror Will Prevent Conviction. (a) In this case, if the jury entertain any reasonable doubt of defendant's guilt, they should acquit him; or, if they entertain

96—In *Hale v. State*, 122 Ala. 85, 26 So. 236 (237), it was held error to refuse this instruction. The court said that many similar charges had recently been brought under review before it. "Some of them have been held bad, and others good; depending upon whether the particular charge under consideration asserted simply and only that the defendant should not be convicted so long as any one of the jurors had a reasonable doubt of his guilt. If it was clear to this intent, and did not tend to mislead the jury to an acquittal upon a reasonable doubt of one or any number of the jurors, less than the whole number, nor to inculcate the idea that the conclusion of each juror should be reached and adhered to 'without the aid of that consideration and deliberation with his fellows which the law intends shall take place in the jury room,' nor to render each juror the keeper of the consciences of his fellows, nor involve other misleading tendencies, the charge has been held to be good; and if it went beyond this it has been disapproved. *Carter v. State*, 103 Ala. 93, 15 So. 893; *Goldsmith v. State*, 105 Ala. 8, 16 So. 933; *Pickens v. State*, 115 Ala. 42, 22 So. 551; *Cunningham v. State*, 117 Ala. 59, 66, 23 So. 693; *Lewis v. State*, 121 Ala. 1, 25 So. 1017."

97—In *Mitchell v. State*, 129 Ala. 23, 30 So. 348 (354), homicide, judgment of conviction was reversed

solely because the trial judge refused to give the above instruction.

The court said:

"That charge combines two principles, each of which, as stated in separate charges, has been sanctioned by decisions of this court: First. To warrant a conviction the evidence must be such as to convince each juror of guilt beyond a reasonable doubt. See *Carter v. State*, 103 Ala. 93, 15 So. 893; *Grimes v. State*, 105 Ala. 8, 17 So. 134; *Hale v. State*, 122 Ala. 85, 26 So. 236. Second. Such a doubt arising from any part of the evidence, upon consideration of the whole, precludes a rightful conviction. *McLeroy v. State*, 120 Ala. 274, 25 So. 247; *Turner v. State*, 124 Ala. 60, 27 So. 272. Charges somewhat like but different from those considered in the cases cited in support of the first proposition were condemned in *Cunningham v. State*, 117 Ala. 59, 23 So. 693, and *Lewis v. State*, 121 Ala. 1, 25 So. 1017; but respecting that feature the charge now in question cannot be distinguished from those passed on in the cases of *Carter*, *Grimes* and *Hale*, supra. It must be held that the refusal of charge 2 (b) requires a reversal of the judgment."

The same request was held properly refused in *Cook v. State*, 46 Fla. 20, 35 So. 665 (669), also a homicide case.

98—*Carter et al. v. State*, 103 Ala. 93, 15 So. 893.

any reasonable doubt as to whether he was excusable and justified in the acts complained of, they should acquit him; or if one of the jury, after having considered all the evidence and having consulted with his fellow jurymen, should entertain such a reasonable doubt, the jury cannot in such case find the defendant guilty.⁹⁹

(b) Now, gentlemen, I have said to you that this man is presumed to be innocent until he is proven guilty. There is about him that presumption, and it attaches to the entire case. The burden is upon the people to prove his guilt beyond a reasonable doubt. He is presumed to be innocent until proven guilty, and all of the jury must be satisfied beyond a reasonable doubt in order to convict.¹⁰⁰

(c) It is incumbent upon the state to establish the guilt of the defendant of some offense embraced within the indictment, to the exclusion of every reasonable doubt in the mind of each of you before you can return a verdict of guilty. The minds of each and all of you must concur in your verdict, and if any one of you has a reasonable doubt of the defendant's guilt, or a reasonable doubt as to whether he was justifiable or excusable in what he did, you cannot convict.¹

§ 2691. Reasonable Doubt—Doctrine Does Not Apply to Mere Subsidiary Evidence. (a) By reasonable doubt is not meant a whim, or captious or speculative doubt. It is properly termed a reasonable doubt, as distinguished from an unreasonable or speculative doubt; and it must arise from all the evidence relating to some material fact or facts charged in the indictment, and not spring from mere subsidiary evidence. Such doubt may also arise from the absence of evidence as to material matters.

(b) But the doctrine of reasonable doubt, as a rule, has no proper application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged, and to any fact or group of facts which may constitute the entire proof concerning any of the constituent or elementary facts necessary to constitute guilt. If from the whole evidence, or the want of evidence, any material fact essential to a conviction has not been established to your satisfaction, beyond a reasonable doubt, as explained in these instructions, the defendant should be acquitted.²

99—State v. Moore, 156 Mo. 204, 56 S. W. 883 (884).

100—People v. Curtis, 96 Mich. 489, 56 N. W. 925.

"The instruction given was all that the law requires."

1—Harris v. State, 155 Ind. 265, 58 N. E. 75 (76).

2—Hauk v. State, 148 Ind. 238, 46 N. E. 127 (132), 47 N. E. 465.

"While the state, in a criminal prosecution, may rely upon mere subsidiary or subservient facts,

yet, in a broader sense, it must, in order to convict, rely upon and establish beyond a reasonable doubt all the material facts which constitute the accused guilty of the crime charged. It is to such facts, and not to the mere items of subsidiary evidence, which may aid in proving the essential facts, that the rule of reasonable doubt applies."

The court cited, Wade v. State, 71 Ind. 535. As to the words "want

§ 2692. Reasonable Doubt—Arising from Part of the Evidence After Consideration of the Whole. (a) If the evidence or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of defendant's guilt, the jury must acquit him.³

(b) If the jury, upon considering all the evidence, have a reasonable doubt about defendant's guilt, arising out of any part of the evidence, they must find him not guilty.⁴

(c) In weighing the evidence, each piece and all the evidence should be weighed with all the other evidence, and you should make up your verdict from due consideration of the whole of the evidence. If the jury, after considering all of the evidence, have a reasonable doubt of defendant's guilt, arising out of any part of the evidence; they should find him not guilty. But this does not mean that you have got to find every single item of testimony to be true before you can convict. If, after weighing all the evidence, you have a reasonable doubt as to any of the elements which constitute any offense charged in this indictment, then you are bound to acquit. It does not mean that you have got to believe every word of the testimony in order to convict.⁵

§ 2693. Reasonable Doubt Should Arise from the Evidence as a Whole—Possibility of the Defendant's Innocence Will Not Warrant an Acquittal. (a) The court instructs you that the burden of proving the defendant guilty beyond a reasonable doubt rests upon the state, and if upon the evidence, considered as a whole, the jury entertain a reasonable doubt as to defendant's guilt, you should give him the benefit of such doubt, and find him not guilty; but a doubt,

of evidence," see *Harris v. State*, 155 Ind. 265, 58 N. E. 75 (76).

Hinshaw v. State, 147 Ind. 334, 47 N. E. 157 (171), homicide, approves the following:

The doctrine of reasonable doubt, as a general rule, has no application to subsidiary evidence taken item by item. It is applicable to the constituent elements of the crime charged, and to any fact or facts which constitute the entire proof of one or more of the constituent elements of the crime charged. That is to say, all the facts which must have existed in order to make out the guilt of the accused must be established beyond a reasonable doubt before you can convict. But the rule of reasonable doubt does not apply to subsidiary and evidentiary facts; that is to say, to such facts and circumstances in evidence, if there be any such, as are not essential elements of the crime charged, and not necessary to the proof where-

of, and, when considered together and as a whole, tend to prove or disprove the existence of one or more of the primary facts necessary to make out the defense. Subsidiary and evidentiary facts may be considered by you in determining the necessary and essential facts, when established by clear and satisfactory proof.

The court said: "The law as laid down in *Wade v. State*, 71 Ind. 535, fully justifies the court in giving the above instruction."

3—Held that this request by defendant "asserts a correct proposition and should have been given." *Hunt v. State*, 135 Ala. 1, 33 So. 329 (331). Citing *Turner v. State*, 124 Ala. 59 (63), 27 So. 272. See also *Mitchell v. State*, 129 Ala. 23, 30 So. 348; *McLeroy v. State*, 120 Ala. 274, 25 So. 247.

4—*Hunt v. State*, 135 Ala. 1, 33 So. 329 (330), homicide case.

5—*Bondurant v. State*, 125 Ala. 31, 27 So. 775 (776), homicide case.

to authorize an acquittal on that ground alone, should, as stated, be a reasonable doubt, and one fairly arising from the evidence as a whole. The mere possibility that the defendant may be innocent will not warrant you in acquitting him on the ground of reasonable doubt.⁶

(b) The court instructs the jury that the burden of proof to establish the guilt of the defendant rests upon the state, and the defendant is presumed to be innocent of the charge against him, and this presumption of innocence attends and protects him throughout the trial until overcome by evidence which shows the guilt of the defendant beyond a reasonable doubt. If the jury have a reasonable doubt of the defendant's guilt, you should give him the benefit of such doubt and acquit him. By "reasonable doubt" is meant a doubt which has reason for its basis, and arising from a consideration of all the evidence in the case, and not a mere possibility of his innocence.⁷

§ 2694. **Reasonable Doubt as to Any Material Fact.** (a) The court instructs the jury that if, from the evidence, you have a reasonable doubt as to whether any material fact given in evidence in the case is true or untrue, it is the duty of the jury to give the defendant the benefit of such doubt, and if, from all the evidence in the case, the jury have a reasonable doubt of the defendant's guilt, you should acquit him.⁸

(b) The law presumes the defendant to be innocent; and, in order to convict him of either of the crimes I have mentioned [murder in the first degree, etc.], every fact necessary to constitute such crime must be proved beyond a reasonable doubt, and, if the jury entertains any reasonable doubt on any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him.⁹

6—State v. Harper, 149 Mo. 514, 51 S. W. 89.

7—State v. Kinder, 184 Mo. 276 (290), 83 S. W. 964 (966).

It has been held error in a criminal prosecution to refuse to give an instruction to the jury "that if there is a probability of defendant's innocence, they will find for defendant," since such probability is equivalent to a reasonable doubt. Shaw v. State, 125 Ala. 80, 28 So. 390. See also Alabama cases cited in Whitaker v. State, 106 Ala. 30, 17 So. 456 (457).

8—Alderson v. Commonwealth, 25 Ky. Law 32, 74 S. W. 679 (681), approving also the following instructions:

The court instructs the jury that, in arriving at their verdict, they shall consider all the facts and circumstances in evidence, and unless

they shall believe from all the facts and circumstances in evidence, beyond a reasonable doubt arising out of such facts and circumstances, that the accused is guilty of killing H., they shall acquit the accused.

The court instructs the jury that the defendant is presumed to be innocent until his guilt has been shown by the evidence in the case beyond a reasonable doubt, and if, from all the evidence, the jury have a reasonable doubt of the defendant's guilt, they shall acquit him.

Toler v. State, 41 Tex. Cr. App. 659, 56 S. W. 917, approves an instruction similar to the preceding one.

9—State v. Lindgrind, 33 Wash. 440, 74 Pac. 565 (566).

(c) The presumption of innocence is in favor of the defendant as to each and every element of the offense charged, and you must acquit unless the state has established by the evidence the existence of each and every element of the particular offense, and the defendant's guilt thereof beyond all reasonable doubt.¹⁰

§ 2695. Reasonable Doubt—May Arise from Want of Evidence.

(a) The reasonable doubt may arise from the evidence already given in the case, or for want of evidence. In this case the defendant has introduced evidence before you that he was with a young lady that he was waiting on, by the name of X, from about half-past nine on the night of the transaction until twenty minutes of one the next morning. If this evidence raises a reasonable doubt in your minds as to whether the defendant was the person that committed the alleged transaction in the manner and form alleged, then, and in that event, you cannot convict the defendant.¹¹

(b) The court instructs you that the defendant, in law, is presumed to be innocent, and that it devolves upon the state to prove, by evidence, to the satisfaction of the jury, beyond a reasonable doubt, that the defendant committed the crime as charged in the indictment and explained in these instructions; and if, upon a view of the whole case, you have a reasonable doubt of defendant's guilt, you will give him the benefit thereof, and acquit him. But a reasonable doubt to authorize an acquittal on that ground, must be a substantial doubt of defendant's guilt, formed on the careful consideration of all the facts and circumstances proven in the case, and not a mere possibility of the defendant's innocence.¹²

¹⁰—*Ryan v. State*, 115 Wis. 488, 92 N. W. 271 (274), charge of homicide.

¹¹—*Fleming v. State*, 136 Ind. 149, 36 N. E. 154 (155).

The court said: "We have read carefully all of the charges given, and feel constrained to hold that they do not cover fully the propositions of the instructions refused. The jury were nowhere told that a reasonable doubt might arise upon the evidence given, as well as for the lack of evidence. While the instruction refused is not clearly stated, it was intended to, and we think did, present the further question that a reasonable doubt could properly arise from a consideration of the alibi evidence referred to, and that, if it did so arise, the jury could not convict."

¹²—*State v. Holloway*, 156 Mo. 222, 56 S. W. 734 (736).

"A reasonable doubt 'formed on the careful consideration of all the facts and circumstances in the case,' necessarily involves a consideration of such facts and cir-

cumstances as are lacking to establish and make complete the full measure of defendant's guilt. These two considerations of the evidence and the lack of evidence are bound together in an indissoluble connection as surely as the premises of a syllogism involve its conclusion. It is logically impossible for a jury to consider the sufficiency of evidence without at the same moment considering, and with the same thought, its insufficiency. A different mental operation would be as much de hors the powers of the human mind as would be the remembrance and the forgetting of the same thing at the same instant. In *State v. Sacre*, 141 Mo. 64, 41 S. W. 905, an instruction similar to the one under review was ruled to be unobjectionable. In *State v. Blunt*, 91 Mo. 503, 4 S. W. 394, a like ruling was made where the instruction complained of read: 'To authorize an acquittal on the ground of reasonable doubt alone, such a doubt should be a real, substantial, well-founded doubt,

§ 2696. Reasonable Doubt—"Doubt" Must be Within the Evidence. By "reasonable doubt" I mean a doubt of the guilt for which a reason can be given, arising out of the evidence. You are not to go outside of the evidence to hunt up doubts, nor should you entertain a doubt that is merely fanciful, speculative, or chimerical, or which is based only upon unreasonable or groundless conjecture. A doubt which ignores a reasonable construction of the whole evidence is not a reasonable doubt. Guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially, and rationally considered, is sufficient to impress the judgment of ordinary, reasonable and prudent men with a conviction upon which they would act without hesitation in their own gravest and most important affairs of life.¹³

§ 2697. Reasonable Doubt—Probability of Innocence. (a) Unless you are satisfied from the evidence, beyond all reasonable doubt, of the defendant's guilt, you should not convict him. I do not mean that you must be satisfied beyond all possible doubt, but beyond all reasonable doubt. The law does not require the defendant's guilt proved to a mathematical certainty, but the law does require his guilt proved to a moral certainty before he can be convicted. It is not necessary that you should be so convinced of his guilt by the evidence that there can be no possibility of his innocence, but it is necessary that before you can convict the defendant you must be convinced of his guilt by the evidence that there can be no probability of his innocence, and no reasonable doubt of his guilt. If there is probability of his innocence, this is just ground for reasonable doubt and requires acquittal.¹⁴

(b) The court charges the jury that if there is from the evidence a reasonable probability of defendant's innocence, then this is a just foundation for a reasonable doubt, and would authorize an acquittal.¹⁵

arising out of the evidence in the cause, and not a mere possibility that defendant is innocent.' The objection, therefore, taken to the instruction, must be held untenable. But it is difficult to refrain from asking why it is that circuit judges do not copy the instruction on reasonable doubt which passed muster in *Nueslein's Case*, 25 Mo. 111, and in every other case since where it has been copied. No other reason suggests itself, except that the opinions of this court are never read, or, if read, are never heeded, by the trial judges."

13—*Secor v. State*, 118 Wis. 621, 95 N. W. 942 (1917).

14—*Karr v. State*, 106 Ala. 1, 17 So. 328 (1904), homicide case.

Liner v. State, 124 Ala. 1, 82 Am.

St. 23, 27 So. 438 (1904), holds that such probability must arise from a consideration of the entire evidence and not of a part merely.

15—*Mims v. State*, 141 Ala. 93, 37 So. 354.

"The above charge refused to the defendant would unquestionably have been proper if the word 'reasonable' had not been employed before the word 'probability.' Does the use of this word render it objectionable? We think not. 'Probability is defined to be the state of being probable.' *Bain v. State*, 74 Ala. 39.

"To say that a state of facts have a probable existence *ex vi termini* implies that there is reason for the belief that they exist. If there is no reason for such belief, there

(c) The jury are instructed that if, from the evidence, there is a probability of the innocence of defendants, you should acquit them.¹⁶

§ 2698. Reasonable Doubt—May Arise from Evidence of Previous Good Character. The court charges the jury that good character itself may, in connection with all the evidence, generate a reasonable doubt and entitle the defendant to an acquittal, even though without such proof of good character you would convict.¹⁷

§ 2699. Reasonable Doubt—Independent Circumstances Identifying Defendant. You are instructed that, when independent facts and circumstances are relied upon to identify the accused as the person who committed the crime charged, each material, independent fact or circumstance necessary to complete such chain or series of independent facts tending to establish his guilt should be established to the same degree of certainty as to the main fact which these independent circumstances, taken together, tend to establish. That is to say, each essential, independent fact in the chain or series of facts relied upon to establish the main fact must be estab-

lish probability of their existence. In order to find that there is a probability of the existence of a fact, a reason for believing in the existence of such fact must be entertained. The employment of the word 'reasonable' does not and can not affect the correctness of the charge. It is but a statement of what would have been implied from the word 'probability' had it been used alone. The charge should have been given."

16—Bardin v. State, 143 Ala. 74, 38 So. 833.

Bones v. State, 117 Ala. 138, 23 So. 138 (139), holds that there was error in refusing the following:

If there is a probability of the defendant's innocence the jury must acquit.

If the evidence in the case convinces the jury that there is a probability of the innocence of the defendant, then your verdict should be "Not guilty."

The court said that they "each assert the same correct principle, that if there was a probability of defendant's innocence, the defendant should be found not guilty. A probability of defendant's innocence is the equivalent of a reasonable doubt of guilt, which requires his acquittal. Bain v. State, 74 Ala. 38; Croft v. State, 95 Ala. 3, 10 So. 517; Whitaker v. State, 106 Ala. 30, 17 So. 456."

But compare Stewart v. State,

133 Ala. 105, 31 So. 944 (945), where the court said that the following was a correct statement of the law and should have been given:

The court charges the jury that a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence.

The court cited in support of the instruction, Croft v. State, 95 Ala. 3, 10 So. 517.

See also Davis v. State, 131 Ala. 10, 31 So. 569 (571), citing Carroll v. State, 130 Ala. 99, 30 So. 394, where it was held error to refuse this charge:

A reasonable doubt may exist, though there is no probability of defendant's innocence from the testimony, and if the jury have not abiding conviction to a moral certainty of his guilt then they should find him not guilty.

17—Bryant v. State, 116 Ala. 445, 23 So. 40 (41), approving this, says that "it is a copy of a charge approved in Newson v. State 107 Ala. 133, 138, 18 So. 206. See also Goldsmith's Case, 105 Ala. 3, 16 So. 933.

See also to same effect, Watkins v. State, 133 Ala. 88, 32 So. 627 (628); People v. Elliott, 163 N. Y. 11, 57 N. E. 103 (104).

lished to a moral certainty, beyond a reasonable doubt, and to your entire satisfaction, or you must acquit the defendant.¹⁸

§ 2700. Reasonable Doubt—Where Testimony Is Limited by Election. The state has elected to ask for a conviction of the defendant on the testimony of certain witnesses, and if the defendant is convicted by the jury it must be upon the testimony of those witnesses, and on the particular count which the jury believes, beyond a reasonable doubt, that the evidence of such witnesses sustain.¹⁹

§ 2701. Reasonable Doubt, to Acquit, Must Relate to Precise Crime Charged. The jury are further instructed, that if the evidence leaves a reasonable doubt in the mind of the jury whether the defendant is guilty of the precise crime with which he is charged in the indictment, then the jury should find the defendant not guilty; although the evidence may show conduct of no less turpitude than the crime charged, that is not enough to authorize a conviction in this trial.²⁰

§ 2702. Reasonable Doubt—Guilty Only as to Count Proven. You are instructed that the burden rests upon the state to prove every material allegation in each count in the information beyond a reasonable doubt, and, unless the allegations are so proven, you cannot find the defendant guilty upon such count as is not so proven; but if you should find that it was not so proven upon the first count, but was so proven upon the second count, in that case your verdict would be "Guilty upon the second count of the information."²¹

§ 2703. Only Allegations of Indictment Need Be Proven beyond Reasonable Doubt. It is not necessary that the jury should believe that every material fact or circumstance in evidence before them has been proved beyond a reasonable doubt, but that it is sufficient for the jury to believe from the evidence in the case that every material allegation in the indictment or either count thereof in manner and form as therein stated and charged has been proven beyond a reasonable doubt.²²

§ 2704. Reasonable Doubt as to Which of Several Killed Deceased. If you find from the testimony, beyond a reasonable doubt,

18—*People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676 (679), homicide case.

19—*State v. Green*, 69 Kan. 865, 77 Pac. 95.

20—*Stuart v. People*, 73 Ill. 20.

21—*Dunn v. State*, 58 Neb. 807, 79 N. W. 719 (720), assault with intent to rape.

22—*Jamison v. People*, 145 Ill. 357 (380), 34 N. E. 486.

"We are able to perceive no substantial objection to this instruction. It merely holds that the rule requiring proof beyond a reasonable doubt applies only to the ma-

terial allegations of the indictment, but has no application to these mere evidentiary facts which the testimony of the witnesses may tend to establish. In all cases where the evidence is circumstantial, its primary tendency is to prove certain acts which are merely evidentiary in their character, and from which the ultimate facts to be proved fall as conclusion either in fact or at law. It is only the latter which must be proved beyond a reasonable doubt."

that W. has been killed, and also find that he was killed by some one or more of several persons, but there is a reasonable doubt as to which person committed the offense, that reasonable doubt must prevail and result in the acquittal of the defendant, unless you find that the defendant was present aiding, abetting or assisting in the commission of the offense.²³

§ 2705. **Doubting as a Juror What One Believes as a Man.** (a) A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all of the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt. And the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from those established by the evidence. Your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all of the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charges made against him, then the jury are satisfied beyond a reasonable doubt.²⁴

(b) You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered.²⁵

23—*Benton v. State*, 78 Ark. 284, 94 S. W. 693.

24—In *Barney v. State*, 49 Neb. 515, 63 N. W. 636 (639), the above was approved:

The court said: "The instruction complained of was, in substance, that given in the so-called 'Anarchist Cases' (*Spies v. People*, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898, 3 Am. St. 320, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570, and approved by the supreme court of Illinois. The portion complained of was merely a paraphrase of the common expression that a jury cannot doubt as jurymen while they believe as men. With regard to this expression, the supreme court of Pennsylvania has said that 'it is the familiar language found in the text-books and decisions which treat of the subject.' *Nevling v. Com.*, 98 Pa. St. 332. As said by the trial judge in the case last cited: 'I have heard men who have sat on juries in criminal cases, after they had rendered a verdict

of not guilty, say that they believed the man was guilty, but that the commonwealth had not proved it. This is a great error, for if you believe a man guilty, solely from the evidence, the commonwealth has proved it.' This is as good law as it is good sense, and there was no error in directing the jury that in weighing the evidence they should not undertake, by virtue of their oaths, to pursue a course of reasoning differing from that which their experience as men had taught them to be safe and trustworthy."

25—*Bartley v. State*, 53 Neb. 30, 73 N. W. 744 (759), the supreme court said: "An expression almost in the foregoing language was approved in the celebrated case of *Spies v. People*, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898, 3 Am. St. 320, 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570, and *Nevling v. Com.* 98 Pa. St. 322, and by this court in at least two cases, *Willis v. State*, 43 Neb. 102, 61 N. W. 254; and *Davis v.*

§ 2706. If Reasonable Doubt of Degree of Offense, Verdict Should Be Guilty of the Less Offense. (a) If the jury believe from the evidence beyond a reasonable doubt that the defendant is guilty, but have a reasonable doubt as to the degree of his offense, then they should find him guilty of that offense highest in degree of which they may have no reasonable doubt.²⁶

(b) The court further instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the defendant is proven guilty, but entertain a reasonable doubt as to whether he is proven guilty as to the offense defined in the first instruction, or the one in the second instruction, they should find him guilty of the less offense, and should fix his punishment for the less offense.²⁷

§ 2707. If Reasonable Doubt Whether Murder or Manslaughter, Verdict Should Be Manslaughter—First or Second Degree. (a) The court instructs the jury that, if they have a reasonable doubt as to whether the defendant has been proven guilty of manslaughter or murder, they shall give him the benefit of that doubt, and find him guilty of manslaughter.²⁸

(b) Even if you should find the malicious purpose, and absence of excuse, cause or provocation necessary to constitute murder in the first degree, but should entertain a reasonable doubt as to whether there was any premeditated design to kill, then you should find the defendant guilty of murder in the second degree.²⁹

(c) If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatedly, then you cannot find the defendant guilty of murder in the first degree; and, if they have a reasonable doubt as to whether the killing was done in malice, then you cannot find the defendant guilty of murder in either degree, but only of manslaughter at the most; and if, after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of any part of the evidence, then you should find the defendant not guilty of any offense.³⁰

(d) If the jury have a reasonable doubt, as to whether the killing was done deliberately, or as to whether it was done premeditatedly, then you cannot find the defendant guilty of murder in

State, 51 Neb. 301, 70 N. W. 984. With those decisions we are content. A discussion of the subject anew would be profitless."

Compare Siberry v. State, 133 Ind. 677, 33 N. E. 681 (683), holding that such an instruction in effect relieves the jury from the obligation of their oaths.

26—Conner v. Commonwealth, 26 Ky. 398, 81 S. W. 259 (260). For an instruction to the same effect see

Ryan v. State, 115 Wis. 488, 92 N. W. 271 (274).

27—Connor v. Commonwealth, supra.

28—Hibler v. Commonwealth, 25 Ky. Law 277, 74 S. W. 1079, 13 Am. Cr. Rep. 416.

29—State v. Vance, 29 Wash. 435, 70 Pac. 34 (45).

30—Stoneking v. State, 118 Ala. 68, 24 So. 47 (48).

either degree, but only of manslaughter at most; and if, after considering all the evidence, the jury have a reasonable doubt as to defendant's guilt of manslaughter, arising out of all the evidence, then you should find the defendant not guilty of any offense.³¹

(e) If the jury have a reasonable doubt of defendant being guilty of murder in the first degree, you should acquit him of that offense, and next proceed to inquire whether he is guilty of murder in the second degree.³²

(f) If you have a reasonable doubt of the defendant having been proven guilty, you will find him not guilty. Or if you shall believe from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty, but have a reasonable doubt whether his crime be willful murder or voluntary manslaughter, you should find him guilty of voluntary manslaughter.³³

§ 2708. Reasonable Doubt—Every Reasonable Hypothesis of Innocence Excluded. (a) The court charges the jury, if the jury are not satisfied beyond all reasonable doubt, to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of defendant's guilt, you should find him not guilty, and it is not necessary to raise a reasonable doubt, that the jury should find from all the evidence a probability of defendant's innocence in the testimony, but such a doubt may arise even when there is no probability of his innocence in the testimony; and if the jury have not an abiding conviction to a moral certainty of his guilt, it is the duty of the jury to find the defendant not guilty.³⁴

(b) The court charged the jury that before the jury can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it

31—Adams v. State, 133 Ala. 166, 31 So. 851 (854).

"This charge was held good in Compton v. State, 110 Ala. 34, 20 So. 119, and in Stoneking v. State, 118 Ala. 70, 24 So. 47; the only difference between the charge here and the charge in those cases being that in the latter the language used is: 'If the jury has a reasonable doubt of defendant's guilt of manslaughter arising out of any part of the evidence,' while the language used in the present charge is 'arising out of all the evidence.' The change, instead of detracting from the charge tended to make it a more perfect one and the court erred in its refusal."

For an instruction to the same effect see Commonwealth v. McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. 836.

32—Smith v. State, — Tex. Cr. App. —, 78 S. W. 694 (695).

33—Wilson v. Commonwealth, 24 Ky. 185, 68 S. W. 121 (122).

34—Rogers v. State, 117 Ala. 192, 23 So. 82; Fuller v. State, 117 Ala. 200, 23 So. 73 (74), where this was approved:

Before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and, unless the jury are so convinced by the evidence of defendant's guilt that the jury would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty.

Compare Collins v. State, 138 Ala. 57, 34 So. 993 (994); Thayer v. State, 138 Ala. 39, 35 So. 406 (408); Bohleman v. State, 135 Ala. 45, 33 So. 44.

is wholly inconsistent with every other rational conclusion and unless the jury are so convinced by the evidence of defendant's guilt that they would venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty.³⁵

(c) The court instructs the jury that circumstantial evidence to warrant a conviction must exclude every reasonable hypothesis except the implying defendant's guilt, and that incriminating circumstances not proven beyond a reasonable doubt were not entitled to any weight or influence.³⁶

(d) The law presumes the accused to be innocent until he is proved guilty beyond a reasonable doubt, and if there is upon the minds of the jury any reasonable doubt of the guilt of the accused, the law makes it their duty to acquit him. Mere suspicion or probability of his guilt however strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of evidence supports the charge in the indictment. But to warrant his conviction his guilt must be proved so clearly, and the evidence thereof must be so strong, as to exclude every reasonable hypothesis of his innocence.³⁷

§ 2709. Duty of Jury to Adopt Hypothesis of Defendant's Innocence. In considering the evidence if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so and if you have a reasonable doubt of his guilt you should acquit him.³⁸

35—*Brown v. State*, 108 Ala. 18, 18 So. 811 (813).

"This instruction requested by the defendant was extracted literally from an instruction which was declared at the last term to assert a correct legal proposition. *Burton v. State*, 107 Ala. 108, 18 So. 234. When analyzed and interpreted, the instruction means no more than that the guilt of the accused must be fully proved,—as it is usually expressed, proved beyond a reasonable doubt,—and that this degree of proof is not reached unless all reasonable supposition of innocence is excluded. When, in its present form, the instruction may be given, the court, *ex mere motu*, if apprehensive that it may unduly influence the jury, or that it may mislead them, has the power, and it may become a duty, to explain its true interpretation and meaning. *McKleroy v. State*, 77 Ala. 95."

36—*O'Brien v. State*, 69 Neb. 691, 96 N. W. 649 (651).

37—*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (340).

Sherrill v. State, 138 Ala. 3, 35 So. 129 (130), approves the following:

Gentlemen of the jury, you should acquit the defendant unless the evidence excludes every reasonable supposition but that of his guilt.

The court said: "This has heretofore been approved as a correct instruction which should be given. *Bones v. State*, 117 Ala. 138, 23 So. 138. In *Baldwin v. State*, 111 Ala. 15, 20 So. 528, and in *Horn v. State*, 102 Ala. 145, 15 So. 278, charges otherwise similar were condemned solely on the ground that in the charges, the word 'reasonable' before the word 'supposition' was omitted. *Yarbrough v. State*, 105 Ala. 45, 56, 16 So. 758, 761."

Bones v. State, 117 Ala. 138, 23 So. 138 (139), holds it was error to refuse the following:

I charge you to acquit unless the evidence excludes every reasonable supposition but that of defendant's guilt.

38—*People v. Clark*, 145 Cal. 727, 79 Pac. 434.

§ 2710. Proof Must Be Inconsistent with Any Reasonable Hypothesis of Defendant's Innocence. (a) To warrant a conviction, the state is required to prove beyond a reasonable doubt that the defendant feloniously killed his wife, ———, at the time and place, and in the manner and form as alleged in the indictment. It is not sufficient if the state had enveloped the death of ——— in mystery that is incapable of explanation without inferring the defendant's guilt. To convict, the state is required to explain all mystery, sufficiently to remove all reasonable doubt, and establish facts that are susceptible of explanation upon no reasonable hypothesis consistent with the defendant's innocence, and that point to his guilt beyond any other reasonable solution and beyond all reasonable doubt.³⁹

(b) The court instructs the jury that the guilt of the accused is not to be inferred because the facts proven are consistent with his guilt, but they must be inconsistent with his innocence.⁴⁰

(c) The court instructs the jury that, to justify a conviction, no mere weight of evidence is sufficient, unless it excludes all reasonable doubt (not unreasonable) as to the guilt of any of the defendants. The proof of guilt must be inconsistent with any other rational supposition.⁴¹

§ 2711. Jury Must Acquit if Evidence Consistent with Defendant's Innocence. (a) The jury must find the defendant not guilty, if the evidence, upon a reasonable hypothesis, is consistent with his innocence.

(b) Before the jury can convict the defendant, every member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant.

(c) The burden is upon the state, and it is the duty of the state, to show, beyond all reasonable doubt, and to the exclusion of every other hypothesis, every circumstance necessary to show that the defendant is guilty; and unless the state has done that in this case, it is your duty, gentlemen of the jury, to render a verdict of not guilty.

(d) The only foundation of guilty in this case is that the entire jury shall believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to so impress the minds of the jury of his guilt, they should find him not guilty.

(e) Before the jury can convict the defendant, they must be

39—*Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157 (173), citing *Trogon v. State*, 133 Ind. 1, 32 N. E. 725.

40—*Longley v. Commonwealth*, 99

Va. 807, 37 S. E. 339 (341), homicide case.

41—*Murphy v. State*, 86 Wis. 626, 57 N. W. 361 (363).

satisfied, to a moral certainty, not only that the proof is consistent with the guilt of the defendant, but that it is wholly inconsistent with every other rational conclusion; and, unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of highest concern and importance to his own interest, they must find the defendant not guilty.⁴²

§ 2712. **Proof of Every Fact Necessary to Establish Guilt Beyond Reasonable Doubt, and Inconsistent with Every Other Reasonable Hypothesis.** The court further instructs the jury that to warrant the conviction of the defendant, each fact necessary to establish his guilt, must be proven by competent evidence, beyond a reasonable doubt, and all the facts and circumstances proven should not only be consistent with the guilt of the defendant, but inconsistent with every other reasonable hypothesis or conclusion than that of guilt, to produce in your minds a reasonable and moral certainty that the defendant committed the offense as charged in the indictment.⁴³

§ 2713. **Reasonable Doubt—Defense of Alibi Established By.** (a) One defense in this case is what is known in law as an "alibi"; that is, that the defendants were not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that they were at that time at another and different place. As to this defense, you are instructed that it is not necessary for defendants to prove an alibi to your satisfaction, beyond a reasonable doubt, nor by a preponderance of the testimony, but if, after a fair and full consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt as to whether or not the defendants were present at the time and place of the commission of the offense charged in the indictment, if such offense has been committed by any one, it will be your duty to give the defendants the benefit of such doubt and acquit them.⁴⁴

(b) The jury are instructed that if you should entertain a reasonable doubt of the defendant's guilt, he should be acquitted, although the jury may not be able to find that the alibi is fully proven.⁴⁵

§ 2714. **Reasonable Doubt as to Sanity Acquits.** (a) Was the defendant H. at the time he committed the homicide charged laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power,

42—"Abstractly considered, the above charges were sound exposition of law. They were applicable to the case as prescribed by the evidence. They should have been given." *Brown v. State*, 118 Ala. 111, 23 So. 81 (82).

43—*Parsons v. People*, 218 Ill. 386 (396, 397, 398), 75 N. E. 993.

44—*State v. Hale et al.*, 156 Mo. 102, 56 S. W. 881 (882).

45—*Territory v. Garcia*, 12 N. M. 87, 75 Pac. 34 (35).

reflection, reason and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant and acquit him.

(b) Did H. commit the homicide not laboring under an insane delusion, but believing that by teachings of the Bible he had right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant.⁴⁶

(c) The jury are instructed that to warrant a conviction in this case, it is incumbent upon the people to establish by evidence to the satisfaction of the jury, beyond a reasonable doubt, the existence of every element necessary to constitute the crime charged; and if, after a careful and impartial examination of the evidence in the case bearing upon the question of sanity or insanity, the jury entertain any reasonable doubt of the guilt of the defendant at the time of the alleged offense, they should give the defendant the benefit of that doubt and acquit him.⁴⁷

§ 2715. Reasonable Doubt that Charge Was Caused by Hallucinations. The court instructs the jury that if the evidence in this case raises a reasonable doubt in their minds that the charge made by Miss J. was superinduced by chloroform and ether taken by her, or by hysteria and nervousness, or by all or any of these, then the jury should acquit the defendant.⁴⁸

§ 2716. Reasonable Doubt as to Malice. The court charges the jury that if from all the evidence you have a reasonable doubt

46—Hotema v. U. S., 186 U. S. 413 (419), 22 S. Ct. 895.

47—Hornish v. People, 142 Ill. 620 (624), 32 N. E. 677.

The court said: "This is quite in harmony with the rule laid down in repeated decisions of this court. Thus in Mullins v. People, 110 Ill. 42, where a defendant on trial for robbery attempted to prove an alibi, we said: 'Nor is it proper for the court to designate any particular branch of the case, and tell the jury that unless it is proved beyond a reasonable doubt, they should acquit. The reasonable doubt the jury is permitted to entertain must be as to the whole of the evidence, and not as to a par-

ticular fact in the case.' See also Crews v. People, 120 Ill. 317, 11 N. E. 404; Leigh v. People, 113 Ill. 372, and Davis v. People, 114 Ill. 86, 29 N. E. 192."

48—State v. Perry, 41 W. Va. 641, 24 S. E. 634 (637). The charge was rape.

"This is, in effect, equivalent to saying: 'If the jury believe from the evidence that it was possible that the charge made by Miss J. against the prisoner was caused by hallucination resulting from the use of chloroform and ether, and such possibility raised in the minds of the jury only a reasonable doubt as to the guilt of the prisoner, they should acquit him.'"

as to whether or not defendant fired the fatal shot of malice or only in the heat of passion, suddenly aroused, under sufficient provocation, then the jury cannot convict the defendant of murder in the second degree.⁴⁹

§ 2717. **Reasonable Doubt—Self-Defense—Instruction May Assume Admitted Facts.** (a) You are instructed that, if you are not satisfied by the evidence beyond a reasonable doubt that the defendant was not acting in self-defense when he killed P., you should acquit him.⁵⁰

(b) Of course, if what he (the defendant) did there, was justifiable, by way of self-defense, under the rule of law as I have given it to you, then your verdict should be a verdict of not guilty; and if you have a reasonable doubt upon that subject, you should give it to the defendant—and that applies not only to that particular feature of the case, but to every other feature of the case, as well as to the question of the degree of crime, if one has been committed.⁵¹

(c) The jury are instructed, that if you believe, from the evidence in the case, that there is a reasonable doubt as to whether the prisoner, at the time of the shooting, was under reasonable apprehension that the prosecuting witness intended to inflict upon him great bodily harm, and that he fired the shot in self-defense, then the jury must acquit.⁵²

49—*Naugher v. State*, 116 Ala. 463, 23 So. 26 (27).

50—*State v. Mitchell*, 130 Ia. 697, 107 N. W. 804 (806).

"The criticism is that the court assumed it to be an established fact that the defendant killed P. It was an established fact, established by the defendant's own word, and hence it was not error so to treat it. *State v. Bone*, 114 Iowa 537, 87 N. W. 507, 55 L. R. A. 378.

51—*People v. Boggiano*, 179 N. Y. 267, 72 N. E. 102, homicide case.

52—*Lawlor v. People*, 74 Ill. 230.

In *Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (710), the following instruction on self-defense, omitting to state that the state must prove the case beyond a reasonable doubt, was held cured by the frequent reference to it in other instructions:

The jury are instructed that the law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation or for revenge. Therefore, if the jury believe, from the evidence, that the defendant sought, brought on or voluntarily entered into a dif-

ficulty with the deceased, A. B., for the purpose of wreaking vengeance upon him, or to accomplish some unlawful purpose, or if the jury shall find and believe from the evidence that he killed the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation and revenge, for the purpose of punishing the deceased for past-threatened injuries done to him, the defendant, then the defendant cannot avail himself of the law of self-defense. Before a person can justify taking the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his own safety, to avoid the danger, and avert the necessity for the killing.

The supreme court said:

"In this case the jury was over and over again impressed with the necessity of being satisfied beyond a reasonable doubt of the defend-

§ 2718. **Self-Defense—Defendant Need Only Create Reasonable Doubt.** (a) If, therefore, you believe from the evidence that the said T. intentionally shot and killed the said B., but further believe that at the time of so doing the deceased was in the act of making or about to make an attack upon him, which from the manner and character of it, together with the weapon used or attempted to be used, if any, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury at the hands of deceased, and acting under such reasonable expectation or fear of death or serious bodily injury he intentionally shot and killed the said B., then you will acquit him, or, if there is in your minds a reasonable doubt thereof, you will acquit him, and so say by your verdict.⁵³

(b) When the taking of life is sought to be justified on the ground of self-defense, it is not incumbent upon the accused to satisfy the jury that the killing was justifiable, but, if the evidence on that question is sufficient to raise a reasonable doubt in the minds of the jury as to whether the defendant was justifiable, then the defendant is entitled to an acquittal.⁵⁴

(c) If you, or either of you, have a reasonable doubt as to whether the defendant acted in self-defense when he fired the shots, he should not be convicted.⁵⁵

§ 2719. **Reasonable Doubt—Conspiracy.** You are instructed that if the evidence in this case does not satisfy your minds beyond all reasonable doubt that the defendant, M., was a party to a conspiracy to murder the deceased, R., your verdict must be that the defendant is not guilty. And you are further instructed that if the defendant was merely present to witness the murder, if any, or to witness a beating or a fight, and did nothing to aid and abet the person or persons committing the act, then your verdict must be that the defendant is not guilty. But it is exclusively for the jury to determine whether the defendant was present, and, if so, for what purpose, if any, and to what extent, if any, he was connected with

ant's guilt, and in at least five places they were expressly or by plain implication told that the state must make out every essential feature beyond a reasonable doubt. We do not think that, after having once impressed this fact upon the jury, it was necessary in every instruction to repeat it. As opposed to this view, counsel cites us to certain cases holding that, if the court misstates the law in one instruction, the error is not cured by a correct statement in another. Among such cases are *Wasson v. Palmer*, 13 Neb. 376, 14 N. W. 171; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *Fitzgerald v. Meyer*, 25 Neb. 77, 41 N. W. 123; *School Dis-*

trict v. Foster, 31 Neb. 501, 48 N. W. 267. But these were all cases where the instruction complained of misstated the law. On the other hand, where an instruction is simply incomplete, so that, taken by itself, it might operate to mislead, another instruction, complementary thereto, and stating the proper limitations and conditions, cures the error which might otherwise exist in the first instruction."

53—*Teel v. State*, — Tex. Cr. App. —, 73 S. W. 11 (12).

54—*Harris v. State*, 155 Ind. 265, 58 N. E. 75 (76).

55—*Whitney v. State*, 154 Ind. 573, 57 N. E. 398 (400).

the person or persons, if any, committing the act, if any was committed.⁵⁶

§ 2720. **Reasonable Doubt—Homicide.** (a) If you have any reasonable doubts upon any facts which are necessary to convict the defendant, he is entitled to the benefit of that doubt. If you have any reasonable doubt of his guilt, he is entitled to be acquitted. If you have any reasonable doubt of his guilt of murder in the first degree, you cannot convict him on that count. If you have any reasonable doubt of his guilt of murder in the second degree, you cannot convict him on that count; or if you have any reasonable doubt as to manslaughter in either degree, you cannot convict him of that, and he must be acquitted. You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence,—a doubt for which some good reason arising from the evidence can be given. When you find such a doubt as that in a case, it is your duty to give the prisoner the fullest and amplest benefit of it.⁵⁷

(b) You are instructed that, if X. shot and killed deceased, and if you further find that defendant, Y., though present at the time and place of such killing, did not participate or aid in such killing, or if you have a reasonable doubt as to whether or not defendant, X., participated or aided in such killing, then and in that event you will acquit defendant; and this even though you may further find from the evidence that such killing upon the part of said X. was done in such manner and under such circumstances as to render the said X. guilty of either murder or manslaughter.⁵⁸

(c) If the jury have a reasonable doubt growing out of the evidence as to whether the killing was done deliberately, or as to whether it was done premeditatedly, then they cannot find the defendant guilty of murder in the first degree; and if they have reasonable doubt growing out of the evidence as to whether the killing was done out of malice, then they cannot find the defendant guilty of murder in either degree, but only of manslaughter at the most; and if, after considering all the evidence the jury have a reasonable doubt as to the defendant's guilt of manslaughter arising out of any part of the evidence, then they should find the defendant not guilty.⁵⁹

56—*People v. Moran*, 144 Cal. 48, 77 Pac. 777 (781).

57—*People v. Guidici*, 100 N. Y. 503, 3 N. E. 493 (495).

The exception to this charge was general; no error was specifically pointed out.

The court said: "We find in the language of the judge nothing to mislead or perplex a juror; but if counsel at the trial thought other-

wise, the attention of the court should have been directed to it."

58—*Monroe v. State*, — Tex. Cr. App. —, 81 S. W. 726 (727).

59—*Hunt v. State*, 135 Ala. 1, 33 So. 329 (331).

Of this, the court said: "Charge (2) refused to defendant is copied from *Compton v. State*, 110 Ala. 24, 20 So. 119, where it was held to be a correct charge; and this ruling

§ 2721. **Reasonable Doubt—Larceny—Husband and Wife.** The government is bound to prove beyond any reasonable doubt all the elements that are necessary to be proved in order to make out the guilt of the defendant upon each of these counts. The larceny of the property and the liability of the defendant if she is a married woman, and if with her husband at the time of the larceny, if there was any, under the first count—the government has to prove that beyond a reasonable doubt. It is for you to say whether the evidence satisfies you beyond a reasonable doubt of the guilt of the defendant under the rules of law as I have stated them to you.⁶⁰

§ 2722. **Reasonable Doubt—Slander.** The court instructs the jury that if they believe from the evidence that the statements made by defendant concerning X., if any were made, were true, or if they have a reasonable doubt as to whether or not statements were true, they should acquit.⁶¹

has been reaffirmed in *Stoneking v. State*, 118 Ala. 70, 24 So. 47; and *Adams v. State*, 133 Ala. 166, 31 So. 851."

In *State v. Elsham*, 70 Iowa 531, 31 N. W. 66 (68), and in *State v. Pierce*, 65 Iowa 75, 21 N. W. 195, the following was held unobjectionable though parts of it standing alone might be criticised:

If there is a reasonable doubt of the defendant being proven guilty, he must be acquitted. In criminal cases full and satisfactory proof of guilt is required. No mere weight of evidence will warrant a conviction, unless it be so strong and satisfactory as to remove from your minds all doubt of the guilt of the accused. In considering this case, you are not to go beyond the evidence to hunt for doubts. Nor should you entertain such doubts as are merely chimerical, or are based upon groundless conjecture. A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent and considerate man to hesitate and pause before acting in the grave and more important affairs of life. If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you have a firm and abiding conviction of the guilt of the defendant, and are fully

satisfied of the truth of the charge to a moral certainty, then you are satisfied beyond a reasonable doubt.

Substantially the same thing passed muster in the homicide case of *Painter v. People*, 147 Ill. 444 (467), 35 N. E. 64.

For other instructions, in homicide cases, as to reasonable doubt, see *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (794); *Stout v. Commonwealth*, 29 Ky. Law 627, 94 S. W. 15; *Hibler v. Commonwealth*, 25 Ky. Law 277, 74 S. W. 1079; *Ireland v. Commonwealth*, 22 Ky. Law 478, 57 S. W. 616 (617); *People v. Curtis*, 97 Mich. 489, 56 N. W. 925, 37 Am. St. 360; *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (781); *People v. Manning*, 146 Cal. 100, 79 Pac. 856 (857); *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676 (678); *Hammond v. State*, 74 Miss. 214, 21 So. 150; *State v. Moore*, 156 Mo. 204, 56 S. W. 883 (884); *Clark v. Commonwealth*, 23 Ky. Law 1029, 63 S. W. 740 (747); *State v. Clark*, 134 Nor. Car. 698, 47 S. E. 36 (38); *Karr v. State*, 106 Ala. 1, 17 So. 328 (329).

60—*Commonwealth v. Adams*, 186 Mass. 101, 71 N. E. 78 (80).

"And the fact that the government had to prove its case and the whole of it beyond a reasonable doubt was repeated several times. This was correct."

61—*West v. State*, 44 Tex. Cr. App. 417, 71 S. W. 967 (968).

CHAPTER XCI.

CRIMINAL—PRINCIPALS AND ACCESSORIES— MISCELLANEOUS.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2723. Who are principals.</p> <p>§ 2724. What the true criterion is in determining who are principals.</p> <p>§ 2725. All persons concerned in the commission of a felony are principals—What to be alleged in indictment.</p> <p>§ 2726. Accessory defined.</p> <p>§ 2727. Distinction between principal and accessory abrogated—Proof required for conviction.</p> <p>§ 2728. Accomplice guilty as principal.</p> <p>§ 2729. Principal and accessory—Jointly indicted.</p> <p>§ 2730. Co - defendant chargeable with wrong done by the other—Participation therein required.</p> <p>§ 2731. Accessory—Presence, actual or constructive.</p> <p>§ 2732. Actual or constructive presence will render one a principal — Illustrations given.</p> <p>§ 2733. Principal and accessory—Aiding, abetting, or consenting.</p> <p>§ 2734. Aiding or encouraging—Reasonable doubt—Alibi.</p> <p>§ 2735. Aiding, advising, etc., may be by words or acts.</p> <p>§ 2736. Aiding and abetting as principal in the second degree.</p> <p>§ 2737. Common purpose or design.</p> <p>§ 2738. Concert of action need not be by express agreement.</p> <p>§ 2739. Mere presence not sufficient—Must have been aiding, counseling, abetting, or encouraging.</p> <p>§ 2740. Advising and encouraging, not being present.</p> <p>§ 2741. Present, but not aiding or assisting.</p> <p>§ 2742. Without knowledge, connivance, or assent of defendant.</p> <p>§ 2743. Encouraging another to kill.</p> | <p>§ 2744. Watching while another killed.</p> <p>§ 2745. Homicide committed while escaping from prison—All who aid and abet are principals.</p> <p>§ 2746. Accomplice in robbery guilty of murder if murder is committed, although opposed to the murder being committed.</p> <p>§ 2747. Accessory—Assault with intent to kill—Intent.</p> <p>§ 2748. Testimony of an accomplice must be corroborated in order to convict.</p> <p>§ 2749. Testimony of accomplice—What corroboration sufficient.</p> <p>§ 2750. Testimony of accomplice corroborated by confession.</p> <p>§ 2751. Testimony of accomplice—Need not be corroborated.</p> <p>§ 2752. Testimony of accomplice should be received with caution.</p> <p>§ 2753. An accomplice cannot corroborate herself—Corroboration must be by evidence outside and beyond her statements, acts and declarations—Seduction.</p> <p style="text-align: center;">MISCELLANEOUS.</p> <p>§ 2754. Statements of prosecuting attorney not based on evidence.</p> <p>§ 2755. Opinion of prosecuting attorney as to guilt of defendant is not to be considered by the jury.</p> <p>§ 2756. Instruction correcting statement of attorney in argument—Reference to Biblical laws.</p> <p>§ 2757. Arguments of counsel—Laying foundation for civil suit.</p> <p>§ 2758. Consideration due to argument of counsel.</p> <p>§ 2759. Comment on evidence by court to be disregarded.</p> |
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Note.—At common law, persons participating in a crime are either principals or accessories. If the crime is felony, they are alike felons. Principals are such either in the first or second degree. Principals in the first degree are those who are the immediate perpetrators of the act. Principals in the second degree are those who did not with their own hands commit the act, but who were present, aiding and abetting it.

An accessory before the fact is he who, being absent at the time the felony is committed, does yet procure, counsel or command another to commit a felony. In many, if not most, of the states, an accessory before the fact is by statute declared to be in law, as he is in reason, either actually or substantially a principal.

§ 2723. **Who are Principals.** (a) All persons are principals who are guilty of acting together in the commission of an offense.¹

(b) Any participation in a general felonious plan, provided such participation be concocted, and there be actual or constructive presence, is enough to make a man a principal as to any crime committed in the execution of such concocted plan.

(c) Previous consent to or procurement of the caption and transportation will not make one a principal, nor will subsequent reception of the thing stolen, or the aiding and concealing or disposing of it, have that effect.²

(d) The court instructs the jury that any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto whether he aids or not in

1—Thornton v. State, — Tex. Cr. App. —, 65 S. W. 1105 (1107).

2—Baldwin et al v. State, 46 Fla. 115, 35 So. 220 (222).

the illegal act, and any person who is a principal, under the rules hereinabove given you, may be prosecuted, and if found guilty, may be convicted and punished as such.³

(e) Any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal, whether he aids in the illegal act or not.⁴

§ 2724. What the True Criterion is in Determining Who are Principals. All persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the true criterion for determining who are principals is, did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact, all were actually bodily present on the ground when the offense was actually committed or not. So, in this case, if you find that F. C. was guilty of assault with intent to kill upon T. J. K. at the time and place charged, beyond a reasonable doubt; and you further find beyond a reasonable doubt that defendant J. H. was then and there present with said C. and that he, J. H., then and there well knowing the intent and purpose of said F. C. in making such assault, if any, he, the said J. H., did then and there aid by acts or encourage by words said C. in the commission of said assault, if any—then if you find beyond a reasonable doubt, defendant J. H. would be guilty as principal, the same as F. C.⁵

§ 2725. All Persons Concerned in the Commission of a Felony Are Principals—What to be Alleged in Indictment. You are further instructed that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony is abrogated; and all persons concerned in the commission of felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, shall be prosecuted, tried and punished as principals; and no other

3—Grimsinger v. State, 44 Tex. 1, 69 S. W. 583 (587).

"This charge is a substantial copy of article 78, Pen. Code, which reads: 'Any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act.'"

4—Tally v. State, — Tex. Cr. App. —, 90 S. W. 1113 (1114).

"The objection urged to this instruction is that there is no evidence authorizing such a charge.

We think the charge is applicable to the facts. At the time of the burglary appellant's co-defendant was in the house, and appellant standing on the outside. He ran away from said building as the officers approached. This testimony would present the issue of principals. It is true that appellant insists his presence was an innocent one; but this issue was properly presented to the jury, and they found against appellant."

5—Henry v. State, — Tex. Cr. App. —, 54 S. W. 592 (593).

facts need be alleged in any indictment against such an accessory than are required in an indictment against a principal.⁶

§ 2726. **Accessory Defined.** (a) The mere presence of the defendant at the time and during the act of killing would not, of itself, be sufficient to constitute him an aider and abettor in the commission of the act; but it is not essential, in order to constitute him such, that he should himself have fired the fatal shot. It is sufficient if at the time of the killing he was there present, consenting to and encouraging the act, and ready, if needed, to give assistance to him who did the act.⁷

(b) The court instructs the jury, as a matter of law, that an accessory is he who stands by, and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises, or encourages, shall be considered as principal and punished accordingly. Every such accessory, when a crime is committed within or without this state, by his aid or procurement in this state, may be indicted and convicted at the same time as the principal, or before or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal.⁸

(c) The court instructs the jury, that an accessory is one who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime charged. He who thus aids, abets, assists, advises or encourages, is considered a principal and punished accordingly.⁹

§ 2727. **Distinction Between Principal and Accessory Abrogated—Proof Required for Conviction.** The jury are instructed that in this state the distinction between accessory before the fact and the principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried and punished as principals, and no other facts need be alleged or proved under an information against such accessory than are required under an information against his principal.¹⁰

6—State v. Bland, 9 Idaho 796, 76 Pac. 780 (783).

"This instruction is in the identical language of section 7697 of the Revised Statutes of 1887 and certainly could in no wise injure or prejudice the defendant."

7—Kelly v. State, 44 Fla. 441, 33 So. 235 (237).

"We discover no error in this charge. It does nothing more than define an aider and abettor in the commission of a crime, and does so, as we think, correctly."

8—Coates v. People, 72 Ill. 303.

9—Iowa Code, § 4314; State v. Hessian, 53 Ia. 68, 12 N. W. 77.

10—State v. De Wolfe, 29 Mont. 415, 74 Pac. 1084 (1087).

"The above instruction," said the court, "is practically in the language of section 1852 of the Penal Code. The words 'such an accessory,' as used in that section, clearly refer to the words 'an accessory before the fact' used in the opening sentence thereof."

§ 2728. **Accomplice Guilty as Principal.** (a) The court instructs the jury that if you find from the evidence beyond a reasonable doubt that the defendant J. was at the time of the killing, present, aiding, abetting, procuring, and assisting O. in the commission of the crime, and that the killing was done with felonious intent, and with deliberate and premeditated malice, then the defendant J. would be guilty as a principal in the transaction.¹¹

(b) The court further instructs the jury that if you find and believe from the evidence in this cause, beyond a reasonable doubt, that one H. V., in the county of C., Mo., on the 24th day of Nov., 1905, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, shot with a pistol, and by such shooting killed J., and that the defendants G. R., C. S., and E. R. were then and there present, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, aiding and abetting, advising, counseling, assisting, or procuring the said H. V., in such shooting and killing, then defendants G. R. and E. R. were within the meaning of the law, each as guilty as if he had fired the fatal shot himself.¹²

(c) The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant V., in connection with T. W., and A. killed J., and that the defendant participated, aiding or assisting, in the killing of J., it will not be necessary, in order to convict the defendant, for the state to prove that he fired any shot or shots that resulted in the death of the deceased; and if you believe from the evidence beyond a reasonable doubt that he was present, aiding, abetting, and assisting, he would be as guilty as though he had fired the fatal shot.¹³

(d) The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that D. was present at the time of the killing of H., with intent to aid and abet in the murder of H., if his assistance became necessary, and that H. was murdered as charged in the indictment, then D. is as guilty as the one who did the killing, though he may not have actually taken any other part in such homicide.¹⁴

(e) If you believe and find from the evidence in this cause that one C., in the county of Butler and state of Missouri, at any time prior to the 14th day of September, 1901, willfully, deliberately, premeditatedly and of his malice aforethought shot with a pistol, and by shooting killed, E. G., and that the defendant, W. G., was then and there present, willfully, deliberately, premeditatedly and of his malice aforethought aiding, helping, abetting, assisting, comforting, maintaining, moving or inciting the said C. in so shooting and killing said E. G., then defendant, W. G., willfully, deliberately, premeditatedly and of his malice aforethought shot and killed E. G., within

11—Jahnke v. State, 68 Neb. 154, 94 N. W. 153, 104 N. W. 154.

12—State v. Vaughan, 200 Mo. 1, 98 S. W. 2.

13—Vasser v. State, 75 Ark. 373, 87 S. W. 635 (636).

14—Dean v. State, 85 Miss. 40, 37 So. 501.

the meaning of this instruction, and is as guilty, under this information, as if he had fired the pistol himself; and if you find the above facts you will find the defendant guilty of murder in the first degree.¹⁵

§ 2729. Principal and Accessory—Jointly Indicted. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant deliberately and intentionally shot with a loaded revolver, as charged in the indictment, and that the defendant A. B. in any way or manner aided, advised or encouraged such shooting, then the jury should find the defendants both guilty; provided, the jury further find, from the evidence, beyond a reasonable doubt, that such shooting was not necessary, and did not reasonably appear to be necessary to save their own lives, or to prevent them, or either of them, receiving great bodily harm.¹⁶

§ 2730. Co-defendant Chargeable with Wrong Done by the Other—Participation Therein Required. (a) The court charges the jury that, although the defendant stands indicted with others, he is not chargeable with anything which any other one named in the indictment may have done, unless he advised, aided, or abetted others in the commission of the offense, intending at the time, by his word or act, to aid or encourage the commission of the offense.

(b) Even though the jury should believe that H. threw the hog in the controversy over the fence some time between 10 and 12 o'clock of the day on which the hog was found dead, and the hog was dead at the time it was thrown over the fence, the defendant's participation in the act of throwing the hog over the fence would not constitute him guilty of the offense charged in this case, unless the jury believe beyond a reasonable doubt that he had before that time killed the hog, or assisted in killing it, or aided or abetted, counseled or encouraged, some one or more in killing the hog.¹⁷

§ 2731. Accessory—Presence, Actual or Constructive. When an offense is actually committed by one person, but another is present, and, knowing the unlawful intent, aids by acts or encourages by words or gestures the person actually engaged in the commission of the unlawful act, or who, not being actually present, keeps watch so as to prevent the interruption of the person engaged in the commission of the offense, such person so aiding, encouraging, or keeping watch is a principal offender.¹⁸

15—State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888, 890).

16—Smith v. People, 74 Ill. 144.

17—Howser v. State, 117 Ala. 176, 23 So. 680 (681).

18—Grimsinger v. State, 44 Tex. Cr. App. 1, 69 S. W. 583 (585).

The court said: "In order to render a person a principal in the second degree, or an aider or abettor, he must be present, aiding

and abetting, at the fact, or be ready to afford assistance if necessary; but the presence need not be strict, actual, immediate presence,—such a presence as would make him an eye or ear witness of what passes,—but may be a constructive presence. 1 Russ. Crimes, § 49. The Am. & Eng. Enc. of Law defines 'present' as follows: 'Being in view or immediately at

§ 2732. **Actual or Constructive Presence Will Render One a Principal—Illustration Given.** (a) The court instructs you that if defendant is present actually or constructively at the time of the commission of the crime, and is so situated with reference to it, and while so situated willfully and intentionally knowing the purpose of the man who strikes the deadly blow or fires the fatal ball, and while so situated the defendant then willfully and intentionally aids either by doing some physical act or by being present at the place by reason of a previous agreement, and the very fact of that presence exerts an influence upon the mind of the party who fires the fatal shot, showing that he more readily or quickly does the act, then the defendant is present at the place and is actually an aider and abettor and is a principal in the crime.

(b) Now a word further as to what is meant by this idea of constructive presence. I have already told you that the test is if a man is so near to the place, no matter how far in feet or yards he may be away, if from the circumstances and from the character of the act done and the way it is done he is so near to where it is actually done as to be able to render assistance or to contribute to the production of that act, and he is there actually to do so, or is there ready to do so willfully, and intentionally present in pursuance of a previous agreement, and he confederated to render aid and assistance, he is then present in the law. As an illustration take the case decided in Nevada, where the man was 30 odd miles away from the place where a stage was robbed; he built a fire on the top of a mountain to signal to his confederates the approach of the stage, they being down in the valley waiting to rob it. He was arrested as a principal in that crime, although as a matter of fact at the time of the robbery he was 32 miles away, or 30 odd miles away, but the law said he was present, because the test of the law as to what is meant by presence is fully satisfied, because the proof showed that he was able to render assistance that looked toward the completion of it—towards the execution of it. Another case: If a man goes to a store kept in the country and decoys away the clerk who slept in the store, decoys him to go

hand.' In the case of *Pryor v. State*, 40 Tex. Cr. 643, 51 S. W. 375, we had under consideration a similar question to the one now at issue. In that case, by an inspection of the original papers, we find that appellant was in the shed room when the killing occurred in the front room of the residence. Appellant earnestly insisted under this state of facts, that the court erred in not charging on the law of accomplices. We held that, under the facts, appellant was clearly a principal. In this case, defendant, under the most favorable aspects, was at the woodshed at the time her husband was killed

in the house, a few feet away,—having agreed with R. that he should go and kill her husband; and she was standing on the outside, watching. Whether or not this last statement be true, her juxtaposition is such as clearly brings her, in legal contemplation, present at the homicide. It follows, therefore, that the court did not err in giving said charge. For a discussion of the law of principals, see *McClain, Cr. Law*, §§ 199, 204; *State v. Arden*, 1 Bay. 487; 1 Am. & Eng. Enc. Law (2d Ed.), p. 258. Furthermore, we think the charge is a correct statutory definition of 'principals.'"

to a dance some miles distant from the store, and detained him at the dance while his confederate robbed the store.¹⁹

§ 2733. Principal and Accessory—Aiding, Abetting or Consenting.

(a) The court instructs the jury that, if they believe from the evidence in this cause beyond a reasonable doubt, that at the county of H., and state of Missouri, the defendant, M., alone, or that the defendant, M., and one F., or either of them, and the other present, aiding, abetting or consenting thereto did on or about the 26th day of March, 1899, feloniously, willfully, deliberately, premeditatedly, and of his (the defendant's) malice aforethought, kill and murder G. in the manner and former charged in the indictment, you should find the defendant guilty of murder in the first degree, and so state your verdict.²⁰

(b) You are instructed that, if you believe beyond a reasonable doubt that defendant, with express malice aforethought, advised the said R. to commit said offense, or agreed with him that it should be so committed, and that she was, with express malice aforethought, present at the time of the killing, knowing the unlawful intent of the said R., and that such killing was in pursuance of such advice or agreement, whether she aided or not in the illegal act.²¹

(c) If you find from the evidence beyond a reasonable doubt that B. killed A. while he (B.) was in the commission of an unlawful act, without malice and without the means calculated to produce death, or if you find, beyond a reasonable doubt, that B. was in the prosecution of a lawful act done without due caution and circumspection, and you further find, from the evidence, beyond a reasonable doubt, that the defendant E. stood by, aided, abetted, or assisted B. in taking the life of A., as defined in this instruction, then you should convict the defendant of involuntary manslaughter.

(d) If you find from the evidence beyond a reasonable doubt that E. stood by, aided, abetted, or assisted B. in unlawfully taking the life of A., then he would be guilty of some degree of felonious homicide as defined in these instructions, whether there was or was not a combination between the defendant and his brother, B., to do an unlawful act.

(e) If you find that there was no agreement or combination, as defined in these instructions, between E. and B. to do an unlawful act, and you further find that E. did not stand by, aid, abet, or assist B. in unlawfully taking the life of A., then E. would not be responsible for the killing of A.²²

(f) If the evidence convinces you beyond a reasonable doubt that the defendant unlawfully killed H. by shooting him, as charged, or that he was present at the time aiding and abetting another, who

19—Johnson alias Overton v. United States, 157 U. S. 320 (321), 15 S. Ct. 614.

21—Grimsinger v. State, 44 Tex. Cr. App. 1, 69 S. W. 583 (587).

22—Burnett v. State, 80 Ark. 225,

20—State v. Miller, 15 Mo. 76, 56 S. W. 907 (910).

96 S. W. 1007.

unlawfully, and from a premeditated design to effect H.'s death, did kill him by shooting him as charged, and that in doing so the defendant acted from such premeditated design to effect H.'s death, as already defined to you, you will find him guilty of murder in the first degree.²³

§ 2734. **Aiding or Encouraging—Reasonable Doubt—Alibi.** (a) Unless the evidence proves beyond a reasonable doubt that the defendant was not only present at the killing, but that he had knowledge of the unlawful intent of R. and F., if that has been shown, and that he aided or encouraged them in the killing, then you should acquit him. If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the time and place of the killing, then you should acquit him.²⁴

(b) If you should believe, from the evidence, that W.'s house was burglarized at the time and place, and in the manner alleged in the indictment, and if you should further believe that C. acted as a principal in committing such burglary, if any was committed, then I instruct you that you cannot convict defendant, unless you further believe, beyond a reasonable doubt, that defendant was present and knew the unlawful intent of C., and aided, encouraged and advised him or agreed with him to commit such burglary.²⁵

§ 2735. **Aiding, Advising, etc., may be by Words or Acts.** (a) The court instructs the jury, that the advising or encouraging that may make one an accessory to crime need not be by words. It may be by words or acts, signs or motions, done or made for the purpose of encouraging the commission of the crime.²⁶

(b) The court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.²⁷

23—"We discover no error in this charge." *Kelly v. State*, 44 Fla. 441, 33 So. 235 (237), citing *McCoy v. State*, 40 Fla. 494, 24 So. 485.

24—*Gutierrez v. State*, — Tex. Cr. App. —, 59 S. W. 274.

"A similar charge to this was discussed in *Gallagher v. State*, 28 Tex. App. 247, 12 S. W. 1087, and approved by this court. The substance of this charge is to the effect that, if the jury entertain a reasonable doubt as to the presence of the defendant at the time and place of the killing, they should give defendant the benefit of such reasonable doubt, and acquit him. In this there was no error."

25—*Glenn v. State*, — Tex. Cr. App. —, 76 S. W. 757 (758).

26—*Brennan v. People*, 15 Ill. 511.

27—*State v. Valle*, 164 Mo. 539, 65 S. W. 232 (235).

The court said, in commenting, that "while the authorities hold that the mere presence of a person while a felonious assault is being committed by another upon a third person, or a mental approval of what is being done, will not, in the absence of some word or act of approval or encouragement, make such party guilty of a felonious assault, yet if he be present, and by words or actions aid or advise or encourage another to commit a felonious assault, with the intent that the words or acts of encouragement should encourage and abet the crime committed, he will be equally guilty with the person who actually commits the physical act; 'and a party may be

(c) If from the conduct of the parties here charged with murder, as shown in the testimony, and from the other testimony in the case, the jury are satisfied beyond a reasonable doubt that the defendant entertained the intent, or knew that the one who fired the pistol entertained the intent, thereby to kill and murder A., when C. fired the pistol, if he did fire it, and with such intent or knowledge, said defendant B. was present encouraging, aiding or abetting C., or ready to do so, then said B. was an accomplice and would be alike guilty with him who fired the shot.²⁸

§ 2736. Aiding and Abetting as Principal in the Second Degree. The defendant M. is charged by the indictment in this case as principal in the first degree in the killing of one L., and that the defendant W., being present when his co-defendant killed the said L., knowing the unlawful and premeditated design of the said M. in the killing of the said L., did aid and abet him in the murder of the said L., as principal in the second degree. Said indictment having been read to the said defendants, and being required to plead thereto, each of said defendants said that he was not guilty as charged in said indictment. Whether the defendants, or either of them, are guilty as charged in the indictment, is the issue you are to try.²⁹

§ 2737. Common Purpose or Design. (a) If, however, defendant and such other person or persons were not acting together with a common purpose to take the life of B., or do him some great bodily harm, and with the intent to assist each other in accomplishing such purpose, then defendant would not be responsible for the acts of such other person or persons, even though they may have also cut and stabbed B. at the same time that defendant did so.³⁰

(b) You are instructed that if you believe, from the evidence, beyond a reasonable doubt, that M. K. and S. H. were jointly engaged in pursuance of a common design in firing their pistols in the crowd assembled at the picnic at the time W. G. was killed, with the felonious intent to kill the said W. G., and the said W. G. was killed by a pistol shot fired by either of them, and they at the time did not act in necessary self-defense, then it is immaterial which of said defendants fired the shot that caused the death of the deceased, but, if both

charged with doing an act himself and be held liable under such a charge for being present, aiding and assisting another in doing it.' Will v. Lucas, 110 Mo. 219, 19 S. W. 726, 33 Am. St. Rep. 436; Canifax v. Chapman, 7 Mo. 175; Page v. Freeman, 19 Mo. 421; Alfred v. Bray, 41 Mo. 484, 97 Am. Dec. 283; Murphy v. Wilson, 44 Mo. 313, 100 Am. Dec. 290; Cooper v. Johnson, 81 Mo. 483; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329.

And it is not necessary to a conviction that it be proven by direct

evidence that a person advised an act, or aided by an overt act in its commission, but such fact may be shown by facts and circumstances. State v. Gooch, 105 Mo. 392, 16 S. W. 892.

28—Singleton v. State, 106 Ala. 49, 17 So. 327. And see Grimsinger v. State, 44 Tex. Cr. App. 1, 69 S. W. 583 (587), for an instruction to the same effect.

29—Mercer et al. v. State, 41 Fla. 279, 26 So. 317 (318).

30—State v. Thornhill, 177 Mo. 691, 76 S. W. 948 (949).

of them were present, aiding and abetting each other, then the law imputes the injury caused by one to the other.³¹

(c) The court instructs you, gentlemen of the jury, that before you convict the defendant in this case you must find and believe from the evidence and beyond a reasonable doubt either that prior to the shooting of G. by C. there was a common purpose or agreement between this defendant and the said C. that the life of X. was to be taken, and that deceased was shot and killed in furtherance of such fixed design, intent or common purpose in the minds of C. and this defendant, or that prior to the shooting there existed in the mind of C. a fixed purpose to take the life of G., of which this defendant had knowledge; and that this defendant did some act in furtherance of the accomplishment of such fixed design or intention.³²

§ 2738. Concert of Action Need not be by Express Agreement. The jury are instructed, that while the law requires, in order to find all the defendants guilty, that the evidence should prove, beyond a reasonable doubt, that they all acted in concert in the commission of the crime charged, still it is not necessary that it should be positively proven that they all met together and agreed to commit the crime; such concert may be proved by circumstances; and if, from all the evidence, the jury are satisfied, beyond a reasonable doubt, that the crime was committed by the defendant, and that they all acted together in the commission of the crime, each aiding in his own way, this is all the law requires to make them all equally guilty.³³

§ 2739. Mere Presence not Sufficient—Must Have Been Aiding, Counseling, Abetting or Encouraging. (a) The bare fact that T. was present at the time the alleged killing of the deceased took place would not be sufficient evidence to warrant his conviction, or to justify you in finding him guilty. You must be satisfied, beyond a reasonable doubt, that he was present when the fatal shot was fired, and then and there aiding, counseling, abetting, or encouraging McC. to kill the deceased; and if, from the evidence, you are not thus satisfied, under these instructions, then you should acquit the defendant T., although you are satisfied, from the evidence, beyond a reasonable doubt, that McC. is guilty of murder in the first, second or third degree, or of manslaughter.³⁴

(b) The court charges the jury that if they believe, from the evidence, that B., C. and E. went to the house of A. P. on the night the killing is said to have been done, and an offense was committed by

31—Humphrey v. State, 74 Ark. 554, 86 S. W. 431 (432).

The court said in comment that "the objection urged against the foregoing instruction is that there was no evidence upon which to base it. As to it, it is sufficient to say that it should not have been given unless there was evidence showing that the shooting by K.

and H. was in furtherance and prosecution of a common design or plan previously entered into by them. Green v. State, 51 Ark. 189, 10 S. W. 266."

32—State v. Gatlin, 170 Mo. 354, 70 S. W. 885.

33—Miller v. People, 39 Ill. 457.

34—McCoy v. State, 40 Fla. 494, 24 So. 485 (487).

one of them from causes having no connection with the common object for which they went there, the responsibility for such offense rests solely on the actual perpetrator of the crime, and the jury cannot find the defendant guilty simply because he happened to be present at the time the offense was committed.³⁵

(c) You cannot convict defendant unless you further believe, beyond a reasonable doubt, that defendant was present at the time and place such offense was committed, and that he knew of said unlawful intent of W. H., and aided and encouraged and advised him or agreed with him to commit such offense.³⁶

(d) The court instructs the jury that the mere presence of a person at the scene of a homicide, does not make him a guilty participator in said homicide. To make him a guilty participator he must have aided, assisted, instigated, abetted or advised said killing as explained in other instructions given by the court in this case.³⁷

(e) The court instructs the jury that the mere fact of one person being present at the time the shooting occurred, and the further fact that he follows along after the party doing the shooting, are not of themselves sufficient to convict the party following or aiding and abetting in the shooting; but before you can find that the defendant was aiding and abetting in the shooting, you must find that he was acting in concert with those committing the crime, and actually participating in some manner in the shooting.

(f) Even if the jury should find, from the evidence, beyond a reasonable doubt, that the deceased, F., was killed at the time and place in question, and that the said defendant, V., was present at the time of such killing, and that such killing was murder, still if you are not satisfied from the evidence beyond a reasonable doubt that the said V. was previously aware of the purpose to commit such murder, or that he in some way aided, abetted, or assisted in the killing, or advised or encouraged it, then you should find V. not guilty.³⁸

§ 2740. **Advising and Encouraging, not Being Present.** The court instructs the jury, that if they believe, from the evidence, beyond a reasonable doubt, that any one or more of the defendants is guilty of the offense charged in the indictment, and that any other of the defendants stood by at the time and aided, abetted or assisted in the commission of the crime, or who, not being present, had advised or encouraged the commission of the same, then such other person, so aiding, abetting, advising or encouraging, are, in law, guilty as principals, and the jury should so find by their verdict.³⁹

§ 2741. **Present, but not Aiding or Assisting.** Though the jury may believe, from the evidence, that the said A. B. was murdered at

35—*Evans v. State*, 109 Ala. 11, 19 Sd. 535 (536).

36—*Tally v. State*, — Tex. Cr. App. —, 90 S. W. 1113 (1114), burglary.

37—*State v. Vaughan*, 200 Mo. 1, 98 S. W. 2.

38—*Vasser v. State*, 75 Ark. 373, 87 S. W. 635.

39—*Sharp v. State*, 6 Tex. App.

the time and place in question, and that the defendant C. D. was present at the time of such murder, still, if the jury are not satisfied, from the evidence, beyond a reasonable doubt, that the said C. D. was previously aware of the purpose to commit such murder, or that he, in some way, aided, abetted or assisted in the killing, or advised or encouraged it, then they should find the said C. D. not guilty, though they further believe, from the evidence, that he subsequently failed to disclose the killing, or even concealed the same.⁴⁰

§ 2742. Without Knowledge, Connivance or Assent of Defendant.

The court charges the jury that, if they believe, from the evidence, that the fatal shot which took the life of W. A. was fired by J. F., and without the knowledge, connivance or assent of this defendant, then the jury must find this defendant not guilty.⁴¹

§ 2743. Encouraging Another to Kill. (a) If the presence of the defendant in this case at the place where the proof shows he was, was by previous agreement or concert, with W., and it was the purpose on his part to assist, aid, or abet the killing of R., and he was there willfully or knowingly for the purpose, if it should be necessary, of assisting W. in killing R., and the knowledge on the part of W. of the presence of the defendant, at the place where he was for the purpose of assisting him in the killing of R. emboldened his purpose and encouraged his heart, or afforded him hope or confidence in his enterprise, or spurred on his mind to do the act, or nerved or strengthened his arm to fire the pistol shot, then the defendant would be present aiding and abetting the killing. He may not have done any actual physical act, but if his relation to the act was of the character that I have just named, the relation was a criminal relation on his part; it was a relation that sprung out of a preconceived design between W. and defendant to take the life of R., and if such a presence for the purpose of aiding or assisting or abetting, should it become necessary, exerted a mental influence upon W., so that he the more readily or quickly executed the act, the defendant would then be present at the crime whether he was really and actually at the place or whether he was so near to the place, as by the means I have described to exert an influence of that character upon the mind of W., he would then be present at the crime and he would be an actual participant in it. If at the time W. shot and killed R. the defendant was constructively present at the place of the killing, and he was at such place with the intent to knowingly and willfully assist W. in killing R., should it become necessary to consummate the deadly purpose, but that such aid was not necessary, as W. did the killing without such help, then such constructive presence with such purpose would be a legal presence and would make the defendant a participant in the killing.⁴²

(b) The court instructs the jury that if they believe, from the

650; State v. Hamilton, 13 Nev.

386; State v. Maloy, 44 Ia. 104.

40—State v. Maloy, 44 Ia. 104.

41—Ferguson v. State, 141 Ala.

20, 37 So. 448 (449).

42—Johnson alias Overton v.

whole evidence, beyond a reasonable doubt, that H. was murdered, and that D. aided, assisted and encouraged C. or any other person in murdering H., then he is as guilty as such other person, and the jury should return a verdict of guilty.⁴³

§ 2744. **Watching While Another Killed.** If you further believe, beyond a reasonable doubt, that defendant, with express malice aforethought, knowing the unlawful intent of said R. to kill and murder upon his express malice aforethought, did keep watch so as to prevent the interruption of the said R. in the committing of said offense, though not actually present, then you will find the defendant guilty of murder in the first degree.⁴⁴

§ 2745. **Homicide Committed While Escaping from Prison—All Who Aid and Abet Are Principals.** The court instructs you that if several persons confined in the state's prison conspire to escape therefrom, and if necessary to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest and recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design. The law makes no distinction or difference between any of the parties so engaged.⁴⁵

§ 2746. **Accomplice in Robbery Guilty of Murder if Murder is Committed, Although Opposed to the Murder Being Committed.** Testimony has been adduced before you tending to show that the defendant L. and others were engaged in a robbery of one M. and the deceased McC. at the M. ranch in S. county, that while so engaged and in furtherance of the common purpose of L. and his associates to accomplish this robbery, the deceased McC. was slain by the defendant, or by some of the parties with whom he was then engaged in the alleged robbery. I charge you that it is no defense to a party associated with others in and engaged in a robbery that he did not propose or intend to take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally and actually given the fatal blow, and is guilty of murder in the first degree.⁴⁶

United States, 157 U. S. 320 (322), 15 S. Ct. 614.

43—Dean v. State, 85 Miss. 40, 37 So. 501 (502).

44—Grimsinger v. State, 44 Tex. Cr. App. 1, 69 S. W. 583 (587).

45—People v. Wood, 145 Cal. 659, 79 Pac. 367 (369).

46—People v. Lawrence, 143 Cal. 148, 76 Pac. 893 (897).

"This instruction is a verbatim copy, with the exception of the names of the parties, from the in-

structions given in the Vasquez Case and appearing in the opinion in that case People v. Vasquez, 49 Cal. 562. The appellant does not question the correctness of the general principle of law contained in the instruction, but claims that the use of certain language in it constituted prejudicial error. His complaint is of the use of the words in the instruction: 'that he did not propose or intend to take life in its perpetration' and the

§ 2747. **Accessory—Assault with Intent to Kill—Intent.** Whether H. fired into the house or not, if you believe, beyond a reasonable doubt, from the evidence, that he was one of the party, some of whom did fire into the house of J. J. with the intent to murder him, and that was his purpose in going there, then you are authorized to find H. guilty, whether he fired one of the shots or not.⁴⁷

§ 2748. **Testimony of an Accomplice Must be Corroborated in Order to Convict.** (a) Under the law of this state a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which, in itself and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense. And the corroboration is not sufficient if it merely shows the commission or the circumstances thereof.

(b) Under the provisions of the statute of this state the corroborating evidence must, in itself, without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense. This corroborating evidence need not be sufficient of itself to establish the guilt of the defendant, but it must tend in some degree to implicate and connect the defendant with the commission of the offense charged. The requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the defendant with the commission of the offense. The statute does not require that such witness should be corroborated in respect to every material fact, but only in respect to such of the material facts as constitute the necessary elements in the crime charged.⁴⁸

(c) If you are satisfied, from the evidence, that the witnesses, V. J., E. S., J. B., and J. R., or either of them, were "accomplices," or if you have a reasonable doubt as to whether they, or either of them, were not, as that term is defined in the foregoing instructions, then

additional use of the word 'regretted.' We do not think the use of this language in the instruction, particularly when the whole instruction is considered, at all warrants the criticism directed against it by counsel that thereby the court assumed the existence of a state of facts of which there was no evidence. We do not perceive that the court made any such assumption. In that portion of the instruction challenged by counsel, the court was not referring to what the evidence tended to show. It was declaring an abstract principle of law to its fullest extent—that a party associated with others for the purpose of engaging in a robbery, in which a homicide is committed by one of his associates, is as guilty of murder as if he had actually done the killing himself;

and it is no defense that the party did not intend that life should be taken in the perpetration of the robbery, or forbade his associates to kill, or regretted that it had been done. This was but the declaration of the rule of absolute responsibility of a party for a homicide committed by his associates in furtherance of their common purpose to rob, emphasized by a reference to possible defenses which might in such a case be urged, but unavailing, against that responsibility, and we cannot perceive that the appellant has any reasonable ground to complain of it."

47—Hicks v. State, 123 Ala. 15, 26 So. 337 (338).

48—State v. Bond, 12 Idaho 424, 86 Pac. 43 (48).

you are further instructed that you cannot find the defendant guilty upon their testimony, unless you are satisfied that the same had been corroborated by other evidence tending to establish that the defendant did in fact commit the offense.⁴⁹

(d) You are instructed that, under the law of this state, a person charged with a crime cannot be convicted upon the evidence of an accomplice, unless the testimony of such accomplice is corroborated by other evidence tending to connect the defendant with the commission of the offense charged; and the corroboration is not sufficient if it merely shows the commission of the crime. An "accomplice," as the word is here used, means any one connected with the crime committed, either as principal, an accomplice, an accessory or otherwise. It means a person who is connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the crime, and whether or not he was present and participated in the commission of the crime. The corroborative evidence must be such as of itself, and without the aid of the testimony of the accomplice, tends in some degree to show that the defendant was engaged in the commission of the crime. And where circumstances are relied upon as corroboration, these circumstances must be criminative; that is, these circumstances, if the accomplice had not testified at all, must to some extent be consistent with the innocence of defendant of the crime charged. So, if you believe, from the evidence, that the witness M. R., who has testified before you, is an "accomplice" within the meaning of that word as used in this charge, then you cannot convict the defendant on his testimony, even though you should believe his testimony has been corroborated by other evidence in the case, outside of his testimony, and outside of any evidence that may merely show the commission of the crime, that tends in some degree to connect defendant with the commission of the offense charged; and you must further believe, from the evidence, that the facts and circumstances relied upon by the state as corroboration are criminative—that is, inconsistent to some extent with the innocence of defendant of such unlawful killing.⁵⁰

(e) Under the laws of this state, a person cannot be convicted upon the testimony of an accomplice unless he be corroborated by

49—*Stevens v. State*, — Tex. Cr. App. —, 58 S. W. 96.

50—*McKinney v. State*, — Tex. Cr. App. —, 88 S. W. 1012 (1913).

Appellant criticises this charge, as we understand, because the court says the evidence must tend in some degree to connect defendant with the commission of the offense, and that by the use of the words "some degree" the court required less corroboration than the statute Article 781, White's Ann. Code Cr. Proc. reads, "Unless corroborated by other evidence tend-

ing to connect defendant with the offense committed." For decisions on this question, see section 997, White's Ann. Code Cr. Proc. In *Jones v. State*, 3 Tex. App. 575, a charge containing the language here criticised on the question of corroboration was approved. However, we believe that it is better practice to follow the statute. This is not a case of circumstantial evidence. Appellant's confession takes it out of the rule; and, besides, the testimony of M. R. clearly does so.

such other evidence in the case as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.⁵¹

(f) You are charged that the witness, J. S., is an accomplice and you cannot convict defendant on his testimony, unless corroborated by other evidence tending to connect defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense.⁵²

§ 2749. Testimony of Accomplice—What Corroboration Sufficient.

(a) The slightest corroboration of the testimony of an accomplice is sufficient if it tends to connect the defendant with the commission of the offense.⁵³

(b) It is not necessary that the testimony of the accomplice be corroborated circumstantially and in detail, but the corroboration is sufficient if the corroborative evidence of itself, and without the aid of the accomplice testimony, in any material matter tends to connect defendant with the commission of the offense for which he is charged; but it need not be sufficient of itself to establish defendant's guilt.⁵⁴

(c) The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. And in this case you are instructed that mere proof of the death of the deceased, M. S., from poison, is not such corroboration as would justify a conviction upon the testimony of the said E. S. alone, if you find she was an accomplice in causing the death of said M. S. But if you fail to find that E. S. was an accomplice as heretofore defined, then if you believe her testimony to be true, and you find it connects the defendant with the commission of the crime, then it would be sufficient to connect the defendant with the commission of the crime without further testi-

51—This charge in the words of the code approved in *State v. Russell*, 90 Iowa 493, 58 N. W. 890, 28 L. R. A. 195.

In *State v. Smith*, 106 Iowa 701, 77 N. W. 499 (500), homicide, the following was approved:

But, upon this question of corroboration of an accomplice, you are further instructed that you have a right to consider the death of the deceased, the cause of said death, in connection with all the facts and circumstances, if any, shown or disclosed by the evidence, which tend to connect the defendant with causing said death of deceased; and if you find that the facts and circumstances, if any, shown or disclosed by the evidence, corroborate the testimony of the witness ——— tending to connect the defendant with the commission of the crime charged, then you are entitled to

convict said defendant upon the evidence of said E. S. so corroborated alone, if you believe the said witness, and if you further find that her evidence warrants such conviction.

52—*Winfield v. State*, 44 Tex. Cr. App. 475, 72 S. W. 182.

The court said:

"If the testimony raises the issue merely of an accomplice then it is proper for the court to submit this to the jury by charge; but where the evidence is undisputed going to show that witness is an accomplice, it is not on the weight of the evidence, nor erroneous, for the court to so instruct the jury. *Hatcher v. State*, 65 S. W. 97, 3 Tex. Ct. Rep. 234."

53—*Crittenden v. State*, 134 Ala. 145, 32 So. 273 (275).

54—*Wilkerson v. State*, — Tex. Cr. App. —, 57 S. W. 956 (962).

mony. But, upon this question of corroboration of an accomplice, you are further instructed that you have a right to consider the death of the deceased, the cause of said death, in connection with all the facts and circumstances, if any, shown or disclosed by the evidence, which tend to connect the defendant with causing said death of deceased; and if you find that the facts and circumstances, if any, shown or disclosed by the evidence, corroborate the testimony of the witness E. S. tending to connect the defendant with the commission of the crime charged, then you are entitled to convict said defendant upon the evidence of said E. S. so corroborated alone, if you believe the said witness, and if you further find that her evidence warrants such conviction.⁵⁵

§ 2750. Testimony of Accomplice—Corroborated by Confession.

(a) A confession by the defendant, if one was made, is admissible as corroborating evidence of that of an accomplice, and may be taken by the jury as a sufficient corroboration to authorize a conviction.⁵⁶

§ 2751. Testimony of Accomplice—Need Not Be Corroborated. (a)

It is not the rule of law, but it is rather the result of our experience in dealing with that class of testimony, that, while you may convict upon the uncorroborated testimony of an accomplice, still you should act upon his testimony with great caution, subject it to a careful examination in the light of the other evidence in the case, and you are not to convict upon such testimony alone, unless satisfied, after a careful examination, of its truth, and also that you can safely rely on it. If that testimony is corroborated, and it satisfies you beyond a reasonable doubt of defendant's guilt, it is your duty to convict. If you find, from all the other evidence, that the charge brought by the state is made out, it is your duty to say so by a verdict of guilty. It is your duty to bring in a verdict of guilty, if you feel that you can rely upon the testimony of that witness, even if not corroborated, if you are satisfied beyond a reasonable doubt of the truth of the charge.⁵⁷

(b) The evidence of an accomplice should be received by the jury with great caution, but if the testimony carries conviction, and the jury, after careful consideration of all the evidence, are convinced

55—State v. Smith, 106 Iowa 701, 77 N. W. 499 (500).

56—Crittenden v. State, 134 Ala. 145, 32 So. 273 (275).

57—State v. Hauser, 112 La. 313, 36 So. 396 (402).

In State v. Vicknair, 52 La. Ann. 1921, 28 So. 273 (276), the following charge was approved:

The fact that a witness was an accomplice may affect his credibility, but not his competency; that he is a legal witness, and you must determine what credit you think his testimony is entitled to, whether corroborated or uncorroborated.

The court said "There is no doubt that an accomplice is a competent witness, provided he is not being tried at the same time with the accused for or against whom he is called on to testify; the fact of his being an accomplice affecting his credibility only, of which the jury are the judges. State v. Prudhomme, 25 La. Ann. 522; State v. Bayonne, 23 La. Ann. 78; State v. Mason, 38 La. Ann. 476. The objection that the testimony of an accomplice could not be taken unless corroborated was therefore not well made, and was properly overruled."

of its truth, they should give to it the same effect as would be allowed to that of a witness who is in no respect implicated in the offense.⁵⁸

(c) The testimony of an accomplice is competent evidence, and the credibility of such an accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will sustain a verdict when uncorroborated, yet the testimony of an accomplice must be received with great caution; but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense.⁵⁹

§ 2752. Testimony of Accomplice—Should be Received with Caution. (a) You are instructed that the testimony of an accomplice in a crime—that is, a person who actually commits or assists or participates in the crime—is admissible in evidence. Yet the evidence of an accomplice in a crime, when not corroborated by some person or persons not implicated in the crime as to matters material to the issues—that is, matters connecting the defendant with the commission of the crime charged against him—ought to be received with great caution by you before you convict the defendant on such testimony.⁶⁰

(b) The testimony of an accomplice should be weighed with great caution, and the jury may disbelieve such testimony altogether, if they believe it untrue, the jury being the sole judge of the credibility of the witness. The jury is not bound to accept W.'s evidence as true, or any part of it, if they believe it untrue, and the jury should weigh the testimony of an accomplice with great care and caution.⁶¹

(c) The information in this case jointly charges the witness, D. B., and defendant with the killing of S. J. The testimony of an accomplice in crime—that is, a person who actually commits, or participates in the crime—is admissible. Yet the evidence of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime, as to matters connecting the defendant with the commission of the crime, as charged against him, and identifying him as the perpetrator thereof—ought to be received with great caution by the jury, and the jury ought to be satisfied of its truth before they should convict the defendant on such testimony. The jury may convict the defendant on the uncorroborated testimony of an accomplice alone, if you believe the statements given by such accomplice in his testimony to be true, if you further believe that the state of facts testified to by such witness, if any, is sufficient to establish the guilt of the defendant.⁶²

58—Myers et al. v. State, 43 Fla. 500, 31 So. 275 (279).

This language has been approved in Bacon v. State, 22 Fla. 51, and Shiver v. State, 41 Fla. 630, 27 So. 36.

59—Shiver v. State, 41 Fla. 630, 27 So. 36 (39), citing Bacon v. State, 22 Fla. 51.

60—State v. Miller, 190 Mo. 449, 89 S. W. 377; State v. Sprague, 149 Mo. 409, 50 S. W. 901 (905).

61—Wilson v. State, 71 Miss. 880, 16 So. 304; Brown v. State, 72 Miss. 990, 18 So. 431 (432).

62—State v. Darling, 199 Mo. 168, 97 S. W. 592.

§ 2753. An Accomplice Cannot Corroborate Herself—Corroboration Must be by Evidence Outside and Beyond Her Statements, Acts and Declarations—Seduction. The court instructs that you cannot convict defendant upon the uncorroborated testimony of B. R. Before you would be authorized to convict upon her testimony, it is necessary for her to be corroborated upon both the alleged promise of marriage, and also upon the alleged act of sexual intercourse; and in this connection the court further instructs you that no act, statement or declaration made by said B. R. subsequent to the alleged seduction can be considered by you as corroborating her testimony. The court instructs you that said corroboration is absolutely essential to a legal conviction; that although the jury might believe the testimony of B. R. to be true, still they cannot convict unless they further believe that there is other testimony outside of her testimony tending to connect defendant with the commission of the offense charged.⁶³

MISCELLANEOUS.

§ 2754. Statements of Prosecuting Attorney not Based on Evidence. The jury are instructed, that it would be highly improper and wrong for them to regard the statements of the prosecuting attorney that, etc., as entitled to any weight whatever in this case. And this is true of any and all other statements of his that are not based on the evidence in the case, if any such have been made.⁶⁴

§ 2755. Opinion of Prosecuting Attorney as to Guilt of Defendant is not to be Considered by the Jury. You are instructed that the opinion of the prosecuting attorney that the defendant is guilty should not be considered by you. It does not matter what his opinions may be. Before you can find the defendant guilty, you must believe he is guilty, beyond a reasonable doubt, from the evidence as testified by the witnesses in the case.⁶⁵

§ 2756. Instruction Correcting Statement of Attorney in Argument—Reference to Biblical Laws. Under the Mosaic dispensation I believe it is true, as my Brother Davis informed the jury, that it required more than one witness to establish the guilt of a person. Moses was a great lawgiver, and no one respects that lawgiver more than your humble servant. He codified the laws. He enacted as laws for the government of Israel under the peculiar conditions in which they were placed in that day. But it is not the law of Georgia. Our law-

63—Barnard v. State, — Tex. Cr. App. —, 76 S. W. 475 (476).

64—Kennedy v. The People, 40 Ill. 488.

In White v. State, 133 Ala. 122, 32 So. 139, the court held that it is not error in the court to refuse a charge having no other purpose than to respond to or offset argu-

ments made before the jury by the prosecuting officer. The confessed purpose of the charge being to refute some remarks of the solicitor in his closing argument; citing Mitchell v. State, 129 Ala. 23, 30 So. 349.

65—Cox v. State, 72 Ark. 544, 81 S. W. 1056 (1057).

makers have believed, for reasons satisfactory to themselves, that such laws are not applicable nor suitable to our day and time, and therefore the laws of Georgia are laid down in our Code as follows: "The testimony of a single witness is generally sufficient to establish a fact." Exceptions to this rule are made in specified cases, such as to convict of treason or perjury (this is not treason or perjury) and in any case of felony where the only witness is an accomplice (this is not a felony, nor is it contended that any witness is an accomplice). Even in these cases (except in treason) corroborating circumstances may dispense with another witness. Now, gentlemen, that is the law of Georgia. That is the law you are sworn to try criminal cases by under the jurisprudence of Georgia.⁶⁶

§ 2757. Arguments of Counsel—Laying Foundation for Civil Suit. There has been some suggestion by counsel for the defendant that this prosecution is laying the foundation for a civil suit. That is a matter you have nothing to do with. It has no place in this case at all. Your simple duty is to determine whether upon the testimony produced before you in this hearing this defendant is guilty as charged, and, if you are satisfied from such testimony that he is guilty, then it is your duty so to say; otherwise you should acquit him.⁶⁷

§ 2758. Consideration Due to Argument of Counsel. You will now, gentlemen of the jury, listen to the arguments of counsel, who will

66—*Cole v. State*, 120 Ga. 485, 48 S. E. 156.

"From the assignment of error on this charge it appears that in his argument to the jury the solicitor made reference to 'the biblical injunction not to put the bottle to thy neighbor's lips'; that counsel for the accused in his reply argued 'that, if the Bible was the rule we were trying this case on, then the state would wholly fail, because the great lawgiver had said that in the mouth of two witnesses shall a fact be established.' It is urged that the court in the charge quoted, singled out the argument of counsel for the accused, and in effect answered it and discredited it to the detriment of the accused. It is also contended that the charge practically instructed the jury that, if one witness had testified against the accused, he should be convicted, and that the reference to corroborating circumstances was erroneous, because, as contended in this case there were no corroborating circumstances. Whatever may be said of the charge under consideration, it cannot be denied that it states a proposition of law eminently sound in the abstract. It

will be noted that it is not objected that the charge was argumentative, but merely that it singled out a portion of the argument of counsel for the accused and answered it. Under the circumstances we think this was permissible. Counsel on both sides of the case seem to have abandoned the law and relied on the prophets; and it was clearly the right of the court to remind the jury that the issue of the case was to be determined under the laws enacted by the Georgia Legislature, and not by those handed down from Sinai. In the early case of *Matthews v. Poythress*, 4 Ga. 294, Nisbet J., delivering the opinion, said: 'If, in the argument, legal positions are taken by counsel, which in the judgment of the court are wrong, I see no sort of objection to the court instructing the jury according to its judgment of those positions.' The rather argumentative tone of the charge excepted to in the present case is to be deprecated, but, as no objection was made to it on this ground, it will not work the grant of a new trial."

67—*State v. Clark*, — N. J. —, 64 Atl. 984.

endeavor to aid you to reach a proper verdict in this cause by refreshing in your minds the evidence which has been given to you in this cause, and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be, and by the law as given in these instructions, and render such verdict as to your consciences and reason and candid judgment seems to be just and proper.⁶⁸

§ 2759. Comment on Evidence by Court to be Disregarded. Under the constitutions and laws of this state, the jury are the sole judges of the facts, and the judge is prohibited from commenting upon the facts. Therefore, if in ruling upon objections or in answering questions asked by counsel for either the state or defendant, or in any other way, or under any other circumstances the court has commented upon the testimony in this case, the court instructs you that you are to disregard entirely any and all such comment by the court, if any has been made.⁶⁹

§ 2760. Duty to Convict—Expression of Opinion. You take this case, gentlemen of the jury, and determine what the truth is. If the defendant is guilty, and you are satisfied of it to the extent I have charged you, it would be your duty to convict him. If so, just say, "We, the jury, find the defendant guilty."⁷⁰

§ 2761. Defendant May Rely Upon Any Theory or Claim He May See Fit—Trumped-up Charge or Conspiracy as a Defense. The court instructs you that it is claimed by the defense that this whole matter concerning the charge against this respondent is a conspiracy or the outgrowth of a conspiracy; that it is a trumped-up charge—in other words, made out of whole cloth, as we say in common parlance—and that there is no truth in it whatever. Now, that evidence goes into this case to be considered with the other evidence in the case, not necessarily as affirmative proof, because, as I said, when all the evidence in the case is before the jury, the burden of proof remains where it is started, with the prosecution. But this is the respondent's claim. You can measure it, you can weigh it, you can sift it, and see what there is to it; that is what you may do. The defense does not have to have a theory, except as they see fit to adopt a theory. The

68—State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888).

69—State v. Manderville, 37 Wash. 365, 79 Pac. 977 (978).

70—Addis v. State, 120 Ga. 180, 47 S. E. 505.

"We do not think the charge subject to the criticism made upon it. The judge had fully charged the jury as to the law of reasonable doubt, and also the rules to be followed in determining cases of circumstantial evidence; and if the jury, from the evidence, were

satisfied to the extent that he had charged them—that is, beyond a reasonable doubt—that the accused was guilty, it was their duty under the law to convict him, and there was no error in instructing them to this effect. Properly construed, there was nothing in the charge complained of which contained an expression of opinion, or which constrained the jury to find any other way than according to the evidence as it appeared to them."

defense is "not guilty;" that is the plea; and, as I told you, they rest upon that plea until the prosecution shall convince the jury of the guilt of the respondent. They may meet that proof in whatever way they see fit. That is what I mean by saying that the defense rely upon a conspiracy. They may meet it by such claim as they see fit to put forth in the case.⁷¹

§ 2762. Tried by Evidence Only—Not on Suspicion—Evidence Excluded or Stricken Out. (a) The defendant is to be tried only on the evidence which is before the jury, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted.

(b) The court deems it proper to admonish you that you are not to consider evidence which has been excluded by the court in determining any fact in the case.⁷²

§ 2763. Must First Determine Guilt Before Fixing Punishment. I have no right to instruct you as to what the sentence might be in case the defendant is found guilty on either of the three counts in the indictment. That is a question which you have nothing in the world to do with. The question that you have to determine is simply a question of fact. It is entirely out of place for you to consider what punishment might be inflicted upon the defendant in case he is found guilty of any offense; that is a question that comes later in the case. You are to consider the evidence adduced in this case, and then determine as to the defendant's guilt or innocence, and nothing else. The law prohibits this court from giving you any instructions, or making any remarks to you whatever, as to what punishment the defendant might receive in case he is found guilty.⁷³

§ 2764. Witness Excused from Answering, When the Answer Might Incriminate. In this case the witness A. B. was asked whether, etc., and declining to answer the question on the ground that the answer might criminate himself, he was excused from answering. From this failure to answer, the jury must not infer that, etc.,—the jury are not at liberty to suppose, infer or imagine what would have been his answer, if one had been given. The case, so far as that question to that witness is concerned, stands as if the question had not been put. The jury must act upon the evidence in the case and not upon what they may imagine the evidence might have been.⁷⁴

71—*People v. Rich*, 133 Mich. 14, 94 N. W. 375 (377).

72—*People v. Roberts*, 1 Cal. App. 447, 82 Pac. 625.

The court said that "when the jury were told that the defendant is to be tried only on the evidence which is before the jury, they as sensible men must have understood that evidence stricken out was not before the jury, and evidence excluded may fairly be said to include evidence stricken out."

73—*Clarey v. State*, 61 Neb. 688, 85 N. W. 897.

The court said "this instruction assumes nothing, and very properly told the jury it was none of their business as to the punishment. That question, in a case like this, is for the court, and arises after verdict of guilty, and not before."

74—*People v. Brewer*, 27 Mich. 134.

§ 2765. **Contradictory and Inconsistent Statements.** The court further instructs the jury, that the fact that witnesses disagree in minor points in their recollection and recital of transactions does not necessarily militate against the candor of any of them. It may only indicate a failure of observation or recollection. Jurors have not the right to captiously or unreasonably disregard the testimony of witnesses, but, unless there appears something which indicates a lack of candor or untruthfulness on the part of the witness, the testimony of all the witnesses should receive proper and candid consideration by the jury, in an honest discharge of their sworn duties.⁷⁵

§ 2766. **Impeaching Witnesses by Contradictory Statements.** Evidence has been offered as to the whereabouts of other persons who are jointly indicted with this defendant, at the time when this offense was alleged to have been committed. This evidence has been offered but for one purpose, namely, for the purpose of throwing light upon the credibility of witnesses in this case. To make this plain to you, certain witnesses have been offered as to certain parties other than the defendant being present at the scene of the killing. Witnesses have been offered to prove that these parties were not present. This last evidence is only relevant for the purpose of contradicting or impeaching such witnesses. You are not to pass upon the guilt or innocence of these parties. In considering this evidence, you only consider it in determining the credit to be given to the testimony of such witnesses, because a witness may be impeached by proof of contradictory statements, and also by disproving the facts testified to by him.⁷⁶

§ 2767. **Credibility—Rejecting Evidence of Perjured Witness.** (a) The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony. In determining as to the credit you will give a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, motives actuating the witness in testifying, the witness' relation to or feeling for or against the defendant or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All those matters being taken into account with all other facts and circumstances given in evidence, it is your province

⁷⁵—State v. McDivitt, 69 Ia. 549, 29 N. W. 459.

⁷⁶—Cochran v. State, 113 Ga. 736, 39 S. E. 337 (339).

"We see no error in this charge. The evidence in question was offered for the distinct purpose of impeaching certain witnesses, and

the court had not been called to pass on its admissibility for any other purpose. That being the case, it was not error to restrict its consideration by the jury to the purpose for which it was admitted, even if it were admissible for other purposes."

to give each witness such value and weight as you deem proper. If, upon a consideration of all the evidence, you conclude that any witness has sworn willfully falsely as to any material matter*involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony.⁷⁷

(b) The jury are the sole judges of the credibility of the witnesses, and of the weight and value of their testimony. In determining such credit, weight, and value, you may take into consideration the character of the witness; his or her manner on the stand and of testifying; his or her interest, if any, in the result of the case; his or her relation to or feeling for the defendant or the deceased; the probability of his or her statement, as well as all other facts and circumstances detailed in evidence; and in this connection you are further instructed that, if you believe any witness has willfully sworn falsely to any material fact in the case, you are at liberty to disregard or treat as untrue the whole or any part of such witness' testimony, except in so far as the same may be corroborated by other credible evidence or by facts and circumstances in evidence in the case.⁷⁸

§ 2768. Testimony of Police Officers and Detectives—Greater Care in Weighing. The court instructs the jury that certain police officers and detectives have testified in this case on behalf of the state, and that, under the law of this state, in weighing their testimony greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused.⁷⁹

§ 2769. Police Officers' Testimony not to be Discarded or Suspicion Cast on it. The police department is an important part of the machinery of our government, and it is well enough to bear in mind that your homes, your lives and your property would not be safe but for the police department and officers. It does not follow that because an officer testifies in the court room that his testimony is to be dis-

77—State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888); homicide.

78—State v. Kinder, 184 Mo. 276 83 S. W. 964 (966); murder.

A nearly identical instruction is approved in State v. May, 172 Mo. 630, 72 S. W. 918 (920). It is as follows:

The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and in determining such credibility and weight you will take into consideration the character of the witness, his or her manner on the witness stand, his or her relation to or feeling toward the defendant or the prosecuting witness, the probability or improb-

ability of the witness' statements, the opportunity that the witness had for ascertaining the facts to which he or she has testified, together with all the other facts and circumstances detailed in evidence; and if you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to reject any portion or all of such witness' testimony.

79—Kastner v. State, 58 Neb. 767, 79 N. W. 713 (716).

The court held "this instruction to be in harmony with the rule announced in *Preuit v. People*, 5 Neb. 378; and *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am Rep. 835." But see *Frudie v. State*, 66 Neb. 244, 92 N. W. 320.

carded, or any suspicion cast upon it, unless there is something about it which calls your attention to it.⁸⁰

§ 2770. Witness Who Testified in Commitment Court Dead—What Evidence Considered. But in this case what was testified to as to what the dead boy (claimed to have been a witness in the justice's court trial), said is not to be considered by you as evidence, unless you believe the boy was sworn and testified to it in the commitment court. What has been testified to, here, as to what he did say, if he was not sworn, you discard entirely.⁸¹

§ 2771. Credibility—Testimony Stipulated Into the Case. In considering the written testimony of G. W., admitted in this trial, by the state, as facts which G. W. would testify to if present, the jury must give the same weight to such testimony as they would give to it had W. been before them on the stand, testifying under oath; and if, from all the testimony in the case,—the testimony of W. inclusive,—there is a reasonable doubt of the guilt of the accused as charged in the indictment, the jury must acquit.⁸²

§ 2772. Irreconcilable Conflict in Evidence. If the evidence is irreconcilable, you must consider that evidence which you deem worthy of credit, and discard that which you do not deem worthy of credit. You must give the evidence just such weight as you think it deserves. The jury should weigh all the evidence and reconcile it, if possible; but, if there be irreconcilable conflict in the evidence—they ought to take that evidence which they think worthy of credit, and give it just such weight as they think it entitled to.⁸³

§ 2773. Duty to Consider all the Evidence. You must consider all the evidence in connection with the law as given you, and therefrom reach a decision. In doing so you must consider without fear, favor or affection, bias or prejudice, or sympathy, compare weight and consider all the facts and circumstances shown by the evidence, with the sole, fixed and steadfast purpose of doing equal and exact justice between the state and the defendant.⁸⁴

§ 2774. Two Counts in Indictment—Duty to Consider all Evidence Under Each Count. For the purpose of determining the guilt or innocence of the defendant upon the two counts in the complaint upon which he is being tried, you should consider upon each count the testimony of all the witnesses that have appeared before you.⁸⁵

§ 2775. Attendance of Witnesses—Limit of Process—Taking Testimony by Commission. (a) The court instructs the jury that the process of the state of Florida to compel the attendance of witnesses does not run beyond the limits of the state, and the attendance of witnesses beyond the limits of the state cannot be compelled.

80—People v. Shoemaker, 131 Mich. 107, 90 N. W. 1035 (1036).

81—Ford v. State, 97 Ga. 365, 23 S. E. 996 (997).

82—Lee v. State, 75 Miss. 625, 23 So. 628.

83—Bondurant v. State, 125 Ala. 31, 27 So. 775 (776); homicide.

84—State v. Buralli, 27 Nev. 41, 71 Pac. 532 (535); homicide.

85—Lincoln Center v. Bailey, 64 Kan. 885, 67 Pac. 455.

(b) The constitution of the state requires the prosecution to produce the witnesses against the defendant face to face with him. Under the laws of this state a defendant in a criminal case can have a commission issued, and the testimony of an absent witness taken on deposition. The state cannot do this.⁸⁶

§ 2776. **Plea of Not Guilty.** When the defendant interposed his plea of not guilty, he thereby put in issue every fact necessary to establish guilt.⁸⁷

§ 2777. **Joint Trial—Jury May Find One or More Guilty, Others Not Guilty.** (a) The court instructs the jury that they are at liberty to find one or more of the defendants guilty and others not guilty, as they may deem right and proper under the instructions of the court and the evidence in the case.⁸⁸

(b) The court charges the jury that E. is not on trial in this case,

86—*Leslie v. State*, 35 Fla. 171, 17 So. 555 (558).

87—*People v. Manning*, 146 Cal. 100, 79 Pac. 856 (858).

88—*State v. Vaughan*, 200 Mo. 1, 98 S. W. 2.

"It is insisted that this instruction should have been given, and a separate finding or verdict as to each one, because each of them had the right to have his case passed upon by the jury, as if he alone were upon trial. As the case went to the jury, this phase of it was not submitted to them, in the absence of which the jury may have believed that it was their duty under the evidence and instructions to find the defendants all guilty or to acquit them all. While it may be true that they were all alike guilty, were they not entitled to have the jury instructed that they were at liberty to find one or more of them guilty and others not guilty as they might believe from the evidence? We think they were. It is no answer to this suggestion to say that under the evidence they were all alike guilty, for that question was for the consideration of the jury, and it was their province, if so inclined, to have acquitted either one or all of them, or to have acquitted some of them and found the others guilty, or guilty of a less degree of crime than that charged, notwithstanding the evidence to the contrary. *State v. Orstrander*, 30 Mo. 13, was a prosecution under an indictment charging murder in the first degree, and although no instructions were given bearing upon murder in the second degree, and the evidence clearly showed the defendant

guilty of murder in the first degree, a verdict returned by the jury finding the defendant guilty of murder in the second degree was held to be responsive to the indictment, and that the trial court was bound to receive it. Each one had the right to have the jury pass upon his guilt or innocence, and the evidence considered by the jury in regard to his particular case, unbiased or uninfluenced by the evidence in respect to the guilt of his codefendants. In the case at bar the jury might have convicted a part of the defendants, and disagreed as to the others, or have acquitted a part of them and convicted or failed to agree as to the others, had they been so instructed. 1 *Bishop's New Criminal Prac.* par. 1036; *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182. In *Abrams v. State*, 121 Ga. 170, 48 S. E. 965, *Abrams* and *One Osburn* were jointly indicted for grand larceny. They were tried together, and both were convicted. The point was made in a motion for a new trial that the court failed to instruct the jury distinctly that they might acquit one of the accused even though the other was convicted. The Supreme Court held that it was erroneous under the peculiar facts of the case to fail to instruct the jury distinctly, though one of the accused was found guilty, the other might nevertheless be acquitted. In *State v. Daniels*, 115 La. 59, 38 So. 894, it is held that, where three persons are being prosecuted at the same time and under the same indictment, the jury ought to be instructed that one or two may be convicted or acquitted without the

and that, if the jury believe that the defendants are guilty, they can find them guilty whether the jury believes that E. had anything to do with the burning of the house or not.

(c) The jury may convict one or more of the defendants as the evidence may justify, and this jury has nothing to do with the influence that a verdict of guilty in this case may have in another case against E. for the same offense; they must try this case on its own merits.⁸⁹

§ 2778. **Former Acquittal as a Defense.** You are instructed that, if you believe, from the evidence, that the defendant's plea of former acquittal is true, you need not look further into the case, but return a verdict as follows: "We, the jury, find that the defendant's plea of former acquittal is true, and find the defendant not guilty." But if you should believe, from the evidence, beyond a reasonable doubt, that the defendant's plea of former acquittal is not true, then you will determine whether or not the defendant is guilty as charged; and, if you find the defendant guilty, beyond a reasonable doubt, the form of your verdict will be as follows.⁹⁰

§ 2779. **Former Conviction of Defendant.** The defendant had a right to be sworn and testify in his own behalf, but that in weighing his testimony, and in determining the weight which should be given thereto, the jury may take into consideration his interest in the result of the trial, and his action and demeanor while on the witness stand, and the further fact, if the same was proven, which was admitted by the defendant, that he had been convicted of a felony and confined in the penitentiary of another state, as affecting his credibility as a witness.⁹¹

§ 2780. **Detection of Crime—Means Must Not Amount to Inducement or Solicitation.** The court instructs the jury that it is legitimate to adopt such measures as may be deemed necessary to detect crime, provided the means used do not amount to a practical inducement or solicitation to commit it.⁹²

§ 2781. **Date of Crime.** It is not necessary, in order to establish the offense charged, that the state should prove the charge or crime to have been committed on the exact day alleged in the information. It would be sufficient to show that the crime was committed at any time within two years prior to the — day of —, which was the day this prosecution was begun.⁹³

conviction or acquittal of the other or others. Our conclusion is that this instruction or one of similar import should have been given in view of the first instruction given on the part of the state."

89—James v. State, 104 Ala. 20, 16 So. 94 (96).

90—Stone v. State, — Tex. Cr. App. —, 85 S. W. 808.

91—Keating v. State, 67 Neb. 560, 93 N. W. 980 (981).

92—State v. Dudoussat, 47 La. 977, 17 So. 685 (687).

93—State v. Lackey, 72 Kan. 95, 82 Pac. 527.

"This is the usual and correct instruction given relating to the certainty of date and the limitation of the action, where, as is usual, only one crime is charged in the information, but was erroneous and misleading in the case at bar."

CHAPTER XCII.

CRIMINAL—ABDUCTION—ABORTION—ADULTERY—BASTARDY—BIGAMY—DISORDERLY HOUSE—INCEST—RAPE—SEDUCTION.

See Erroneous Instructions, same chapter head, Vol. III.

ABDUCTION.

- § 2782. Abduction—Proof of.
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ABORTION.

- § 2784. Abortion—Result of natural causes.
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ADULTERY—CRIMINAL.

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- § 2810. Rape—Prompt complaint by prosecutrix.
- § 2811. Failure of prosecutrix to complain.
- § 2812. Failure of prosecutrix to make outcry.
- § 2813. Outcry by prosecutrix prevented by fear.

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| <p>§ 2814. Adulterous disposition of defendant and prosecutrix—How material.</p> <p>§ 2815. Rape—Circumstances summed up by the court.</p> <p>§ 2816. Prosecutrix under age of consent.</p> <p>§ 2817. Age of prosecutrix, how proven.</p> <p>§ 2818. Reasonable doubt as to age of girl.</p> <p>§ 2819. Testimony of the prosecutrix.</p> <p>§ 2820. Whether prosecutrix need to be corroborated.</p> <p>§ 2821. Attempted rape—Definition of.</p> <p>§ 2822. Assault with intent to commit rape—Essential elements.</p> <p>§ 2823. Assault with intent to commit rape—Abandonment of purpose.</p> <p>§ 2824. Intent to overcome prosecutrix with force essential.</p> <p>§ 2825. Reasonable doubt as to defendant's intent to overcome all resistance with force.</p> <p>§ 2826. Not necessary that every instruction should show the prosecutrix not to be the wife of the defendant.</p> <p>§ 2827. Definition of carnal abuse.</p> | <p>§ 2828. Rape—Assault with intent to commit rape—Series.</p> <p style="text-align: center;">SEDUCTION.</p> <p>§ 2829. Illicit intercourse alone is not seduction—What constitutes the offense.</p> <p>§ 2830. Not seduction when by force and against her will.</p> <p>§ 2831. Seduction under promise of marriage—Refusal of prosecutrix to marry defendant—Proof required.</p> <p>§ 2832. Promise of marriage—Female thought to be of previous chaste character—Unchaste at time of seduction.</p> <p>§ 2833. Previous chaste character—Promise to marry—Reasonable doubt.</p> <p>§ 2834. Voluntary consent as a defense.</p> <p>§ 2835. Circumstantial evidence sufficient to corroborate—Proof of acquaintance and opportunity not sufficient.</p> <p>§ 2836. Complainant's contradictory evidence—Reasonable doubt.</p> <p>§ 2837. Presumption of innocence—Jury must reconcile evidence and indictment—Compromise cannot bar prosecution.</p> |
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ABDUCTION.

§ 2782. **Abduction—Proof of.** You are instructed that before you should convict the defendant in this case you must believe from the evidence beyond all reasonable doubt that defendant maliciously, willfully or fraudulently did lead, take, carry away, decoy, or entice away F. H., without the consent of her mother, etc.¹

§ 2783. **Abduction—Previous Chaste Character Presumed.** The jury are instructed that the presumption of the law is that the life and previous character of the prosecuting witness, A. S., were chaste, and the onus is upon the defendant to produce sufficient evidence to overcome such presumption.²

1—Riley v. State, — Miss. —, 13 So. 117.

2—Bradshaw v. People, 153 Ill. 156 (159), 38 N. E. 652, 9 Am. Crim. Rep. 23.

The court said: "If the words 'previous character,' as used in the instruction, do not mean substantially the same as 'conversation' as used in the statute in the phrase 'a chaste life and conversation,' they are to our minds meaningless. They might properly have

been omitted from the instruction, but we are unable to discover in what manner the use of them placed any greater burden upon the defendant than would have been done by the instruction without them. . . . The general rule in such cases is that "chaste character will be presumed, and the burden is on the defendant to impeach it, notwithstanding the presumption of innocence in his favor." (See cases cited in Vol. 87 Ameri-

ABORTION.

§ 2784. **Abortion—Result of Natural Causes.** If the jury believes that A. aborted from natural causes, or from any one of the several causes testified to by the medical witnesses in the case, then you should find the respondent not guilty. If the jury believes that A. aborted by reason of the ordinary sickness and vomiting, augmented by the nervous, mental excitement, fatigue, lack of nourishment, and the change of climate, then you should find the respondent not guilty.³

§ 2785. **Abortion Resulting in Injuries Causing Death, Murder or Manslaughter, According to Intent.** (a) If you believe from the evidence, beyond a reasonable doubt, that prior to the finding of the indictment herein, in the county of U., state of Kentucky, the defendant, C., did willfully, feloniously and with malice aforethought kill and murder W. by thrusting into her body an instrument, which by said use was ordinarily dangerous to her life, with the intent to procure an abortion upon her, you shall find him guilty as charged in the indictment, and in your discretion fix his punishment at death, or confinement in the penitentiary of the state during his natural life.

(b) If, however, the instrument, as used by defendant, if he used any instrument on her, was not necessarily dangerous to life, yet if you believe from the evidence, beyond a reasonable doubt, that it was, by the defendant, thrust into the body of W. with the intent to procure an abortion, and she was thereby killed, contrary to the wish and expectation of defendant, he should be acquitted of murder, but you should find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary from two to twenty-one years, in your discretion.

(c) Though the wound inflicted on W. by the defendant, if he inflicted any, may not have been sufficient of itself to produce death, yet if you believe, beyond a reasonable doubt, from the evidence, that such wound, owing to her condition, produced her death, when, but for the wound, she would not then have died, the wound is, in law, the cause of her death, and you should so find.⁴

§ 2786. **Abortion—Definition of—Present, Aiding and Abetting, May Be Murder in First Degree.** Where two persons agree to commit a felony, each is responsible for the act of the other, provided it be done in pursuance of the original understanding or in furtherance

can decisions, note on p. 406, also *Slocum v. People*, 90 Ill. 274."

3—*People v. Seaman*, 107 Mich. 348, 65 N. W. 203 (208), 61 Am. St. 326.

The court said above requested instruction should have been given.

"The testimony tending to prove the body of the crime was circumstantial. The theory of the de-

fense was that death resulted from natural causes. That theory should have been submitted to the jury." citing *People v. Cummins*, 47 Mich. 334, 11 N. W. 184, 186.

4—*Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740 (746).

"The above instructions, in our opinion," said the court, "are without just criticism."

of the common purpose. Hence if you find that the defendant agreed together with A. and B. and others to take W. to the V. house for B. to produce an abortion on her, producing an abortion being a felony, and an abortion being as follows: "Every person who shall administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, and every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes,"—and the defendant in pursuance of that agreement, carries her to the V. house to effect that purpose, and B. killed her in the attempt to produce the abortion, the defendant being present, aiding and abetting, it would be murder in the first degree, if he knew the nature of the act he was doing and that the act was wrong.⁵

ADULTERY.

§ 2787. **Criminal Prosecution for Adultery—Adulterous Disposition or Inclination.** (a) You may also take into consideration any evidence tending to show an opportunity upon the part of these parties to commit this crime. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in a verdict of guilty against this defendant, if this evidence satisfies you beyond a reasonable doubt that the crime was committed.⁶

(b) You can take into consideration evidence tending to show an adulterous or amorous disposition on the part of the accused, and also on the part of the person with whom it is alleged that he committed this crime—any adulterous or amorous disposition, or evidence tending to show an inclination on the part of these parties to commit

5—State v. Mills, 116 N. C. 992, 21 S. E. 106 (107).

6—State v. Eggleston, 45 Ore. 346, 77 Pac. 738 (742).

"In State v. Scott, 28 Ore. 331, 42 Pac. 1, it is said: 'Mere proof of an opportunity to commit adultery is insufficient to convict a person of that crime, unless there be proof also of an adulterous mind on the part of both parties; and to prove this state of mind circumstantial evidence is admissible to show a purpose or inclination to commit the act.' To the same effect, see Herberger v. Herberger, 16 Ore. 327, 14 Pac. 70; Freeman v.

Freeman, 31 Wis. 235. If adultery could be inferred from the existence of an opportunity to commit the act, it would be unsafe for persons of opposite sex to meet, except in the presence of others. When, however, proof of an adulterous disposition on the part of each party has been produced, evidence of an opportunity to commit the act is admissible, and from these combined factors the commission of the crime may be reasonably inferred. No error was committed in giving such instruction."

adultery. You can take into consideration any evidence tending to show such a disposition, either before or after the time when this crime is alleged to have been committed; and you may take into consideration any evidence tending to show that this act was committed at other times and places, although it may show distinct and separate crimes, because such evidence would tend to show an adulterous disposition or inclination on the part of the parties.⁷

§ 2788. Adultery May Be Presumed from the Conduct and Situation of the Parties—Nighttime Defined. (a) If you find from the evidence, and beyond reasonable doubt, that the defendant went to the dwelling house of D. secretly and in the nighttime, and there secretly entered the dwelling house, and was shortly thereafter found undressed and in bed with Mrs. B., who was then also undressed, then a strong presumption would arise that he did so enter for the purpose of committing adultery; and such presumption would continue until rebutted by the evidence, and, if not so rebutted, would justify you in finding such intent to have existed at the time of the entry. "Nighttime" means the time between darkness after sundown and dawn of daylight in the morning.⁸

(b) The court instructs the jury that if a married man is found with a woman not his wife, in a room with a bed in it, and stays

7—State v. Eggleston, supra.

"This instruction," said the court, "was evidently founded on the rule announced in State v. Bridgman, 24 Am. Rep. 124, where it was held on the trial of an indictment for adultery that evidence was admissible of improper familiarity and adultery both before and after the commission of the offense charged, although it proved other and different offenses."

8—State v. Mecum, 95 Iowa 433, 64 N. W. 286 (287).

"The contention is that the court presumes the intent charged, notwithstanding there was evidence tending to show that defendant did not have that intention 'when he went to the house and window.' Appellant quotes from section 2290, 2 Thomp. Trials, as follows: 'A presumption of fact is simply an inference or conclusion of the existence of a fact from some other fact. It is always drawn by the jury, who are the triors of questions of fact. It is therefore merely a repetition of what has already been said to say that it is for the jury and not for the judge to draw presumptions of fact, and that for the judge to tell the jury what presumptions of fact they ought to draw from a given fact or series of facts is a usurpation

of their functions.' It is argued that, if all that is enumerated in the instruction was proven, yet, in view of the defendant's evidence, it was a question of fact for the jury whether an intent to commit adultery should be presumed therefrom. Counsel for appellee quote the part of said section preceding that quoted by appellant, as follows: 'A presumption of law is a conclusive or indisputable inference which the law, by a settled rule, draws from a given fact. Such an inference is therefore made by the judge, and not by the jury.' In State v. Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. 425, the court instructed as follows: 'If you find that, in the nighttime, the defendant broke and entered the dwelling house described in the indictment, this fact would be strong presumptive evidence that the defendant did such breaking and made such entry with the intent to commit a public offense. But such presumption may be overcome by evidence.' That instruction was approved, the court holding that the facts 'raise a presumption of an intent to commit a public offense.' This instruction, like that, does not declare the presumption 'conclusive or indisputable,' but only a strong presumption, that should continue until re-

through the night with her there, that is sufficient to warrant a finding of adultery against him.⁹

§ 2789. Living in State of Adultery Not Proved by Occasional Illicit Acts. (a) The court charges the jury that if you believe from the evidence that W. lived with his mother, near the college, and that L. lived with her mother, in Needmore, and that they did not live together in adultery or fornication, you should acquit the defendant; and before defendants, or either of them, can be convicted, the evidence must satisfy your minds beyond a reasonable doubt, that the defendants did more than occasional acts of illicit or criminal intimacy.¹⁰

(b) The court instructs the jury that you are to determine from all the circumstances as brought out by the evidence whether or not the defendants lived together in a state of adultery, and in order to find the defendants guilty, you must find, from the evidence, that the defendants were living together in an open and notorious state of adultery, and that they were cohabiting together; and if the evidence does not establish the living together and cohabiting together of the defendants in the minds of the jurors beyond a reasonable doubt, then you must find the defendants not guilty.¹¹

§ 2790. Prosecution Must Be at the Instance of Either Husband or Wife. You are instructed that you should be satisfied that this prosecution was brought at the instance of the wife before you can convict.¹²

BASTARDY.

§ 2791. Question of Paternity Material, Not the Character of Complainant. The material question to be determined by this action is not what is the character of the complaining witness, but the question for you to determine from the evidence under the instructions of the court is, is the defendant the father of her bastard child as charged? If you shall find from the evidence in the case, under the instructions given you, that the defendant is the father of her bastard child, it is immaterial on that question what the character of the complaining witness, J. K., was or is.¹³

butted. See also *State v. Maxwell*, 42 Iowa 208, and *State v. Teeter*, 69 Iowa 717, 27 N. W. 485."

9—*Commonwealth v. Clifford*, 145 Mass. 97, 13 N. E. 345 (346).

"The form of expression might be used in such a way as to prejudice the jury, but on its face it only means that there is evidence to be considered by the jury, and that they have a right to infer guilt if that inference appears to them the true one. Such a ruling is unexceptionable, and the correction left the defendant without ground of complaint. *Eldridge v. Hawley*, 115 Mass. 410; *Goodnow v. Hill*, 125 Mass. 587."

10—*McAlpine v. State*, 117 Ala. 93, 23 So. 130.

11—*Tomlinson v. People*, 102 Ill. App. 542 (543).

In this case said the court, "the defendants were indicted not for adultery but for living in an open state of adultery; it was therefore necessary to a conviction that the evidence should show beyond a reasonable doubt that they had so lived," citing *Searles v. People*, 13 Ill. 565; *Miner v. People*, 58 Ill. 59.

12—*State v. Eggleston*, 45 Ore. 346, 77 Pac. 738 (743).

13—*Suckow v. State*, 122 Wis. 156, 99 N. W. 440 (441).

§ 2792. Previous Birth of Another Bastard Not to Be Considered—Prior Chastity Not Material. You are instructed that in determining whether or not the defendant is the father of said bastard child, it is entirely immaterial as to the plaintiff's chastity prior to the time that the child in question was begotten; and it is improper for you to consider in passing upon this point, or take into consideration, the fact that the plaintiff was the mother of another bastard child several years previous to the birth of this one.¹⁴

§ 2793. Sexual Intercourse with Other Men about the Time the Child Was Begotten. (a) Evidence has been permitted to go to you of the relatrix's association with one X. The purpose of evidence of this character is to prove that at about the time the child in question was begotten the relatrix had intercourse with said X., and that the child was begotten by such intercourse; and it is competent only for this purpose. It is your province alone to determine the weight of the evidence, and it is for you to say whether or not the evidence on this point is sufficient to establish the fact that such intercourse did take place between the relatrix and X.

(b) If you should be satisfied from the evidence that the relatrix did have intercourse with X. about the time the child in question was begotten, it does not necessarily follow that your finding shall be for the defendant, but it is a circumstance you should consider in determining the question as to whether or not the defendant is the father of the child.

(c) The state must show by a preponderance of the evidence that the defendant is the father of the child, and if you should find from the evidence that about the time the child was begotten both the defendant and X. had intercourse with the relatrix, and that you are unable to tell which of them is the father of the child, then you must find for the defendant.¹⁵

14—Morgan v. Stone, 4 Neb. 115 (Unof.), 93 N. W. 743 (745).

15—Goodwine v. State, 5 Ind. App. 63, 31 N. E. 554.

The court said in comment that "it is true the question whether or not X is the father of the relatrix's child is not an issue in this cause. It may also be true that proof of sexual intercourse with another would tend to throw doubt upon the credibility of the relatrix's testimony. O'Brien v. State, 14 Ind. 468. But, after all, the only purpose of proof of intimate relationship and association with X must be to show criminal connection, for certainly it could not be maintained that proof of mere intimacy between the relatrix and another, without sexual intercourse, tended to impeach her as a witness. Whatever may be the ultimate ob-

ject of the testimony, the mere fact of association between the relatrix and other men proves nothing unless it tends to establish criminal connection other than that to which the relatrix attributes the conception and pregnancy, and that the child was begotten at a time and by one other than as claimed by her. . . .

" . . . We agree with the court that it does not necessarily follow that the jury must find for the defendant even if they were satisfied that the relatrix had intercourse with X about the time the child was begotten, although, in our opinion, it would have been better to leave the entire question as to the force and effect of such testimony to the jury. There is no doubt, however, that there are or may be circumstances enabling a

§ 2794. Credibility of Complaining Witness in Bastardy Proceedings. The jury are instructed that while the precise day on which sexual intercourse took place, resulting in pregnancy and the birth of a child, in a case of this kind, is not material, yet in this case, if the jury believe that the complaining witness testified falsely that the defendant had sexual intercourse with her on Sunday, May 19, 1901, the jury have a right to take that fact, if such is the fact, into consideration as affecting her credibility in determining whether or not the defendant is the father of the child in question.¹⁶

§ 2795. Only Evidence That of the Prosecutrix—Jury at Liberty to Disregard It if They Believe It to Be Untrue. (a) The court instructs the jury that if they believe from the evidence that the only evidence tending to prove the guilt of the defendant is the testimony of the prosecuting witness, Miss R. J., and that her testimony on any material point is untrue, then the jury is at liberty to disregard her whole testimony.

(b) The court instructs the jury that if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, Miss R. J., then they should scrutinize her testimony with care and caution.¹⁷

BIGAMY.

§ 2796. Acts and Conduct Which Would Tend to Prove Marriage. You may look to the fact that the defendant and the woman, A., lived together 13 years; that they lived in the same house under the same roof that long; that a few years ago, when one of their children died, that the defendant and A. went to the grave of the child together, she leaning on his arm; and that they signed deeds as husband and wife,—in deciding what weight you will give to the testimony of the woman A.¹⁸

§ 2797. Persons Exempt from Charge of Bigamy on Account of Prior Marriage. The jury is instructed that section 800 of the Revised Statutes as amended by Act No. 93 of 1898 reads as follows: "If any married person shall marry, the former husband or wife

female to determine to which of two or more connections her conception is due. *Kintner v. State*, 45 Ind. 175. There was, therefore, no technical inaccuracy in the statement of the court, and, as the jury were also told that they were the exclusive judges of the weight and effect of the evidence, no harm could have resulted from the instruction, and we cannot say upon the whole that the province of the jury was invaded by it.

The last instruction properly informs the jury, we think, if they

find that at about the time conception took place both the defendant and X had carnal knowledge of the relatrix, and they are unable to decide which of them is the father of the child, they should find for the defendant. *Whitman v. State*, 34 Ind. 360; *Kintner v. State*, *supra*."

16—*Beck v. People*, 115 Ill. App. 19 (21).

17—*State v. Perry*, 41 W. Va. 641, 24 S. E. 634 (638).

18—*Bynon v. State*, 117 Ala. 80, 23 So. 640, 67 Am. St. 163.

being alive, the one so offending shall, on conviction, be imprisoned at hard labor in the state penitentiary for a period of not more than five years, and not less than one year. The provisions of this statute shall not extend to any person whose husband or wife shall absent himself, or herself, from the other for the space of five years, the one not knowing the other to be living within that time; nor to any person who shall be at the time of such marriage divorced by competent authority, nor to any person whose former marriage by sentence of competent authority shall be declared void."¹⁹

§2798. Criminal Intent Presumed from the Doing of the Prohibited Act. The criminal intent of the accused is presumed to exist whenever a statute has made it criminal to do any act under particular circumstances, and the party voluntarily does the act. He is thereby chargeable with the criminal intent by the doing of the act.²⁰

DISORDERLY HOUSE.

§ 2799. Disorderly House and Lewdness Defined. A house resorted to for the purpose of prostitution and lewdness is a house visited by persons of both sexes for the purpose of having sexual intercourse, or some other lewd purpose; lewdness is the unlawful indulgence of the animal desires.²¹

§ 2800. Keeping Disorderly House—Other Offenses Not in Issue. However bad she may be, or however guilty of other offenses, the question for you to determine here is whether she is guilty of the offense charged, and has that guilt been shown beyond a reasonable doubt?²²

19—State v. Cain, 106 La. 708, 31 So. 300 (301).

The court said in comment that "bigamy is a statutory crime, and the crime denounced by the first paragraph of section 800, Rev. St., falls within the commonly accepted definition thereof. 2 Whart. Cr. Law (10th Ed.) §1682.

The act of 1898 imposes a penalty for bigamy, and repeals all laws in conflict with its provisions; hence it operates the repeal of the penalty for that crime as provided in the first paragraph of section 800, Rev. St. But the second paragraph of that section purports to exempt certain classes of persons from the penalty denounced by the first, and the fact that one penalty is substituted for the other does not affect such exemption. In fact, of the three classes mentioned, two—that is to say, persons who at the time of their second marriage have been di-

vorced, or those whose first marriages have been decreed void—would not incur the penalty denounced by the first paragraph, even if they had not been specially exempted, for the reason that they are not included within the terms of the first paragraph; and with regard to the other class, i. e., persons whose husbands or wives have been absent, etc.,—the defendant has no concern. He would, therefore, have no reason to complain if the charge had been erroneous, but there was no error."

20—State v. Cain, 106 La. 708, 31 So. 300 (302), citing Com. v. Marsh, 7 Metc. 472; 4 Am. & Eng. Enc. Law p. 40 note.

21—State v. Wilson, 124 Iowa 264, 99 N. W. 1060 (1061).

22—People v. Wells, 112 Mich. 648, 71 N. W. 176 (177).

The court held that "there was no error in this instruction. It had crept out in the testimony that de-

§ 2801. **Extorting Money Under Threats of Criminal Prosecution for Keeping Bawdy House.** The court instructs the jury that, the keeping of a bawdy house is an offense against the ordinances of the city of Pensacola, and if the defendant threatened to turn M. over to the criminal court for keeping a bawdy house unless she paid money, this would be threatening to accuse her of a crime against the ordinances of the city of Pensacola.²³

§ 2802. **Accessory—House of Ill Fame.** The court instructs the jury, as a matter of law, that any one who aids, abets, assists or encourages in the keeping or superintending of a house or of premises where prostitution, fornication or concubinage is allowed or practiced, is guilty as principal.²⁴

INCEST.

§ 2803. **Definition of—Consent of Both Parties Not Essential to the Crime of Incest.** The court instructs you that the consent of both parties is not essential to the crime of incest. If the party charged have sexual intercourse with a female related to him within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female.²⁵

defendant had been charged with selling liquor without a license, and testimony affecting her character for chastity had been given. This instruction was in her interest, and to ward against the jury giving undue weight to those items of testimony which tended to show her guilty of other offenses."

23—Wallace v. State, 41 Fla. 547, 26 So. 713 (725).

24—Mash v. People, 220 Ill. 86, 77 N. E. 92 (95).

"This instruction, as an abstract proposition of law, correctly states the rule that all who are accessories to the commission of a crime are held as principals. It does not purport to state that any one who aids, abets, etc., in the operation of a house of prostitution, is guilty of the crime charged in the indictment under which the plaintiff was put to trial, and is not, as argued by the plaintiff in error, faulty in that it ignores all the elements necessary to be found by the jury to warrant a conviction of the plaintiff in error."

25—People v. Stratton, 141 Cal. 604, 75 Pac. 166 (167).

The court said in comment that "incest is defined by the Code as follows: 'Persons, being within the degrees of consanguinity within

which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other are punishable by imprisonment in the State Prison not exceeding ten years.' Pen. Code, par. 285. Upon this it is urged and argued that the crime of incest cannot be committed without the mutual consent of the parties, and that where, as here, the act is shown to have been accomplished under circumstances amounting to the rape of the female, the crime is not incest but rape. In support of this view there is authority of great weight and dignity. Incest was not known to the common law, and being, therefore, a statutory crime, its definition will be found to be as various as the statutes themselves. But in many states where no substantial distinction can be discerned between their laws defining the offense and our own, the decisions fully support appellant's contention. The Supreme Court of Oregon, in a careful and learned opinion, reviews many of the cases, and reaches the conclusion which it expresses as follows: 'We think the decided weight of authority is that under a statute like

§ 2804. **Question of Relationship—Admission of Competent Evidence.** (a) If the defendant B. has been proven to have admitted that G. was his daughter, such admission is competent evidence for the jury to consider upon the question of the relationship of the defendant to B., and is sufficient to establish the fact she was his daughter, if it satisfies the jury on that fact beyond a reasonable doubt.

ours, the crime of rape by forcible ravishment and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties.' State v. Jarvis, 26 Pac. 302, 23 Am. St. 141, 20 Or. 437. In DeGroat v. People, 39 Mich. 124, the learned Justice Cooley, speaking for the court, said: 'Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristic of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent assent of two.' The reasoning by which this conclusion is reached in all of the cases which so hold can be stated in the language of the Supreme Court of Oregon, in the case above cited, as follows: 'It will be noticed that the language of the statute is "with each other," which necessarily implies a concurrent act and the consent of both parties. If one of the parties is compelled by force to submit to the act, there can be no consent of such party, and the act cannot be committed "with each other," as declared by the statute.' But this reasoning does not commend itself. It interprets the law as making mutuality of agreement and joint consent of the essence of the crime. This is done by judicial construction, and not by the express declaration of the law. The gravamen of the crime of incest, as of rape, is the unlawful carnal knowledge. In rape, it is unlawful because accomplished by unlawful means. In incest, it is unlawful, without regard to the means, because of consanguinity or affinity. Where both the circumstances of force and consanguinity are present, the object of the statute being to prohibit by punishment such sexual intercourse, it is not less incest because the element of rape is added, and it is not less rape because perpetrated upon a relative. In this, as in every offense, the guilt of the defendant is meas-

ured by his knowledge and intent, and not by the knowledge and intent of any other person. That such has been the view of this court is evidenced by People v. Kaiser, 119 Cal. 456, 51 Pac. 702, where the defendant was indicted for the crime of incest, alleged to have been committed upon his daughter, a girl under 13 years of age. As intercourse with a female child incapable in law of giving consent is declared to be rape, it was argued against the indictment that the offense charged was rape. But this court said: 'Assuming that the facts stated in the indictment in this case were sufficient to constitute the crime of rape, the daughter then being under the age of consent, still, under section 285 of the Penal Code, they clearly constituted the crime of incest, and the defendant was therefore properly put upon trial for that offense.' In further support of this view may be cited Bishop, Statutory Crimes, par. 660; Wharton, Criminal Law, par. 1751; State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321, 8 Am. Dec. 175; Mercer v. State, 17 Tex. App. 452; People v. Barnes, 2 Idaho (Hasb.) 161, 9 Pac. 532; Smith v. State, 108 Ala. 1, 19 So. 306, 54 Am. St. 140; State v. Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. 349; State v. Ellis, 11 Mo. App. 588; Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. 954.

If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is particeps criminis, and her testimony, like that of any other accomplice, is insufficient to uphold a conviction. Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640. But if, upon the other hand, she is the victim of force or fraud or undue influence, or is too young to be able to give legal assent, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. Porath v. State, supra. In this case, the instructions fairly left this matter

(b) If from the evidence you believe that the defendant B. and the defendant G.'s mother were never married to each other, and that the defendant B. is not the father of G., then the court instructs you that any sexual intercourse between the defendants, B. and G., would not be incest, and you should acquit the defendant.

(c) If from the evidence you believe that the defendant B. is not the father of G., but was the husband of her mother, and that her mother was dead before any sexual intercourse; if any, occurred between the defendants, B. and G., then the defendant B. would not be guilty of incest, and you should acquit him.

(d) If you have any reasonable doubt from the evidence that B. is the father of G., then you should give him the benefit of the doubt and acquit him.

(e) If you have any reasonable doubt from the evidence of the guilt of the defendant B. according to the instructions given you then you should acquit the defendant.²⁶

RAPE.

§ 2805. Rape Defined. To constitute the crime of rape, it will be necessary for you to find beyond all reasonable doubt that this defendant had carnal knowledge of the body of this young lady by

open to the determination of the jury."

26—*Brown v. State*, 42 Fla. 184, 27 So. 869 (871).

"It is contended," said the court in comment, "that the instruction excepted to is erroneous, under the principles governing the decision in *Green v. State*, 21 Fla. 403, 58 Am. Rep. 670. The indictment in that case was for polygamy, and the judgment of conviction was reversed because the only evidence of the first marriage was that proving cohabitation and repute. If we admit that the principles controlling the decision in that case are applicable to proof of marriages on indictments like the one before us, they would not apply to the instruction complained of here, because this instruction does not relate to evidence of a marriage, but to evidence of the relationship between the parties charged with crime. Perhaps, if it had been necessary to prove that G. was the legitimate daughter of the plaintiff in error, the instruction would have been erroneous, because, to prove legitimacy, it might be necessary to prove a valid marriage; in which case, ac-

cording to the decision in *State v. Roswell*, 6 Conn. 446, the principles of the *Green Case* would be applicable. But the crime denounced by our statute can be committed by a father with his illegitimate daughter, and it was therefore not necessary to prove a valid marriage between plaintiff in error and the mother of G. *Bishop St. Crimes*, par. 727; *Baker v. State*, 30 Ala. 521; *People v. Jenness*, 5 Mich. 305; *State v. Schauburshurst*, 34 Iowa 547; *State v. Laurence*, 95 N. C. 659. Evidence of the character mentioned in the instruction is not only admissible, but it is sufficient for the jury to found their verdict upon, if believed by them to be true. There was no error in giving this instruction in connection with the other instructions mentioned. *People v. Harri-den*, 1 Parker Cr. R. 344; *Ewell v. State*, 6 Yerg. 364. 27 Am. Dec. 480; *State v. Bullinger*, 54 Mo. 142; *Cook v. State*, 11 Ga. 53; *State v. Schauburshurst*, 34 Iowa 547; *People v. Jenness*, 5 Mich. 305; *Bergen v. People*, 17 Ill. 426. 65 Am. Dec. 672; 2 Whart. Cr. Law, par. 1753; *Bishop St. Crimes*, par. 735."

force and against her will, and I mean by that, it will be necessary for you to find that the act was committed by force and against the will of this young lady; that she did everything she could under the circumstances to prevent defendant from accomplishing his purpose. If she did not do that, it is not rape.²⁷

§ 2806. **Proof of Intercourse Alone Not Sufficient to Convict.** You are instructed that you cannot find the defendant guilty in this case upon proof alone that defendant had intercourse with the complaining witness.²⁸

§ 2807. **Moral Character of Prosecutrix—Reputation for Chastity.** Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape cannot be committed on a woman of bad moral character. A woman may be a common prostitute, and may still be a victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will,—upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. So that whatever conviction the evidence may produce in your minds as to whether she is of good or bad moral character, or as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is true or false, and the act of intercourse voluntary or against her will.²⁹

§ 2808. **Defense of Consent by Prosecutrix.** (a) To authorize a conviction of rape, the jury must believe from the evidence, beyond a reasonable doubt, that the defendant had carnal connection with the prosecuting witness, forcibly and against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape, the will of the female alleged to have been outraged must have been overcome, either by force, violence or fear. If she consents to sexual intercourse in the least during any part of the act there is no such opposing will as the law requires to convict on the charge of rape.³⁰

(b) If the jury believe from the evidence that, on or about the 28th day of last July, the prosecutrix went to the barn where the defendant was engaged in harnessing horses, and that mutual overtures were made between them leading to a mutual understanding and desire to have intercourse there in the barn when they were dis-

27—People v. Murphy, 145 Mich. 524 (528), 108 N. W. 1009 (1011).

28—People v. Howard, 143 Cal. 316, 76 Pac. 1116 (1118).

29—Anderson v. State, 104 Ind.

467, 4 N. E. 64 (65), 5 N. E. 711, 5 Am. Cr. Rep. 601.

30—Brown v. People, 36 Mich. 203, 2 Am. Cr. Rep. 586; Ulrich v. People, 39 Mich. 245; Maxey v. State, 66 Ark. 523, 52 S. W. 2 (6).

covered, then the jury are instructed that they must find the defendant not guilty.³¹

§ 2809. **Involuntary Consent Induced by Fear.** (a) If you believe from the evidence in this case, that an act of sexual intercourse did take place between the defendant and the prosecutrix, as averred in the indictment, then, the question as to whether or not she did voluntarily consent to such act, is a question of fact for you to determine, from the evidence in the case. The defendant insists that she did voluntarily consent thereto, and that he used no force or coercion of any kind to compel such consent, but that she yielded to his desires upon his request alone. While the prosecution insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that if she finally submitted to her fate it was against her will, and for the fear of more serious consequences. You are to say from the evidence, which, if either, is right, and, if, after giving due weight to all the evidence, you find the prosecutrix did voluntarily consent to such act of intercourse, and not under coercion, you should acquit; but if you find, beyond a reasonable doubt, that the act was by force, and against her will, and find the other facts averred in the indictment established beyond a reasonable doubt, you should convict.³²

(b) You are instructed that rape is a carnal knowledge of a female, forcibly and against her will; and where threats of personal violence are made to overcome her will, and she believes that her person is in danger from said threats, and defendant has sexual connection with her, then the law considers such carnal knowledge as having been forcibly had, and against the will of the female.³³

(c) If, at the time the man had carnal knowledge of the female, her mind was overpowered by fear induced by the man, and therefore she made no resistance, it is rape.³⁴

(d) If she was incapable of resistance through fear, or if resistance was entirely useless, there might be rape if no resistance was in fact made.

(e) It is to be expected that resistance will be made, unless the mind of the woman is so overcome by fear that she is incapable of resistance, or unless there is such an exhibition of brute force as to make resistance useless or impossible.³⁵

(f) If the jury believe, from the evidence, beyond a reasonable

31—*Adams v. People*, 179 Ill. 633 (637), 54 N. E. 296; assault with intent to rape.

32—*Anderson v. State*, 104 Ind. 467, 4 N. E. 64 (65), 5 N. E. 711, 5 Am. Cr. Rep. 601.

33—*State v. Urie*, 101 Iowa 411, 70 N. W. 603 (604).

34—*Rice v. State*, 35 Fla. 236, 17 So. 286 (287), 48 Am. St. 245.

"The gist of the offense is forcible carnal knowledge against the

will of the woman. Surely there could not be such an absurdity as claiming that the act was not against the will of the woman when her will was paralyzed with fear through the wrongful act of the defendant and she was incapable of voluntarily consenting." The court cited *Hollis v. State*, 27 Fla. 387, 9 So. 67.

35—*State v. Long*, 72 Conn. 39, 43 Atl. 493 (495).

doubt, that the defendant had sexual intercourse with the said A. B. against her will, then the defendant may be guilty of the crime of rape, although the said A. B. did not make the utmost physical resistance of which she was capable to prevent such intercourse, provided the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant threatened to use force and to do her great bodily injury in case she did not submit, and that she did submit to such sexual intercourse through fear that the defendant would do her great bodily injury.³⁶

§ 2810. Rape—Prompt Complaint by Prosecutrix. (a) Upon the trial of a defendant accused of the crime of rape the fact that the prosecutrix made prompt and early complaint of the wrong and injury committed upon her person, and to her character and chastity, is admissible and may be received and considered by the jury in corroboration of her other testimony given in the case.³⁷

(b) The court instructs the jury that if you believe, from the evidence, that the prosecuting witness told her father of the assault alleged to have been made on her at the earliest opportunity, then that is a corroborating circumstance tending to sustain the truth of her statements.³⁸

§ 2811. Failure of Prosecutrix to Complain. Though the jury may believe, from the evidence, that the prosecuting witness did not tell her (mother) or others of the alleged outrage upon her until, etc., still, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant was guilty of the crime charged in the indictment, and, if the jury further believe, from the evidence, that at the time of the alleged outrage the defendant threatened to take her life if she ever told of what had occurred, and she was afraid she would lose her life, or suffer some great bodily harm, if she should tell of the injuries complained of, then these facts would excuse the prosecuting witness from communicating the knowledge of such injury to others.³⁹

§ 2812. Failure of Prosecutrix to Make Outcry. If the jury believe, from the evidence, that at the time of the alleged rape other people were at the same time in the same house, who might easily

36—State v. Ruth, 21 Kas. 583.

37—People v. Keith, 141 Cal. 686, 75 Pac. 304.

"That the instruction is a correct statement of the law is held in People v. Lambert, 120 Cal. 170, 52 Pac. 307, and in People v. Wilmot, 139 Cal. 103, 72 Pac. 838, and we can see no error in so informing the jury."

38—Bean v. People, 124 Ill. 576 (582), 16 N. E. 656.

The court said this "was strictly too broad in its use of the term 'statements.' The instruction might properly have been more

guarded, and have said that the prosecuting witness' telling her father of the assault was a circumstance tending to sustain the truth of her statement on trial, and that such an assault was made. This was the substantial meaning of the instruction given, and was probably so accepted."

See also State v. Niles, 47 Vt. 82; Pefferling v. State, 40 Tex. 486.

39—Turner v. People, 33 Mich. 363.

See also Brown v. State, 72 Miss. 997, 17 So. 278 (279).

have heard her had she made any outcry, and that she in fact made no outcry at the time defendant was attempting to have connection with her, these facts will tend to raise a presumption that no rape was committed upon her at the time.⁴⁰

§ 2813. Outcry by Prosecutrix Prevented by Fear. If you find the defendant committed the alleged offense upon the plaintiff, and that the defendant threatened her and put her in fear, that is a circumstance to be taken into consideration by you in rebutting unfavorable inferences from her not making outcry and offering more physical resistance to the commission of the alleged offense.⁴¹

§ 2814. Adulterous Disposition of Defendant and Prosecutrix—How Material. You are further instructed that evidence of previous act of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on the 23d day of February, 1902, and for no other purpose.⁴²

§ 2815. Rape—Circumstances Summed Up by the Court. The charge of rape against a person is easy to make, difficult to prove, and more difficult to disprove, and in considering a case of this kind, it is the duty of the jury to carefully and deliberately consider, compare and weigh all the testimony, facts and circumstances bearing on the acts complained of, and the utmost care, intelligence and freedom from bias should be exercised by the jury in the consideration thereof. The time and place of the alleged acts, relation of the defendant to the said Y., upon whom the assault is alleged to have been made; her age and intelligence, strength and physical development, his influence and power over her, if any; her condition thereafter, together with the condition of her clothes; evidence of injuries, if any, upon her person; appearance of the same when examined; the time since said injuries appeared to have been made; the length of time after the alleged transaction before complaint was made by her; the place where said acts are alleged to have been committed; the corroborating evidence, if any; what was said by him, if anything to the little girl, W., at the time of the alleged acts; what, if any—

40—State v. Hagerman, 47 Ia. 151.

41—Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911 (912).

"It seems very clear, upon a proper construction of this request, that it cannot be held prejudicial to the defendant; for, if the offense had actually been committed as it assumes, the plaintiff was entitled to recover whether there were threats or not, and all that relates to this subject after the of-

fense had been committed was entirely unnecessary."

42—People v. Edwards, — Cal. —, 73 Pac. 416 (417).

"In a case like this it has been held not to be error to admit evidence of previous acts of sexual intercourse between the parties for the purpose of showing the disposition of the defendant. People v. Williams, 133 Cal. 168, 65 Pac. 323; People v. Manahan, 32 Cal. 68."

thing, she, W., saw and heard at the time,—together with all the other facts and circumstances of the case, as the same have been developed and established by the proof in the case, should be considered by you while you are considering whether the defendant is or is not guilty of the crime charged.⁴³

§ 2816. **Prosecutrix Under Age of Consent.** (a) Rape is the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud. To constitute the crime of rape, it is necessary that penetration be shown, but, if penetration be shown to have actually taken place as a matter of fact, the degree of penetration is immaterial. Penetration, as herein used, means the penetration of the female organ of a female with the male member or — of a man.⁴⁴

(b) If you believe from the evidence in this case beyond a reasonable doubt that the defendant, J. P., in the county of Brazos and state of Texas, on or about the month of February, A. D. 1902, did have carnal knowledge of L. P., and did penetrate the female organ of said L. P. with his male member or —, and that said L. P. was then and there a female under the age of fifteen years, and was not then and there the wife of the defendant, J. P., you will find the defendant guilty under the first count of the indictment, and assess his punishment by death or by confinement in the penitentiary for life or for any term of years not less than five.⁴⁵

(c) You are further instructed that it is the policy of our law, as expressed in the statutes, that any female under the age of sixteen years shall be incapable of consenting to the act of such intercourse, and that any one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her actual con-

43—State v. Watson, 81 Ia. 380, 46 N. W. 868 (869).

"In the Meshek case, 51 Iowa 308, 1 N. W. 685, an instruction was disapproved because the effect of it was to exclude from the consideration of the jury certain evidence proper for the determination of an important fact in the case. No such objection can be urged to this instruction. It does call attention to particular and important facts, but has no such effect as limiting the evidence to be considered in the finding of any fact in the case. So far as the condition of the hymen is concerned, it is silent, as it is with regard to many other incidental questions in the case but none are excluded in effect because not mentioned. The mention of each fact in instructions is not required of the court. State v. Miller, 65 Iowa 60, 21 N. W. 181."

Compare People v. Totman, 135 Cal. 133, 67 Pac. 51 (53), where a like instruction is held to be an invasion of the province of the jury.

In State v. Trusty, 122 Ia. 82, 97 N. W. 989 (991), the following instruction was refused by the trial court:

Such an accusation is easily made, hard to prove, and harder to be defended against by the party accused, though ever so innocent.

The supreme court said: "While it might have been given, yet we think, in view of the entire charge, there was no error in denying it. No case has ever been reversed, to our knowledge, because of failure to give such cautionary instruction."

44—Price v. State, 44 Tex. Cr. App. 304, 70 S. W. 966 (967); Buchanan v. State, 41 Tex. Cr. App. 127, 52 S. W. 769 (771).

45—Price v. State, *supra*.

sent, and whether the girl in fact consented or resisted is immaterial in this case. In the present case neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her.⁴⁶

(d) The jury are instructed that if you find, from the evidence, beyond a reasonable doubt, that on the date mentioned in the indictment the defendant was above the age of sixteen years and that the prosecuting witness was under the age of fourteen years; and if you further find, from the evidence, beyond a reasonable doubt, that the defendant and the prosecuting witness were then in the office of the defendant; and that the defendant then and there had the intent and purpose to have carnal intercourse with M. G., either with or without her consent, and that in pursuance of and in furtherance of such intent and purpose the defendant then and there did acts toward the accomplishment of such intent and purpose, and that he had then and there the present ability to accomplish such intent and purpose, then you should find the defendant guilty as charged.⁴⁷

§ 2817. Age of Prosecutrix—How Proven. The state would not be required to show the age of said Emma M. by a family record or any instrument in writing; such proof may be made by oral testimony of witnesses, and said Emma M. is a competent witness as to her age, and such testimony may be based upon information with respect thereto, if any she may have, from her parents.⁴⁸

§ 2818. Reasonable Doubt as to Age of Girl. If you believe from the evidence that at the time the defendant had sexual intercourse with the prosecuting witness, as alleged, she was of the age of 15 years or over, then you will find the defendant not guilty; or, if you have a reasonable doubt of the fact that she was under the age of 15 years, you will give defendant the benefit of such doubt and find him not guilty.⁴⁹

§ 2819. Testimony of the Prosecutrix. The court instructs the jury that you yourselves are the sole judges of the weight of the

46—*People v. Totman*, 135 Cal. 133, 67 Pac. 51 (52); *People v. Roach*, 129 Cal. 33, 61 Pac. 574.

47—*Addison v. People*, 193 Ill. 405 (416), 62 N. E. 235. The principle stated in the instruction is correct and according to our decisions, although the authorities are not uniform on the subject. That view was adopted in *Porter v. People*, 153 Ill. 370 where W. A. P., being over sixteen years old, was indicted for assault with intent to commit rape upon a girl under fourteen, and the indictment did not charge force. It was held that, inasmuch as the consummated offense would have been rape, it was immaterial whether

the offense was forcible and against the will of the girl or not, and that the indictment was good."

Note: By statute in Illinois age of consent is now sixteen years for female when with male of seventeen years or upwards. Male of sixteen or upwards guilty of rape if done without consent of female any age. Ill. Sess. Laws, 1905, p. 194.

48—*State v. Scroggs*, 123 Ia. 649, 96 N. W. 723 (724).

49—*Curry v. State*, — Tex. Cr. App. — 94 S. W. 1058 (1060).

"It did not impose on him the burden of proof in that respect; nor was it a charge on the weight of testimony."

testimony that has been introduced before you, and in determining what weight to give the testimony of the complaining witness in this case, you should take into consideration her appearance while upon the stand, her apparent interest or lack of interest in the proceeding, if any appear, and her manner of testifying; and, in the light of all her testimony, and of the other evidence in the case, you should give to her testimony such weight, and only such weight, as you think, under all the circumstances, it is entitled to. And if, upon consideration of all the evidence in the case and the former instructions of the court, you find that all the material allegations of the complaint have been proved beyond a reasonable doubt, you should find the defendant guilty. If you find that the material allegations of the complaint have not been so proved, then you should find the defendant not guilty.⁵⁰

§ 2820. **Whether Prosecutrix Need to Be Corroborated.** (a) You are instructed that in the case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense, and if the jury believe from the testimony of the prosecutrix, and the corroborating circumstances, and facts testified to by other witnesses, that the defendant did make the assault as charged, the law would not require that the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made.⁵¹

50—Maxfield v. State, 54 Neb. 44, 74 N. W. 401.

The above instruction was given in response to an inquiry by a juror was held good.

The court said:

"The contention is that the instruction was not responsive to the inquiry made by the juror, and for that reason was misleading and prejudicial. This criticism is unavailing. The doctrine has been repeatedly stated that mere non-direction by the trial court is no cause for the reversal of a criminal cause where there has been no refusal of a proper instruction tendered. Hill v. State, 42 Neb. 502, 60 N. W. 916; Housh v. State, 43 Neb. 163, 61 N. W. 571; Pjarrou v. State, 47 Neb. 294, 66 N. W. 422."

51—Dunn v. State, 58 Neb. 807, 79 N. W. 719 (720).

The court said:

"While the law in this class of cases requires that the prosecutrix shall be corroborated, it does not demand that the corroboration shall be by direct evidence of the particular fact constituting the crime. Proof of incriminating circumstances is sufficient. Krum v.

State, 19 Neb. 728, 28 N. W. 278; Fager v. State, 22 Neb. 332, 35 N. W. 195; Hammond v. State, 39 Neb. 252, 58 N. W. 92. This is exactly the idea which the instruction conveys. It is not susceptible, we think, of any other reasonable interpretation."

See also Matthews v. State, 19 Neb. 330, 27 N. W. 234.

In Brenton v. Territory, 15 Okla. 6 (8), 78 Pac. 83, the following instruction was given:

The court instructs the jury that they cannot find the defendant guilty of the charge made in the indictment unless the testimony of the prosecutrix is corroborated by other testimony admitted upon the trial of the cause. The testimony required by law in corroboration must be of such character as, standing alone, and without the aid of the testimony of the prosecutrix, tends to connect the defendant with the commission of the crime charged; and such testimony in corroboration must apply directly to the defendant, and not be of that character which may apply as well to any other man. Unless the evidence in corroboration is of

(b) In this case the prosecution relies for a conviction upon the testimony of L. S., the prosecuting witness, and no other witness was called by the territory to testify directly to the time and place or circumstances of the alleged offense; and you are instructed, in cases where the territory relies upon the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, that you should view such testimony with great caution, and it is the duty of the court to warn the jury of the danger of conviction on such testimony. You are further instructed that in considering her testimony you may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed—all the facts and circumstances at the time and immediately after the alleged offense was committed—in determining the weight of her testimony, and the reasonableness thereof, as tending to show to your minds the credit to be given to the same.⁵²

(c) The court instructs the jury that it is their province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And, if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself, without other corroborating circumstances or evidence, to justify a verdict of guilty of rape upon the trial of the case.⁵³

(d) The defendant in a prosecution for rape, or an assault with intent to commit rape, cannot be convicted upon the testimony of the

such a character, then it is your duty to find the defendant not guilty. The testimony of the several witnesses who testified to admissions made by the defendant and the testimony of C. N. as to the age of M. N. was intended to corroborate, and was introduced for the purpose of corroborating, the testimony of the prosecuting witness; and if you believe such testimony to be true, it would be a sufficient corroboration of the prosecuting witness; if, standing alone and without the aid of the testimony of the prosecuting witness, it tends to connect the defendant with the commission of the crime, and tends to prove each material fact in the case testified by her.

The court said:

"The rule of requiring the prosecutrix to be corroborated in rape cases is followed, it is believed, in but one state and one territory, except where adopted by statute,

viz., Nebraska and New Mexico. With criminal procedure acts like ours, the states of California, Florida, North Dakota, and Montana have held that such corroboration is not required, and the same is held by the courts of highest resort in Alabama, Arkansas, Arizona, Georgia, Illinois, Kentucky, Michigan, Minnesota, Mississippi, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming. Courts of last resort should be as ready to correct their own errors as they are that of inferior courts, and, believing that the rule as enunciated in *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257, is not the law, said case is overruled. It follows that the instruction given was more favorable to the defendant than the law authorized."

52—*Trimble v. Territory*, 8 Ariz. 273, 71 Pac. 932 (933).

53—*People v. Keith*, 141 Cal. 686, 75 Pac. 304.

person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. The fact that a crime has been committed by some one may be established by the testimony of the injured party alone. But in order to convict for the offense of rape, or assault with intent to commit rape, it is necessary that the testimony of the injured party be corroborated by other evidence tending to connect the defendant with the commission of the crime. In arriving at a conclusion as to whether the prosecutrix, M. S., has been corroborated by other evidence tending to connect this defendant with the offense of rape, or assault with intent to commit rape, you may consider all the facts and circumstances surrounding the case established by the evidence at the time of the commission of the offense, if one was committed, and all other circumstances as shown by the evidence may be considered by you in determining whether the prosecutrix, M. S., has been corroborated by other evidence tending to connect the defendant with the commission of the offense of rape, or assault with intent to commit rape, if either of such offenses was committed. Mere proof of opportunity to commit the offense is not sufficient corroboration. However, it is enough that the corroborating evidence tends to strengthen and corroborate the prosecutrix in connecting the defendant with the commission of the offense, and point out the defendant as the person who committed the offense, if any was committed. It is for you to determine whether the testimony of the prosecutrix in this case has been sufficiently corroborated by other evidence tending to connect the defendant with the commission of the offense of rape, or assault with intent to commit rape, if either of such offenses has been committed.

(e) You should acquit the defendant of the offense of rape unless the testimony of M. S. has been corroborated by other evidence tending to connect the defendant with the commission of such offense. And you should acquit the defendant of the offense of assault with intent to commit rape unless the testimony of M. S. has been corroborated by other evidence tending to connect the defendant with the commission of such offense.

(f) Evidence has been admitted tending to show that the prosecutrix, M. S., made complaint to her brother and mother on July 18, 1902, that she had been ravished by defendant. Such complaints, if any, would not be evidence corroborating the testimony of prosecutrix tending to connect the defendant with the commission of the offenses of rape, or assault with intent to commit rape, if either of such offenses was committed; and neither would the existence of injuries, if any, to her genital organs, be corroboration of the testimony of the prosecutrix tending to connect the defendant with the commission of either offense of rape, or assault with intent to commit rape, if either offense was committed; but the evidence of such complaints was admitted as tending to confirm or corroborate the truth of her testimony. The law is that a failure by the prosecutrix to imme-

diately complain is looked upon as a suspicious circumstance that her story is a fabrication. Hence the testimony of such complaints was admitted for the purpose of testing the accuracy and veracity of the prosecuting witness, and for no other purpose.⁵⁴

§ 2821. **Attempted Rape—Definition of.** (a) It will be necessary for you to find that the defendant made an assault upon this young girl, and actually intended to use whatever force was necessary to accomplish his purpose, and if you find that he did that and actually intended that, it would be your duty, and you would be authorized in finding him guilty of an assault with intent to commit the crime of rape, if you find that he ought not to be convicted of the graver charge.⁵⁵

(b) The jury are instructed that they should acquit defendant unless they believe from the evidence, beyond a reasonable doubt, that defendant did by force attempt to enter the house mentioned in the indictment, and that it was then and there his intention to have carnal knowledge of the said X. by force, and without her consent.⁵⁶

§ 2822. **Assault With Intent to Commit Rape—Essential Elements.**

(a) If you are satisfied beyond a reasonable doubt, from the evidence, that the defendant took hold of said X., and tore open her cloak, and seized her arm, with the intent of having carnal intercourse with her against her will, and with the intent of accomplishing his object at all events, without regard to any resistance she would make, then he is guilty of an assault with intent to commit rape; and, if you are satisfied of this beyond a reasonable doubt, you should so find.⁵⁷

(b) The jury should convict the defendant of an assault with intent to commit a rape, if they believe, from the evidence, beyond a reasonable doubt, that at the time in question he committed an assault on the prosecutrix for the purpose of having carnal intercourse with her, and that in making the assault he intended to use whatever force might be necessary to overcome the prosecutrix and accomplish his purpose.⁵⁸

(c) It must be shown in this case by the evidence, beyond a rea-

54—State v. Carpenter, 124 Iowa 51, 98 N. W. 775 (778).

55—People v. Murphy, 145 Mich. 524, 108 N. W. 1009 (1011).

"It is objected that in this case the court was in error in charging the jury that respondent might be found guilty of an offense less than the crime of rape. The action of the court was authorized by the decisions of this court. People v. Miller, 96 Mich. 119, 55 N. W. 625, and cases cited; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360 and cases cited."

56—Byas v. State, 41 Tex. Cr.

App. 51, 51 S. W. 923 (924), 96 Am. St. 762.

57—State v. Urie, 101 Iowa 411, 70 N. W. 603 (604).

"The court simply tells the jury that certain facts, if proven, would constitute an assault, and also says that if they found they were done with a certain intent and against her will, then he will be guilty of the crime charged. There is no doubt of the correctness of this instruction."

58—State v. Cannada, 68 Ia. 397; Krum v. State, 19 Neb. 728.

sonable doubt, not only that the defendant committed an assault upon the female, but that he did so with intent to compel her, by force and against her will, to have sexual intercourse with him notwithstanding any resistance she might make.⁵⁹

(d) If you are satisfied beyond a reasonable doubt, from the evidence, that the defendant took hold of the prosecuting witness with intent to have carnal intercourse with her against her will, and with an intent to accomplish his object at all events by his strength and power, or by threats of violence, against any resistance which she might offer, then he was guilty of an assault with intent to commit a rape, whether he succeeded in his purpose or not.⁶⁰

(e) The information charges the defendant with an assault with an intent to commit rape. You are instructed that the attempt contemplated in this charge must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the accused; and although you find from the evidence that the defendant did, at the time charged in the information, take hold of the said X., expose her private parts, and make an indecent exposure of his own person, yet if he desisted in his attempts to have sexual intercourse or abuse her upon his own volition, without the intervention of circumstances independent of his own will, the law would presume that he did not intend to carnally know or abuse said X.; but, on the other hand, if you should find from the evidence, and beyond a reasonable doubt, that the defendant proceeded in efforts to carnally know or abuse the said X., and desisted therefrom by reason of some intervening circumstance not dependent upon his own will, or by the intervention of some third party, then the law would presume that he did intend to carnally know or abuse the child in question; and this would be true even though you should believe from the evidence that sexual intercourse between the defendant and the said X. would be impossible, and that the only physical possibility in the attempt at sexual intercourse was to place the genital organs of the defendant in contact with the genital organs of the said child.⁶¹

§ 2823. **Assault with Intent to Commit Rape—Abandonment of Purpose.** The jury are instructed that if you are satisfied, from the evidence, beyond a reasonable doubt, that the defendant laid hands on L. C. violently and against her will, for the purpose of having sexual intercourse with her, and that at the time he so laid hands upon her he intended to accomplish his purpose at all hazards, in

59—State v. McDevitt, 69 Ia. 549; State v. Kendall, 34 N. W. 843.

60—People v. Lynch, 29 Mich. 274.

61—Palin v. State, 33 Neb. 862, 57 N. W. 743 (744).

The court said:

"The jury could not have inferred from the language of the court

that they might find the prisoner guilty of the offense charged even though they believed he did not intend to have sexual intercourse with X. Webster defines the verb 'abuse' thus: 'To violate; to ravish'; and the noun 'abuse' the same authority defines as 'violation; rape; as, abuse of a female child.' "

defiance of and notwithstanding any resistance that she might make, then the defendant was guilty of an assault with intent to commit rape, although he may have subsequently abandoned his purpose.⁶²

§ 2824. **Intent to Overcome Prosecutrix with Force Essential.** In order to convict the defendant of an assault with an intent to commit a rape, the jury must be satisfied beyond a reasonable doubt, from the evidence, that the defendant assaulted the prosecuting witness with the intent at the time to overcome any resistance which might be offered by her. And so although the jury may believe that the defendant, inflamed with passion, went to the bed of the prosecuting witness with intent to have carnal connection with her, still, if you have any reasonable doubt, from the evidence, as to whether he intended to accomplish his purpose by force and to overcome by violence or fear any force that might be offered to resist him, or whether he went with the design only to accomplish his purpose if he could without force or threats, then the act would only amount to an assault or assault and battery, but the defendant cannot be convicted of an assault with an intent to commit a rape.⁶³

§ 2825. **Reasonable Doubt as to Defendant's Intent to Overcome All Resistance with Force.** The jury are further instructed, as a matter of law, that the intent is, in this case, the essence of the offense charged, and, although you may find, from the evidence, that the defendant did commit an assault upon the prosecutrix for the purpose of having carnal intercourse with her, still, if, after considering all the evidence in the case, you are not satisfied beyond a reasonable doubt, that, at the time of committing the assault, he intended to compel her by force and against her will, to have sexual intercourse with him, notwithstanding any resistance she might make, then it will be your duty, under the law, to acquit the defendant.⁶⁴

§ 2826. **Not Necessary That Every Instruction Should Show the Prosecutrix Not to Be the Wife of the Defendant.** If you believe from the evidence that defendant did have carnal knowledge of said X., and if you further believe from the evidence that said X. was then under the age of fifteen years, you will convict defendant of rape.⁶⁵

§ 2827. **Definition of Carnal Abuse.** Carnal abuse means any abuse of the female child's genital organs, either by the defendant's

62—State v. Williams, 121 N. C. 628, 23 S. E. 405 (406).

See also Palin v. State, 38 Neb. 862, 57 N. W. 743 (744).

63—People v. Lynch, 29 Mich. 274.

64—State v. Cannada, 68 Ia. 397; Krum v. State, 19 Neb. 728; State v. Kendall, 73 Ia. 255, 34 N. W. 843; Strong v. State, 63 Neb. 440, 88 N. W. 772 (773).

65—Hill v. State, — Tex. Cr. App. —, 77 S. W. 808.

In that case the first portion of the charge, in defining rape, stated that the same must be committed "upon another than the wife of the person," etc. The evidence showed that prosecutrix was not the wife of defendant. Held therefore there was no reversible error in the omission mentioned.

private parts, or by rough handling of or use of her private parts by him in any way.⁶⁶

§ 2828. Rape—Assault with Intent to Commit Rape—Series.

(a) *Rape Defined*—Rape is the carnal knowledge of a female, forcibly and against her will. So, in this case, if you should find from the evidence, beyond a reasonable doubt, that the defendant, J., in Crawford County, Arkansas, at any time before the finding of the indictment herein, which was on April 4, 1899, forcibly and against the will of a female named H., had carnal knowledge of her, the said H., you will find the defendant guilty of rape. If you do not so find beyond a reasonable doubt, you will acquit the defendant of rape.

(b) *Carnal Knowledge Defined*—Carnal knowledge is the insertion of the male organ of the male to some extent, however slightly, into the female organ of a female; and if this is done forcibly and against the will of the female it is rape.

(c) *Carnal Knowledge, Consent*—If you believe from the evidence that the defendant did not have carnal knowledge of the prosecuting witness, you will, of course, not find him guilty of rape; and if you find from the evidence that he did have carnal knowledge of her, but that it was with her consent, why, then, you will find him not guilty.

(d) *Force—Absence of Consent*—To authorize a conviction of rape, the jury must believe from the evidence, beyond a reasonable doubt, that the defendant had carnal knowledge of the prosecuting witness, forcibly and against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape, the will of the female alleged to have been outraged must have been overcome, either by force, violence or fear. If she consents to sexual

⁶⁶—State v. Hummer, 72 N. J. Law 328 (331), 62 Atl. 388.

"The contention made on behalf of the defendant is that there may be a rough handling of the private parts of a female child under such circumstances as to disprove that the person so doing was guilty of the crime of carnal abuse, and that therefore this instruction was erroneous. But, assuming that this contention is well founded, it affords no ground for reversing the conviction. By virtue of the 136th section of the criminal procedure act (P. L. 1898, p. 915), no judgment given upon any indictment shall be reversed for any error, except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. In the case before us the proof submitted by the state, in support of the charge laid against the defendant, was that he had un-

successfully attempted to insert his — into the private parts of this girl, causing her some pain in doing so. No evidence was introduced showing any rough handling of her parts, except this attempted entrance of her person. The abstract proposition complained of might possibly have been considered by the jury as an instruction that, in order to justify a conviction, there must have been a rough handling of the girl's private parts while attempting to effect an entrance into her person. It is not possible, it seems to us, that they should have based their verdict of guilty upon a conclusion that there had been no attempt on the part of the plaintiff to enter the girl's person, but that he had roughly handled her private parts, in the absence of any evidence whatever upon which to found such a conclusion."

intercourse in the least during any part of the act, there is not such an opposing will as the law requires to convict on the charge of rape.

(e) *Penetration*—If you have a reasonable doubt from all the evidence in the case that the defendant's private part or member actually penetrated the private part or organ of H. forcibly and against her will, then you must acquit the defendant of the charge of rape.

(f) *Presumption of Innocence*—You must not allow the gravity of the charge, nor the fact that the defendant is a negro and the prosecuting witness a white woman, to in any way sway or bias your judgment in your deliberations upon a verdict. You must look alone to the evidence in this case, and from it make your decision. The defendant is entitled to your calm, unbiased and deliberate judgment upon the truthfulness of the charge against him. He is presumed by the law to be innocent, and this presumption is evidence in his behalf, and protects him from a conviction until his guilt is established beyond a reasonable doubt. If therefore you have a reasonable doubt of the defendant's guilt, after a careful and unbiased consideration of all the evidence in the case you must resolve that doubt in his favor and return a verdict of not guilty.

(g) *Reasonable Doubt*—The defendant is presumed to be innocent, and this presumption is evidence in his favor, and protects him from conviction until his guilt is established to your satisfaction beyond a reasonable doubt. If the evidence does not so satisfy you, this presumption of innocence absolutely entitles the defendant to an acquittal. A reasonable doubt is not a mere captious or imaginary doubt, but it is a doubt that arises naturally in your minds after a fair and impartial consideration of all the evidence in the case, and leaves your minds in that condition that you do not feel an abiding conviction to a moral certainty of the truth of the charge. The law, in order to convict does not require the guilt of the defendant to be established to an absolute certainty, but it does require his guilt to be established to your satisfaction to a moral certainty; and that is a certainty that convinces and directs your understanding and satisfies your reason and judgment of the truth of the charge. If therefore the proof in this case convinces and directs your understanding, and satisfies your reason and judgment of the guilt of the defendant of the charge here made against him, you will convict him. If it does not you will acquit the defendant.

(h) *Credibility and Weight*—The jury are the sole and exclusive judges of the credibility of the witnesses, and of the weight to be attached to their testimony, and in determining this you may take into consideration the interest, if any, the witness has in the result of the trial; his bias or prejudice, if any, for or against the accused; his mental capacity for knowing and his means of knowing that about which he testifies; the reasonableness or unreasonableness of his statements, his demeanor on the witness stand; his candor or eva-

sion, if either appear,—and applying your knowledge and observation of human actions, motives, and affairs, you will find the truth, and present the same in your verdict.

(i) *Alibi*—The defendant in this case undertakes to show that at the time the rape charged was alleged to have occurred, he was not at the place where it was alleged to have happened, but at another place, and that, therefore, he is not guilty of the charge made against him. The burden of showing an alibi is upon the defendant, but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, if in fact, it was committed, he should be acquitted, but the jury should scrutinize the testimony of witnesses to see if some of them may or may not have been mistaken as to the precise time they saw the defendant on the evening the offense is alleged to have been committed, and in arriving at your conclusion on this point, the jury should consider whether it may or may not be true that the defendant was present at the time the offense is said to have been committed, if in fact, it was committed, and that some of the witnesses are honestly mistaken as to the exact time they saw the defendant on the evening of March 17, 1899.

(j) *Evidence, Direct or Circumstantial*—The guilt of the defendant may be established by either direct or circumstantial evidence or by both, and if his guilt is established to your satisfaction beyond a reasonable doubt, by either direct or circumstantial evidence, or by both, you will convict; if not you will acquit.

(k) *Assault with Intent to Rape*—An assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another. An assault with intent to commit a rape, is an assault committed upon a female with the intent existing in the mind of the assaulting party to have carnal knowledge of the female forcibly and against her will.

(l) *Summary*—In this case, if you should find, from the evidence beyond a reasonable doubt that the defendant in Crawford County, Arkansas, at any time within three years next before the 4th of April, 1899, committed an assault upon a female named H. with the intent at the time to have carnal knowledge of her forcibly and against her will, and entertain a reasonable doubt as to whether such attempted carnal knowledge was completely effectuated, you will convict defendant of assault with intent to rape, and assess his punishment in the penitentiary at some period of time (naming it) not less than three years nor more than twenty-one years. If the defendant is not shown beyond a reasonable doubt to be guilty of either rape or assault with intent to rape committed on a female named H. you will acquit him entirely, but if he is shown to be guilty of either rape or assault with intent to rape, you will convict of the one of which his guilt is established beyond a reasonable doubt. Or, if his guilt

of both is made out beyond a reasonable doubt, you will convict of rape.⁶⁷

SEDUCTION.

§ 2829. Illicit Intercourse Alone Is Not Seduction—What Constitutes the Offense. The jury are instructed that illicit intercourse alone does not constitute the crime of seduction. To constitute this offense it must appear from the evidence, beyond a reasonable doubt, that the complaining witness yielded to some sufficient promise or inducement held out to her by the defendant and had been thereby drawn aside from the path of virtue which previous to that time she had been honestly pursuing.⁶⁸

§ 2830. Not Seduction When By Force and Against Her Will. Though the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the complaining witness, still, if the jury further believe, from the evidence, that he had such intercourse by force and against the will of the said A. B., this would not constitute the crime of seduction, and the jury should acquit the defendant of that charge.⁶⁹

§ 2831. Seduction Under Promise of Marriage—Refusal of Prosecutrix to Marry Defendant—Proof Required. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant obtained carnal knowledge of S. by virtue of an express promise of marriage made by him to her, and that said marriage was by agreement of the parties set to take place on the fourth Sunday in June, 1899, and that said marriage has not taken place, and that the defendant seeks to justify his failure to make said marriage on the ground of the refusal of the said S. to join him in the marriage, then he must prove such refusal on the part of said S. to your satisfaction, by a preponderance of the testimony; in other words, the burden of proof is on the defendant in such matter of defense.⁷⁰

§ 2832. Promise of Marriage—Female Thought to Be of Previous Chaste Character—Unchaste at Time of Seduction. Although the jury may believe from the evidence, beyond a reasonable doubt, that the prisoner had illicit connection with the prosecutrix under promise of marriage, and may have thought at the time that she was a female of previous chaste character, yet they must find him not guilty if they believe she was unchaste at the time of said seduction.⁷¹

§ 2833. Previous Chaste Character—Promise to Marry—Reasonable Doubt. The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the prosecutrix was an unmarried female, of previous chaste character, at the time of her alleged seduction, and that she was seduced by the prisoner by having

67—Maxey v. State, 66 Ark. 523, 52 S. W. 2 (3) approves the above series of instructions.

68—People v. Clark, 33 Mich. 112.

69—State v. Dewis, 43 Ia. 578, 30 Am. Rep. 407.

70—Caldwell v. State, 69 Ark. 322, 63 S. W. 59 (61).

71—Barker v. Commonwealth, 90 Va. 820, S. E. 20, 776 (777).

illicit connection with her under promise of marriage, you should find him guilty.⁷²

§ 2834. **Voluntary Consent as a Defense.** The court charges the jury that, if the evidence shows beyond a reasonable doubt that P. consented and entered into the sexual act voluntarily, the defendant cannot be convicted.⁷³

§ 2835. **Circumstantial Evidence Sufficient to Corroborate—Proof of Acquaintance and Opportunity Not Sufficient.** (a) The court instructs the jury that circumstantial evidence may be relied upon to establish the corroboration required by the statute in such cases, and, if it be shown by evidence, other than that of the prosecuting witness, that the defendant visited her at her home or elsewhere, and that they kept company together, and acted as lovers usually do, is sufficient to justify a conviction, if, when considered in connection with her evidence and all the other evidence in the case, you are satisfied beyond a reasonable doubt of the defendant's guilt. You will bear in mind, however, that you are the judges of the sufficiency of the corroborating evidence when it is such as tends to connect the defendant with the commission of the offense charged.

(b) Mere proof of acquaintance and opportunity to have committed the offense is not sufficient, but there must be such corroborating evidence as tends to connect the defendant with the commission of the offense and corroborate her evidence in relation to the crime charged.⁷⁴

§ 2836. **Complainant's Contradictory Evidence—Reasonable Doubt.** In determining what credit should be given to the testimony of the complaining witness, it is your duty to consider her contradictory statements upon the stand, and her testimony that she had knowingly sworn falsely, and if, after such consideration, you have a reasonable doubt of the truth of her testimony in relation to the defendant's promise of marriage, or her yielding to him in consequence thereof, you must acquit the defendant.⁷⁵

§ 2837. **Presumption of Innocence—Jury Must Reconcile Evidence and Indictment—Compromise Cannot Bar Prosecution.** (a) The court instructs the jury that the prisoner comes to trial presumed to be innocent, and this presumption continues until it is rebutted by the commonwealth beyond a reasonable doubt; and the jury cannot convict unless they can reconcile from the evidence the guilt of the prisoner with all the necessary allegations of the indictment.

(b) The court instructs the jury that no compromise between the prosecutrix and the prisoner, or any one else, could bar a prosecution by the commonwealth for the crime charged in the indictment.⁷⁶

72—Barker v. Commonwealth, 90 Va. 820, 20 S. E. 776, citing Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Boyce v. People, 55 N. Y. 644; State v. Heatherton, 60 Iowa 175, 14 N. W. 230.

73—Hall v. State, 134 Ala. 90, 32 So. 751 (755).

74—State v. Smith, 124 Iowa 334 (339), 100 N. W. 40 (42).

75—People v. Hubbard, 92 Mich. 322, 52 N. W. 729 (730).

76—Barker v. Commonwealth, 90 Va. 820, 20 S. E. 776.

CHAPTER XXIII.

CRIMINAL—ASSAULT AND BATTERY.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2838. Assault and battery—Defined.</p> <p>§ 2839. Intent—How proven.</p> <p>§ 2840. Assault in sudden affray, and in sudden heat of passion—Punishment.</p> <p>§ 2841. Mutual combat—Both parties guilty.</p> <p>§ 2842. Justification—Ejecting trespasser upon land.</p> <p>§ 2843. Justification—Keeping order in religious meeting.</p> <p>§ 2844. Repelling seizure of dog.</p> <p>§ 2845. Insults as justification.</p> <p>§ 2846. Prosecutrix visiting defendant.</p> <p>§ 2847. Violating ordinance against profane swearing — Attempted arrest—Shooting at offender.</p> <p>§ 2848. Assault by policeman—Striking with hand or club —Self defense.</p> <p>§ 2849. Counter-assault — Bringing on difficulty—Self-defense.</p> <p>§ 2850. Use of fire arms; pointing gun in the air or discharging same.</p> <p>§ 2851. Presence of others at the time of assault—Aiding or abetting.</p> <p>§ 2852. Aggravated assault — Defined.</p> <p>§ 2853. Aggravated assault — Embracing a woman—Intent to injure.</p> <p>ASSAULT WITH INTENT TO KILL OR MURDER.</p> <p>§ 2854. Assault with intent to murder—To kill defined.</p> | <p>§ 2855. Assault with intent to murder—What lesser crimes included.</p> <p>§ 2856. Intent must be proven.</p> <p>§ 2857. Assault with intent to murder—Intent—How proven.</p> <p>§ 2858. Whether intent is proved.</p> <p>§ 2859. What jury should consider in determining whether intent was present.</p> <p>§ 2860. Animus, purpose and intent may be shown by writing of a valentine.</p> <p>§ 2861. Incapable of forming intent from drunkenness.</p> <p>§ 2862. Burden of proof—Justification.</p> <p>§ 2863. Adequate cause—Insulting words.</p> <p>§ 2864. Must be murder had death ensued—Deliberation.</p> <p>§ 2865. Assault with intent to murder—Malice and deliberation necessary elements—Malice defined.</p> <p>§ 2866. Assault with intent to kill —Malice and deliberation not necessary elements.</p> <p>§ 2867. Assault with deadly weapon —Implied malice.</p> <p>§ 2868. Assault with intent to commit voluntary manslaughter.</p> <p>§ 2869. Included crimes — Reasonable doubt acquits.</p> <p>§ 2870. Assault with intent to kill—Circumstantial evidence.</p> <p>§ 2871. Assault with intent to murder—Form of verdict.</p> <p>Note.—For instructions on the subject of Self-Defense, see chapter, Homicide—Self-defense.</p> |
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§ 2838. **Assault and Battery—Defined.** (a) The court instructs the jury that an assault is an unlawful attempt to commit violence upon the person of another, with the present ability to do so.

(b) A battery is an unlawful beating of another. Every battery includes an assault.¹

¹—State v. Cody, 94 Ia. 169, 62 N. W. 702, 10 Am. Cr. Rep. 41. "We think the definition in either case is sufficiently accurate.

(c) You are charged that the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with the intent to alarm another, and under circumstances calculated to effect that object is an assault.²

(d) The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it an immediate intention coupled with an ability to commit a battery, is an assault.³

§ 2839. Intent—How Proven. (a) The court instructs the jury that the intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered from the outward manifestations by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected.⁴

(b) In this case the intent must be derived from the evidence of the deed committed, in connection with the other evidence in the case; and it is for you to say from the evidence in the case whether or not an intent existed in the mind of the respondent, at the time of the commission of the alleged offense, to commit upon the person of the injured man great bodily harm, less than the crime of murder, or whether he committed a simple assault and battery, or whether he is guilty of any offense at all. The extent of the injury inflicted, no matter how severe or disproportionate to the provocation, if there was any provocation, will not take the case out of that of an assault and battery, unless you find the existence of the intent to do great bodily harm, less than the crime of murder. But the severity and aggravated character of the assault, and extent of the injury received, as well as the weapon with which it was committed, may be considered by you, in connection with other evidence in the case, in your endeavor to find from the evidence whether or not such intent stimulated the respondent's action. If from the evidence you find that the respondent struck the complainant with a dangerous and offensive

In Bishop's New Criminal Law (volume 1, para. 584) it is said: 'A battery is an unlawful beating, or other physical violence or constraint, inflicted upon a human being without his consent. . . . An assault is included in every battery.' This language clearly indicates that an unlawful beating is a wrongful physical violence."

2—Werner v. State, — Tex. Cr. App. —, 68 S. W. 681 (682).

3—Perrin v. State, 45 Tex. Cr. App. 560, 78 S. W. 930 (932).

4—Clarey v. State, 61 Neb. 638, 35 N. W. 897 (898).

The court said:

"The criticism is upon the word 'must.' The court, by employing the word, merely intended to convey to the jury that the intent of a person is deducible from his words and conduct only, and not that the jury were obliged to infer the unlawful intent in the case. The instruction was doubtless copied from the opinion in Botsch v. State, 43 Neb. 501, 61 N. W. 730."

weapon, and that the result was serious bodily harm to the complaining witness, less than the crime of murder, you may take all these facts into consideration in determining whether or not the respondent intended to do great bodily harm, less than the crime of murder, at the time he committed the assault, if he committed an assault at all. In this case, the intent is the gist of the offense charged in the information, and the law usually presumes that a man intends the natural results of his own acts. And this rule applies in this case, with the usual conditions that if the circumstances and surroundings of the case shown by the evidence establish the fact that there was no intention to do what was done, in the way of inflicting the injury, or leaves in your mind a reasonable doubt of such intent, then your duty is to acquit the respondent of the offense charged in the information.⁵

(c) That to constitute the offense charged in this case, the intent alleged in the indictment is necessarily to be proved, but direct and positive testimony is not necessary to prove the intent; it may be inferred from the evidence, if there are any facts proved which satisfy the jury, beyond a reasonable doubt, of its existence.⁶

§ 2840. Assault in Sudden Affray, and in Sudden Heat of Passion—Punishment. If, however, the jury believe from all the evidence in this case, to the exclusion of a reasonable doubt, that in this county, and within one year next before the finding of the indictment herein, the accused, F., in sudden affray, and in sudden heat and passion, without malice, did cut, stab and wound L. with a weapon and in the manner described in another instruction, then they will find him guilty of the misdemeanor or offense included in the indictment, and fix his punishment at a fine of not less than \$50 nor more than \$500, in their reasonable discretion, or by confinement in the county jail, in their reasonable discretion, for not less than six months nor more than one year, or both so fine and imprison, in their reasonable discretion, and they may say in their verdict that such fine or imprisonment, or both, shall be at hard labor, in their reasonable discretion.⁷

§ 2841. Mutual Combat—Both Parties Guilty. If the jury believe from the evidence that it was a mutual combat engaged in by both parties for the gratification of their evil passions, and a mutual desire to inflict punishment and hurt on each other, and voluntarily engaged in to gratify their own bad feelings to each other, and is not the result of insult on the part of the prosecutrix or defendant, and is not the purpose of self-defense, and is simply a mutual combat, both would be guilty (of assault), and the defendant on trial would be convicted.⁸

5—*People v. Resh*, 107 Mich. 251, 65 N. W. 99.

See also *People v. Jassino*, 100 Mich. 536, 59 N. W. 230 (231).

6—*Roberts v. People*, 19 Mich. 401.

7—Approved in *Ford v. Commonwealth*, 30 Ky. L. 54, 97 S. W. 370.

8—*Ford v. State*, 97 Ga. 365, 23 S. E. 996 (997).

§ 2842. **Justification—Ejecting Trespasser Upon Land.** The court instructs the jury that if you find and believe from the evidence that the defendant E. H. was on the 3d day of February, 1897, on the inside of the building where the assault is alleged to have been committed, and that he had closed and fastened the doors thereof, then the defendant was in possession of said building, and the prosecuting witness G. had no right to forcibly enter the said building; and if you find from the evidence he did so, then the defendant had the legal right to forcibly eject said G. by using only such force and violence as was necessary to eject said G. therefrom.⁹

§ 2843. **Justification—Keeping Order in Religious Meeting.** But if he (G.) was not asked there to investigate, but was simply asked to come to the house there to attend a meeting of that kind, and it was a meeting, so far as this defendant, H., was concerned, which was fair and honorable in its character, it would be the duty of a person who came there under such circumstances to observe proper decorum, not to rudely interfere with the proceedings and religious rite, which, so far as the defendant was concerned, was being held in good faith. He would not have a right to do those things which would interfere with the comfort and peace and enjoyment of other persons who might be there for honest purposes. And if he did do things of that character, whether it was a religious meeting or whether it was not, I think this defendant would have a right to use reasonable means to restrain such conduct. If he only went so far as seemed to him at the time to be reasonably necessary to preserve decorum there in his own house, and protect the comfort and peace of those whom he had invited to his house there, then I think he would be justified in what he did.¹⁰

§ 2844. **Repelling Seizure of Dog.** You are instructed that defendant, J. W., had the right of possession to the dog as against every person except the true owner, and that even the true owner would not be authorized to go upon the premises of defendant's father and forcibly take away or remove the dog against the protest and remonstrances of defendant. In this case defendant had the legal possession of the dog, and had the right to use such force, and no more, as the surroundings show might have been necessary to repel the forcible seizure and removal of the property, and if it became necessary to slay the party or pretended owner making the seizure in order to prevent the removal of the dog after all other means had failed, defendant would have had the right to do so, and if you should so believe you should acquit defendant.¹¹

9—State v. Howell, 21 Mont. 165, 53 Pac. 314 (315).

"If a man may not lawfully defend his property—his home—by the use of whatever force is necessary to use under the circumstances of the case, then he is at the mercy of every tramp, tres-

passer or even burglar who comes along, and enters, and takes possession during his temporary absence therefrom," citing Montana Penal Code, Sec. 404, subd. 3.

10—People v. Hughes, 116 Mich. 80, 74 N. W. 309 (310).

11—Weaver v. State, — Tex. Cr.

§ 2845. **Insults as Justification.** (a) The law does not permit one to measure his wrongs, to go and take out what he conceives to be redress upon any citizen. The law does not tolerate that. You have the right to strike your neighbor to keep him from striking you; that is based upon necessity; that is self-defense. All civilized countries recognize the right of self-defense. You have the right to repel force with force. But it (the law) does not give to any man the right to go and chastise or beat—inflict punishment on—another for words spoken, no matter how opprobrious or insulting. If you have been aggrieved, slandered, the courts are open. You can bring your suit for a civil action for slander, or a criminal action, either—both branches of the court.¹²

(b) The court charges the jury that the jury may look to the fact, if it be a fact, that S. used abusive or insulting language to R. at or near the time of the difficulty, and such language may be taken in mitigation or justification of the offense, as the jury may determine.¹³

§ 2846. **Prosecutrix Visiting Defendant.** If the prosecutrix went there to see Cornelia F., in a visit, or otherwise, she had the right to be there; and it is not to be taken against her, if she went there for that purpose, and got in the fight afterwards.¹⁴

§ 2847. **Violating Ordinance Against Profane Swearing—Attempted Arrest—Shooting at Offender.** If the jury find from the evidence that the plaintiff had violated the town ordinance against loud and profane swearing on the streets, and that the defendant had attempted to arrest him, and that plaintiff got loose and was running from defendant, and while so running defendant had shot at him with a pistol, then, in law, that would be an assault, and they should respond "Yes" to the first issue.¹⁵

App. —, 76 S. W. 564 (565), 53 Am. Rep. 389.

"We believe the court should have given the requested instruction as the facts raise the issue, and the court nowhere in the general charge instructed the jury as to the rights of defendant in protecting his possession to the dog in the controversy."

12—Hayes v. State, 51 S. C. 534, 29 S. E. 259 (261).

13—Rogers v. State, 117 Ala. 192, 23 So. 82.

14—Ford v. State, 97 Ga. 365, 23 S. E. 996 (997).

15—Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

"This instruction the court refused to give, and the plaintiff excepted. The court charged the jury fully in regard to the power of a policeman to arrest for the violation of a town ordinance,

when the offense is committed in his presence, and to this part of the charge there was no objection by the plaintiff, but exception was taken to the following passages in the charge of the court:

(1) If you are satisfied from the evidence that the defendant had reasonable ground to believe, and did believe, that plaintiff was violating in his presence the ordinance prohibiting loud and profane swearing in the corporate limits of the town of Concord, and arrested the plaintiff although the defendant was mistaken, he would be excused; and you are the judges of the reasonableness of the grounds upon which the defendant acted.

(2) If the jury believe from the evidence that the plaintiff was violating, in the presence of the defendant, the ordinance of Con-

§ 2848. **Assault by Policeman—Striking with Hand or Club—Self-Defense.** (a) If the jury believe from the evidence that the defendant, G. M., was standing upon the sidewalk on the 26th day of October, 19—, at C. and N. streets, near H.'s saloon, in the city of St. Louis, Mo., and that he was conducting himself in a peaceable and quiet manner, and that the policeman, D., ordered and commanded him to move on, or to move and go away, and the defendant failed or refused to obey him, and that thereupon the said officer, D., assaulted the defendant, or struck him with his hand or with a club, or shoved him, and that the defendant then struck said D. and knocked him down, then such act was in the nature of self-defense on the part of the defendant, and is in law justifiable.

(b) The jury are further instructed that under the law a police officer in the city of St. Louis has no right, power or authority to compel any person who is standing upon a public street or highway in a quiet and peaceable attitude to move or go away at the bidding of said officer, or to do his mere bidding; and that the officer, upon such person failing or refusing in a peaceable way to obey him, has no right whatever to assault, beat or strike such person; and such person has the right to resist force by force, meet violence with violence, and to use all the means necessary to preserve his life, or so prevent great bodily harm from being inflicted upon him, even to the extent to taking the life of his assailant, whether he be an officer or private citizen.

(c) The court instructs the jury that if you believe and find from the evidence that the defendant, G. M., was standing on the corner

cord prohibiting loud and profane swearing within the corporate limits, and the defendant not being actuated by ill will, malice, hatred or malevolent purpose, arrested the plaintiff, and the plaintiff, not being out of the control of the defendant, attempted to escape, and to prevent such an escape, the defendant fired his pistol, such firing would not constitute an assault.

Before discussing what we regard as the principal and vital question in the case, we will call attention to the phraseology of the second passage taken from the charge of the court. The jury is there told that, if 'they believe from the evidence' the facts therein recited, the acts of the defendant did not constitute an assault. This court has referred to this form of expression as being open to the objection that the jury might believe that certain facts existed when they would not be willing to find that they did exist, and that the law, as given by the court to the jury, should be based, not upon their belief, merely, but

upon the facts as found by them under the rule of law as to the burden of proof, and such proper instructions from the court as will enable the jury to intelligently weigh and apply the evidence. *State v. Barrett*, 123 N. C. 753, 31 S. E. 731; *Wilkie v. Railroad*, 127 N. C. 203, 37 S. E. 204.

We are of the opinion that, upon the evidence in the case the court should have given the instruction asked by the plaintiff in his prayer. The exception to the refusal to give the instruction may conveniently be considered with the first of the above instructions given by the court, to which exception was also taken. That instruction was, in substance, that 'if the plaintiff had been lawfully arrested and not being out of the control of the defendant, had attempted to escape, and to prevent such an escape the defendant fired his pistol, such firing would not constitute an assault.' This instruction in view of what seems to be the uncontroverted facts in the case was erroneous."

of C. and N. streets, at the side of or near H.'s saloon, on C. and N. streets, in the city of St. Louis, Mo., on the night of the 26th day of October, 19—, and that he was acting in a quiet and peaceable manner, and that he was assaulted, shoved or struck by the policeman, D., then he (defendant) had the right in law to resist said assault or battery by such means and in such manner as was necessary to repel his assailant. And the jury are instructed that said D., although a police officer of said city of St. Louis, with authority to make arrests for offenses against the law, had no right to assault, beat or strike or shove the defendant, G. M., if he, the defendant, was conducting himself in a peaceable and law-abiding manner.¹⁶

§ 2849. **Counter-Assault—Bringing on Difficulty—Self-Defense.** (a) If the jury shall find from the evidence that the prosecuting witness, T. H., made the first assault without the right to do so, as explained in these instructions, and that the defendant had good reason to believe, and did believe, that the said H. was about to do him some great bodily harm, then the defendant had the right to meet such assault by the use of such force and means as were reasonable and necessary to protect himself from such assault; and, if the jury shall believe from the evidence that the defendant acted in self-defense, as herein explained, they will find him not guilty.

(b) The prosecuting witness, T. H., had no right to assault the defendant with a club merely because the defendant was using threatening and insulting language towards him, nor unless the conduct of the defendant at the time, considered in connection with what he said, was such that the said H. had good reason to believe, and did believe, that it was necessary for him to strike the defendant in order to protect himself from an assault by the defendant then about to be made upon him.¹⁷

(c) The state claims that there is some evidence tending to prove that the defendant in going upon the brewery premises and into the building where W., the complaining witness, was, under the circumstances under which he did enter and with the knowledge of the unfriendly relations existing between himself and the two W. boys, G. and M., voluntarily went into said building where the complaining witness was, with the intent and for the purpose of provoking an affray or a difficulty with said W. and there so conducted himself as to bring on the assault and affray as it took place in the boiler room. The court instructs that if you believe and find from the evidence that the defendant did so, that is to say, that he voluntarily entered and went into said boiler room with the intent and for the purpose of provoking an affray and difficulty with said W., there so conducted himself as to bring on the assault and affray as it

16—In *State v. Meyers*, 174 Mo. 352, 74 S. W. 862 (863), the court says of the above instructions: "In the light of the uncontradicted evidence, there was mani-

fest error in refusing the instructions which the defendant asked."

17—*State v. Higginson*, 157 Mo. 395, 57 S. W. 1014 (1015-6).

took place in the boiler room, that he, the defendant, is not entitled to the plea of self-defense. And the assault and battery which took place in the boiler room cannot excuse or justify the shooting which took place outside the boiler room.¹⁸

§ 2850. **Use of Fire Arms, Pointing Gun in the Air or Discharging Same.** I instruct the jury that the pointing of a gun in the air is not an unlawful act, and I charge you that the respondent would have a right to take a gun out in the field to the east of the house and point the same in the air, so long as in doing so he did not take it there for the purpose of obstructing or resisting the officer, Elisha Moore, and did not use it for that purpose. I instruct you that the discharging of the gun, by respondent in the air, is not an unlawful act, and I charge you that the respondent would have the right to take the gun out into the field east of the house and discharge the same in the air, so long as by doing so he did not take it there for the purpose of obstructing or resisting the officer, Elisha Moore, and did not use it for that purpose, and did not use it in such manner as to amount to a reckless disregard of human life by so using it. The respondent, under the law, had a right to take the gun with him to the field where the shooting occurred, so long as by doing so he did not take it there for the purpose of obstructing and resisting the officer, Elisha Moore, and did not use it for that purpose, and to carry said gun in his hands and to point the same in the air, so long as he did not have the gun there for the purpose of obstructing the officer or resisting the officer, but he would not have the right to knowingly point said gun in the direction of any person.¹⁹

§ 2851. **Presence of Others at the Time of Assault—Aiding or Abetting.** If the jury believe from the evidence that the prisoner, B., in pursuance of an understanding and combination between himself and D. and E., or either of them, assaulted B. in the nighttime, on the street, in the City of Huntington, in this county, for the purpose of whipping him or doing him an injury, and did then and there inflict any punishment or bodily injury upon said B., and the said D. and E., or either of them, were present when the said assault was so made and injury inflicted by said prisoner, and that they, or either of them, aided or abetted said prisoner, in said assault, either by word or action, then they must find the prisoner guilty as charged in the indictment.²⁰

18—Holmes v. State, 124 Wis. 133, 102 N. W. 321 (324).

19—People v. Sauer, 143 Mich. 308, 106 N. W. 866.

The court said:

"We think this charge sufficiently recognized the defendant's theory insofar as it was entitled to consideration. The writ was still in the officer's hands, and, whatever may have occurred in

the lower field, so long as the logs called for, had not in fact been secured, the writ had not spent its force. If, however, the jury were satisfied that the officer was not, at the time he was shot down acting under the writ, the charge fully protected the rights of the accused."

20—State v. Bingham, 42 W. Va. 234, 24 S. E. 883.

§ 2852. **Aggravated Assault—Defined.** (a) You are instructed that if any male adult should use any unlawful violence upon the person of a female with intent to injure her, whatever be the means or degree of violence, he is deemed guilty, under the law, of an aggravated assault and battery.²¹

(b) An assault and battery become aggravated when a serious bodily injury is inflicted upon the person assaulted or when committed with a deadly weapon. A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury.

(c) If you find that defendant struck M. with a stick or club with no intention to take his life, and that he was not justifiable on the ground of self-defense, and if you further find that such stick or club was then and there a deadly weapon, or that by means of such assault serious bodily injury was inflicted upon M., then you may find defendant guilty of an aggravated assault and battery, and if you find him guilty you will assess his punishment at, etc.²²

§ 2853. **Aggravated Assault—Embracing a Woman—Intent to Injure.** If you believe the defendant put his arm on the back of the buggy seat, and thereby touched the prosecutrix, ———; or if you believe that he took hold of her and endeavored to embrace her, but did so with no intention of injuring her or her feelings, and had probable ground to believe, and did believe, that such touching or taking hold of her, if any, or such attempt to embrace her, if any, would not be objected to by her, or would not be offensive to her, or hurt her feelings—then he would not be guilty of any offense, and you will acquit. And in passing upon this issue, you will look to all the facts and circumstances in evidence, and the conduct of the parties, both before and after the commission of the alleged offense; and if you have a reasonable doubt of the defendant's guilt, or of his intent to injure the prosecuting witness, you will find him not guilty.²³

ASSAULT WITH INTENT TO KILL OR MURDER.

§ 2854. **Assault With Intent to Murder—To Kill—Defined.** (a) An assault becomes and is an assault with intent to murder when it

21—*Millard v. State*, — Tex. Cr. App. —, 59 S. W. 273.

"We think the charge presents a correct proposition of law, and is not subject to the criticism urged by appellant."

22—*Perrin v. State*, 45 Tex. Cr. App. 561, 78 S. W. 930 (1932).

23—*Stripling v. State*, — Tex. Cr. App. —, 80 S. W. 376 (377).

"The court should have given this charge. The case of *Chambless v. State*, — Tex. Cr. App. —, 79 S. W. 577, in many of its phases is like this case. We there held that the court should charge in ef-

fect that if the defendant tried to kiss plaintiff, but did so with no intent to injure her or her feelings, and had probable grounds to believe, and did believe, that said trying to kiss her would not be objectionable to her, or would not be offensive to her feelings, then he would not be guilty of any offense. As we understand the charge asked by appellant in this case, it is practically the same as in the *Chambless* case. Citing also *Floyd v. State*, 29 Tex. App. 341, 15 S. W. 819."

is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder.²⁴

(b) The court charges the jury that if they believe, from the evidence in this case, beyond a reasonable doubt, that the defendant on the 1st day of February, 1902, assaulted M. H. with the intent to murder him, then they must find the defendant guilty as charged.²⁵

(c) If from the evidence you are satisfied beyond a reasonable doubt that defendant, L., at any time within three years before the filing of the indictment, to-wit, the 28th day of January, 1904, in the county of Webb and state of Texas, with a deadly weapon, or instrument reasonably calculated and likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault the said G., with intent then and there to kill and murder her, then you will find defendant guilty of an assault with intent to murder.²⁶

(d) You cannot find defendant guilty of the crime charged here unless you would find defendant guilty of murder if he had killed C., and was on trial for murder.²⁷

(e) If from the evidence, and under these instructions, you find and believe that at the city of St. Louis and state of Missouri, on December 31, 1899, the defendant V., either alone or acting together with another one, with a common intent, feloniously made an assault upon and shot B. with a pistol loaded with gunpowder and leaden ball, and that he did so willfully, on purpose, and of his malice aforethought, and with the intent to kill the said B., you will find the defendant guilty of an assault with intent to kill, and assess his punishment, etc.; and unless you find the facts so to be, you will acquit the defendant of such assault with intent to kill.²⁸

(f) The court instructs the jury that if you find [and believe, beyond a reasonable doubt,] from the evidence in the case that the defendant at the county of St. Charles in the state of Missouri, on or about the 25th day of March, 1899, on purpose and intentionally made an assault on one Z. W., with a loaded pistol and shot him, with the intent to kill him, the said W., and not under such circumstances as to justify him on the grounds of self-defense, as explained in other instructions, then you will find the defendant guilty of assault with intent to kill as charged, and assess his punishment at imprisonment, etc.²⁹

§ 2855. Assault With Intent to Murder—What Lesser Crimes Included. The following crimes are included necessarily in the charge

24—*Alvarez v. State*, — Tex. Cr. App. —, 58 S. W. 1013 (1014), 13 Am. Cr. Rep. 137.

25—*Deal v. State*, 136 Ala. 52, 34 So. 23 (24).

26—*Lozano v. State*, — Tex. Cr. App. —, 81 S. W. 37 (38).

27—*Goodwin v. State*, 73 Miss. 873, 19 So. 712, 55 Am. St. 573.

28—*State v. Valle*, 164 Mo. 539, 65 S. W. 232 (235).

29—*State v. Moore*, 168 Mo. 432, 68 S. W. 358 (360).

contained in the indictment, viz., assault, assault and battery, assault with intent to do a great bodily injury, assault with intent to commit manslaughter, and assault with intent to commit murder; and the defendant may, if the evidence justifies the finding, be convicted of either one of these crimes.³⁰

§ 2856. Intent Must Be Proven. (a) If you believe, [beyond a reasonable doubt, from the evidence,] that the defendant and the prosecuting witness B. got into a fight, and the defendant cut the prosecuting witness B., without intent to do so, then you will find the defendant not guilty.³¹

(b) If it appears that the alleged assault was committed under such circumstances as would, had death ensued, have mitigated the offense from murder to manslaughter, such intent was not premeditated, and you cannot find the defendant guilty of the charge preferred against him.³²

(c) Should you believe [from the evidence, beyond a reasonable doubt,] that the said pistol was discharged by the defendant, but have a reasonable doubt as to whether the same was discharged accidentally, you will find the defendant not guilty.³³

§ 2857. Assault With Intent to Murder—Intent—How Proven. (a) The jury are further instructed that they may take into consideration whether it is true that the defendant made any declaration or statement at the time, or immediately before the shooting, as to what

30—State v. Graham, 51 Iowa 72, 50 N. W. 285 (286).

It was argued "that this instruction is erroneous because the crime of an assault and battery is not necessarily included in the crime of an assault with intent to murder. Section 4466 of the Code provides that 'in all other cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment.' It is doubtless correct that if this indictment had charged an assault merely, without a battery, as by discharging a gun at the prosecuting witness or the like, the crime of assault and battery would not be necessarily included in the crime charged. But the defendant is charged, not only with an assault but a most grievous battery. It is, in fact, an indictment for an assault and battery under such allegations as to have made the crime murder, if death had ensued. We think the instruction was not erroneous."

31—Territory v. Baca, 11 N. M. 559, 71 Pac. 460 (462).

"The Code (Section 1083) provides, 'if any person shall assault

another with intent to murder,' etc. Intent is one of the essential ingredients of the crime charged against the defendant. U. S. v. Buzzo, 18 Wall. 125, 21 L. Ed. 812; Territory v. Pino, 9 N. M. 598, 58 Pac. 393; U. S. v. Folsom, 7 N. M. 532, 38 Pac. 70; Territory v. Vigil, 8 N. M. 583, 45 Pac. 1117. Therefore if the defendant did what he is charged to have physically done without any intent in fact, the defendant would not be guilty. Whether or not he did intend to do that which he is alleged to have done was a fact to be determined by the jury upon the evidence in the case. If there was any evidence tending to show that the defendant did not cut the prosecuting witness with intent to murder him, then the court should not have refused to give this instruction asked by the defendant, as the court nowhere gave its equivalent in its own instructions."

32—People v. Mendenhall, 135 Cal. 344, 67 Pac. 325 (327).

33—Alvarez v. State, — Tex. Cr. App. —, 58 S. W. 1013 (1014), 13 Am. Cr. Rep. 137, approves the above without the words in brackets.

his intentions were, and also his testimony regarding his intentions at the time of the shooting, if any, and also the testimony regarding the defendant's character and reputation as a peaceable and quiet citizen; and if, after considering all these matters, together with all the other evidence in the case, the jury entertain any reasonable doubt as to whether the defendant intentionally shot the said pistol at or against the said C., or if they entertain any reasonable doubt as to whether the defendant fired the pistol with the intention thereby to take the life of said C., then the defendant is not guilty of an assault with intent to murder.³⁴

(b) The court instructs the jury that direct and positive testimony is not necessary for proving the intent alleged in the indictment, but such an intent may be inferred from the evidence, if there are any facts and circumstances proven that show beyond a reasonable doubt that the assault in question was made with an abandoned and malignant heart and a reckless disregard of human life, and in such a manner as was likely to cause the death of the party assaulted.³⁵

(c) The intent to murder cannot be implied as matter of law. It must be proved as a matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. The offense of intent to murder cannot exist unless, if death had resulted, the completed offense would have been murder; and even if the act of shooting would have been murder if death had resulted, still, if the defendant did not intend to kill, he is not guilty of assault with intent to murder.³⁶

§ 2858. **Whether Intent Is Proved.** (a) The court instructs the jury, for the defendant, that if they believe the evidence in this case

34—Rollins v. State, 62 Ind. 46.

35—Crosby v. People, 127 Ill. 325 (338), 27 N. E. 49 (51), in which case judgment was reversed because of a bad instruction as to drunkenness.

The court said: "It is objected that the latter clause of this instruction lays down an improper rule, and that there was no evidence that there was an assault of a character likely to cause the death of the party assaulted. And again, the instruction is divided, by counsel, in argument, and it is insisted that the intent to murder cannot be inferred from the facts and circumstances which show beyond a reasonable doubt that the assault was made with an abandoned and malignant heart and reckless disregard of human life. It is sufficient to say that no such division is made of the instruction itself. The jury were told that the intent might be inferred from the

evidence if there were 'facts and circumstances proved which show beyond a reasonable doubt that the assault in question was made with an abandoned and malignant heart and reckless disregard of human life, and in such a manner as was likely to cause the death of the party assaulted.' If one with an abandoned disregard of human life makes an assault that in its manner and circumstances is likely to produce the death of the party assailed, not only is malice presumed, but the specific intent to take life may also be inferred, for if, with malice, he makes an assault in a manner likely to produce death, he must be presumed to intend the result likely to, that is, which probably and naturally would, flow from his act."

36—Keady v. People, 32 Colo. 57, 74 Pac. 892 (894).

shows that defendant had another load in his gun, and could have used it, and killed said F., if he had so desired, but did not do so because he did not want to kill him, the jury should take this into consideration, along with all the other facts and circumstances in the case, in determining whether the defendant did intend to kill and murder F., and if, from all the facts and circumstances in evidence, they have a reasonable doubt as to whether he really meant to murder, they cannot lawfully convict him of assault and battery with intent to kill and murder.³⁷

(b) If the jury have a reasonable doubt, from the evidence in the case, whether the gun was accidentally or intentionally discharged, the defendant is entitled to the benefit of such doubt, and the jury should find the defendant not guilty.³⁸

(c) If you believe from the evidence that the defendant shot X. as charged in the bill of indictment, and that in doing so he was not acting in self-defense, nor under other circumstances justifying him in shooting, yet, if you should believe that at the time of the shooting it was not the intention on the part of the defendant to take the life of the prosecutor, X., then you would not be authorized to return a verdict finding the defendant guilty of an assault with intent to commit murder; but, if you should believe that to be the truth of the case, then you would be authorized to return a verdict finding the defendant guilty of the offense of shooting at another.³⁹

(d) If you believe that the instrument used is one not likely to produce death, intent to murder is not presumed, but must be proved from the nature of its use, or by specific proof. Where an assault occurs under the influence of sudden passion, or by the use of means, not in their nature calculated to produce death, the person assaulting is not deemed guilty of assault to murder, unless it appears that there was an intention to kill, but he should be convicted of a lower grade of assault and battery.⁴⁰

§ 2859. What Jury Should Consider in Determining Whether Intent Was Present. In order to convict the prisoner at the bar, in manner and form as he stands indicted, it is necessary for the state to satisfy you, beyond a reasonable doubt, that the assault was committed by the prisoner, that it was committed with an intent to murder the person assaulted, and that if the person assaulted had died from the effects of the injuries received thereby, the prisoner

37—*McCaa v. State*, — Miss. —, 38 So. 228.

38—*State v. Connor*, 59 Ia. 357, 13 N. W. 327.

39—*Frazier v. State*, 112 Ga. 868, 33 S. E. 349 (350).

40—*Johnson v. State*, — Tex. Cr. App. —, 93 S. W. 735 (736).

"We think it reasonably appears that he could have used his knife oftener. The evidence shows that

appellant was a negro, and C., N. and B. were white men. Under this state of facts we believe that the provisions of article 717 Pen. Code, 1895, should have been given in charge to the jury, and the court erred in refusing to give the special requested instruction, which, in substance, submits the provisions of said article."

would have been guilty of murder, either of the first or second degree. The intent to commit murder is an essential ingredient of the charge, and it must be proved to your satisfaction, just as any other material fact in the case. It may be proved, however, by direct evidence, such as the declarations of the prisoner made at the time of the shooting, or by circumstantial evidence. It is your duty therefore to consider all the facts proved in the case in order to determine whether such an intent to commit murder existed or not; and in determining whether there was such intent, you should consider the words or threats which may have been made by the prisoner at the time of the shooting, the character of the assault, the kind of weapons used, the danger of producing death, and the means used to avoid or cause death, and all the acts and conduct of the prisoner with the circumstances attending them, as shown by the evidence.⁴¹

§ 2860. Animus, Purpose and Intent May Be Shown By Writing of a Valentine. If the jury believe from the evidence, beyond a reasonable doubt, that defendant wrote the valentine in question, then you can consider said fact as a circumstance going to show the animus, purpose, and intent of appellant at the time of the attempted homicide; and if the jury do not believe, beyond a reasonable doubt, that defendant was the author of said valentine, you should not consider said valentine in the case for any purpose.⁴²

§ 2861. Incapable of Forming Intent from Drunkenness. (a) Intoxication is no defense or excuse for crime; but in certain cases, where a specific intent is an element in the offense, the fact of intoxication, if shown, is to be considered. If it appears from the evidence that the prisoner was intoxicated at the time, and if you find that his state of intoxication was such that he had so far lost his intelligence, and his reason and faculties, that you have a reasonable doubt whether he was able to form and have a purpose to kill, or to know what he was doing, then you should find him not guilty of intent to kill.⁴³

(b) The court instructs the jury, that, in this case, in order to warrant a conviction of the defendant, the jury must be satisfied, from the evidence, not only that the defendant made an assault upon the said A. B., as charged in the indictment, but it must also appear, from the evidence, that, at the time he made the assault, he had formed in his own mind an intention to take the life of the said A. B.; and, if the jury further believe, from the evidence, that at the time of the alleged assault, the defendant was so deeply intoxicated or besotted with drink that he was incapable of entertaining or forming an intent to kill the said A. B., then the jury should

41—State v. Brown — Del. —, 63 Atl. 328.

42—Kelly v. State, 43 Tex. Cr. App. 40, 62 S. W. 915 (917).

Citing Martin v. State, 38 Tex. Cr. App. 285, 43 S. W. 91; Russell v.

State, 37 Tex. Cr. App. 314, 39 S. W. 674; Wilson v. State, — Tex. Cr. App. —, 36 S. W. 587.

43—State v. Fiske, 63 Conn. 388, 28 Atl. 572 (573).

acquit the defendant of the crime of an assault with intent to commit murder.⁴⁴

§ 2862. **Burden of Proof—Justification.** (a) If you find defendant guilty as charged in the information under the instructions so far given you by the court, of course that is the end of your labors in this case, and you will return such a verdict.

(b) You should find him guilty as charged in the information, unless you find that such shooting was justifiable under the rules which will hereafter be given to you by the court.⁴⁵

(c) The burden of proof is on the state, in order to convict of the crime charged, to show that the shooting was not only done deliberately and feloniously and with malice aforethought, but that it was done without legal excuse or justification; and unless it has made such proof so clearly on the whole evidence as to remove from your minds every reasonable doubt, you must acquit of the crime charged.⁴⁶

§ 2863. **Adequate Cause—Insulting Words.** (a) If the jury believe that defendant committed an assault upon S. with the specific intent to kill him, but you further believe that said assault was committed under the immediate influence of sudden passion, arising from having been told that said S. had used insulting words or had been guilty of insulting conduct towards defendant's sister, then you will acquit defendant of assault with intent to murder and convict him of an aggravated assault; and this though you should believe that said S. had not used insulting words or been guilty of insulting conduct towards defendant's sister.

(b) By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection; and the condition of the mind at the time of the homicide is a question to be determined by the jury from all the facts and circumstances in evidence; and when a sudden transport passion is once engendered in a mind, the law does not prescribe any specific length of time for the mind to become cool and deliberate, if it does so change, but leaves that as a question of fact to be determined by the jury from the evidence. Insulting words or conduct of the person killed towards a female relative of the party guilty of the homicide is such adequate cause, provided the homicide occurs upon the first meeting of the person committing the homicide with the person slain.⁴⁷

(c) If you believe from the evidence that defendant shot C. when he appeared to be in no danger at C.'s hands, but that such shooting

44—Mooney v. The State, 33 Ala. 419; State v. Garvey, 11 Minn. 154; Pigman v. State, 14 Ohio 555, 45 Am. Dec. 558; Pays v. State, 5 Tex. App. 35; Parke v. State, 5 Tex. App. 552.

45—Approved as part of the

charge in Holmes v. State, 124 Wis. 133, 102 N. W. 321 (324).

46—Godwin v. State, 73 Miss. 873, 19 So. 712, 55 Am. St. 573.

47—Jones v. State, — Tex. Cr. App. —, 85 S. W. 5 (6).

was in the heat of passion, and without deliberation, you must acquit of the crime charged.⁴⁸

§ 2864. Must Be Murder Had Death Ensued—Deliberation. (a) In order to justify a verdict of guilty of the crime of an assault with intent to commit murder, the facts and circumstances proved in the case must be such that if death had resulted from the shooting, the jury would have found the defendant guilty of willful murder.⁴⁹

(b) You are instructed that while the law requires, in order to constitute an assault with intent to commit murder, that the assault, killing, and murder must have been committed under such circumstances and with such premeditation and design as would have made the killing murder had death ensued, while it does not require that willful intent, premeditation or deliberation shall exist for any length of time before the crime was committed, it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the blow was struck or pistol fired. In this case if you believe from the evidence beyond reasonable doubt that the respondent discharged his pistol at the undersheriff, and that before or at the time he did so, he had formed in his mind a willful, deliberate, and premeditated design to take the life of X., or any person who should attempt to seize the boat under the warrant introduced in this case, and that the pistol was fired in furtherance of that design or purpose, and without justifiable cause or legal excuse therefor, then you should find the defendant guilty. * * * In determining the defendant's intent, you may consider the threats made by him, if you are satisfied beyond reasonable doubt that they were so made; and you will also consider the fact of his leaving the state in the manner he claimed he did as well as the fact that some of the witnesses testified to having heard four shots, as claimed by the defendant.⁵⁰

§ 2865. Assault with Intent to Murder—Malice and Deliberation Necessary Elements—Malice Defined. (a) You are instructed that malice and deliberation are essential elements of the crime of assault with intent to murder; and that malice is not necessarily inferred from the use of a deadly weapon, or the mere fact of shooting or killing a person; and, while it is true that malice may be implied, it is not an offense or presumption of law, but a question of fact to be found by the jury from the proof of facts and circumstances, and sufficient to warrant such implication; and the evidence of such facts and circumstances surrounding and attending the shooting should be

48—Godwin v. State, 73 Miss. 873, 19 So. 712, 55 Am. St. 573.

In Ford v. State, 97 Ga. 365, 23 S. E. 996 (1897), the court said to the jury:

"See whether the nature and extent of the battery, taken together with the nature and extent of abusive language, was not dispro-

portionate to such abusive language."

49—King v. State, 21 Ga. 220, 68 Am. Dec. 457; State v. Malcomb, 8 Ia. 413; Sharp v. State, 19 Ohio 379.

50—People v. Bernard, 125 Mich. 550, 84 N. W. 1092 (1094), 65 L. R. A. 559.

of such a character as to remove all reasonable doubt in your minds on the question of defendant's malice before you can find him guilty.⁵¹

(b) "Malice," in its legal sense, means the intentional doing of a wrongful act towards another, without legal justification or excuse.⁵²

§ 2866. **Assault with Intent to Kill—Malice and Deliberation Not Necessary Elements.** But the state goes further, and has alleged another element of criminality in this case—the element of malice, which is not necessary in the offense known as assault with intent to kill. And if the evidence justifies you in finding that the element of malice existed in this case, beyond a reasonable doubt, as well as the assault with intent to kill, then the state will have made out the full offense as charged. I have to say to you that no deliberation or previous design or premeditation is necessary to constitute this offense of an assault with intent to kill and murder with malice aforethought. There are necessary only the assault, the intent to kill, and the malice aforethought; no deliberation being necessary.⁵³

§ 2867. **Assault with Deadly Weapon—Implied Malice.** Implied malice means that which may be inferred from the acts and facts shown. Thus, when a wanton, wicked, cruel, or revengeful act is shown, the inference or implication may be drawn that the person who did such an act was actuated by malice. And when one person assaults another with a deadly weapon—that is a weapon that will likely produce death—the law presumes malice from that fact alone, in the absence of proof, either direct or implied, to the contrary. The selection and use of a weapon, such as a revolver, in a deadly manner, without legal excuse, raises a presumption and is evidence of malice.⁵⁴

51—Keady v. People, 32 Col. 57, 74 Pac. 892 (894).

52—Bean v. State, — Tex. Cr. App. —, 51 S. W. 946.

"If the court had used the expression 'malice aforethought,' instead of the word 'malice,' in this sentence, it seems, in the view of appellant, the charge would have been correct. His objection is hypercritical," citing Martinez v. State, 30 Tex. App. 129. See also State v. Moore, 168 Mo. 432, 68 S. W. 358 (360).

53—State v. Fiske, 63 Conn. 388, 28 Atl. 572 (573).

54—State v. Hayden, 131 Ia. 1 (7), 107 N. W. 929 (931).

"It has support in the following cases: State v. Gillick, 7 Iowa 311; State v. Ostrander, 18 Iowa 435; State v. Hockett, 70 Iowa 442, 30 N. W. 742; State v. Zeibart, 40 Iowa 169; State v. Sullivan, 51 Iowa 142, 50 N. W. 572; State v. Townsend, 66 Iowa 741, 24 N. W. 535; State v. Roan, 122 Iowa 136, 87 N. W. 997; and except for the last clause in practically all the text

books and adjudicated cases. See Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373, opinion by Shaw, C. J. The statement of the facts referred to 'raised a presumption and is evidence of malice' added nothing to what was already stated, and should be taken in connection with what preceded, to the effect that such presumption arose in the absence of other proof to the contrary. The rule almost everywhere is that from the mere fact of killing, the inference of malice arises; the burden being on the prosecution to raise it to murder in the first degree and on the defense to reduce it to manslaughter. See cases cited in 21 Am. & Eng. Ency. pp. 140 and 170. Of course, we do not mean to say that a jury should ever be instructed that the burden is upon a defendant to show want of malice. We use the above expression for want of better term in which to convey the thought. What we mean is that an unexplained killing with a deadly weapon is evidence of malice, and that

§ 2868. **Assault with Intent to Commit Voluntary Manslaughter.**

(a) To convict the defendant of an assault and battery with intent to commit the crime of voluntary manslaughter, the evidence must prove, beyond a reasonable doubt, that the defendant committed an assault and battery upon the person of X., as charged in the indictment, and that at the time he did so he was in a sudden heat or passion, produced by a provocation given by said X., in the use of personal violence by him, upon his person, and, being in such heat, he, by said assault and battery, without malice, purposed and designed to kill said X.⁵⁵

(b) If you find, from the evidence, that the defendant, at the time and place charged in the indictment, unlawfully assaulted said R. with a pistol, and shot him in the breast, and you further find that said assault was made upon reasonable provocation, in the heat of blood, but without malice, and without legal excuse, and with the intent to kill, then you would be justified in finding the defendant guilty of an assault with intent to commit manslaughter.⁵⁶

§ 2869. **Included Crimes—Reasonable Doubt Acquits.** (a) If you are satisfied beyond a reasonable doubt in this case that the defendant did, within three years prior to the filing of the information in this case, assault the prosecuting witness in manner and form as charged in the information, in the county of Yakima, state of Washington, and that he intended to commit the crime of murder, as previously defined to you, it will be your duty to find him guilty as charged. If you find he committed the assault alleged, but without intent to commit murder, you will find him guilty of assault. If you entertain a reasonable doubt as to whether or not he committed the assault alleged to have been committed in the information, or that he committed it with intent to commit murder, then it will be your duty to give the defendant the benefit of that doubt and acquit him.⁵⁷

(b) The crime charged in the indictment included assault with intent to commit great bodily injury, assault and battery and assault,

the burden is on the accused in that sense that he must make proof of legal excuse, justification, or extenuation, or take the risk of a conviction upon the presumption or inference of malice. 3 Current Law 1651, 5 Current Law 1711 and cases cited; State v. Moore, 25 Iowa 128, 95 Am. Dec. 776; Harkness v. State, 129 Ala. 71, 30 So. 73; People v. Phelan, — Cal. —, 56 Pac. 424; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. Moreover, the court fully and carefully explained all the degrees of homicide, and the instruction upon manslaughter was as favorable to defendant as he could ask."

55—Newport v. State, 140 Ind. 299, 39 N. E. 926, holds that "An objection is not well taken that this

instruction requires the defendant to prove the facts, beyond a reasonable doubt, necessary to reduce the grade of the offense from that charged in the indictment to the lowest degree. The indictment contained charges of all three degrees, namely, an assault and battery with intent to commit murder in the first degree, the same with intent to commit murder in the second degree, the same with intent to commit manslaughter, and a simple assault."

56—The former edition cited State v. White, 45 Ia. 325, and State v. Connor, 59 Ia. 357, 13 N. W. 327, in support of the instruction.

57—State v. Williams, 36 Wash. 143, 78 Pac. 780 (781).

and if you find defendant guilty, it should be of the highest of the included offenses of which the evidence showed him guilty beyond a reasonable doubt, but if there is a reasonable doubt of his guilt of the higher charge, you should then consider the lower degree, and so consider each to the last included crime if necessary, and if there was a reasonable doubt in respect to his guilt in each instance, then he should be acquitted.⁵⁸

§ 2870. **Assault with Intent to Kill—Circumstantial Evidence.** In this case the state seeks a conviction on circumstantial evidence alone, and, while it is the law that a person may be convicted of such an offense on circumstantial evidence alone, before you can convict on such evidence, the circumstances, when all taken together, should be consistent with each other and consistent with the theory of defendant's guilt, and absolutely inconsistent with any reasonable theory of innocence; and circumstantial evidence should always be cautiously considered, and, to warrant a conviction, it must be such as to produce in the minds of the jury that certainty of guilt that a discreet man would be willing to act upon in his own most important affairs; and, if you are not satisfied of the guilt of the defendant on this charge beyond a reasonable doubt, you ought to acquit him, although the unfavorable circumstances [if any] may not have been disproven or explained.⁵⁹

§ 2871. **Assault with Intent to Murder—Form of Verdict.** If, after a careful consideration of all the testimony in the case, you are not satisfied beyond a reasonable doubt that the prisoner committed the assault alleged, your verdict should be not guilty. But if you believe that he did commit the assault, and are not satisfied that it was his intent to commit murder, your verdict should be not guilty in the manner and form as he stands indicted, but guilty of assault only. If, however, you believe and are satisfied that he not only committed the assault alleged, but that it was his intention at the time to murder the person assaulted, your verdict should be guilty in manner and form as he stands indicted.⁶⁰

58—State v. Leuhrman, 123 Iowa 476, 99 N. W. 140 (142).

59—State v. Naves, 185 Mo. 125 (138), 84 S. W. 1 (4).

The court thought it would have

been better if the bracketed words, "if any," had been inserted after "unfavorable circumstances."

60—State v. Brown, — Del. —, 63 Atl. 328.

CHAPTER XCIV.

CRIMINAL—BURGLARY—ROBBERY.

See Erroneous Instructions, same chapter head, Vol. III.

BURGLARY.

- § 2872. Burglary defined—Limitation.
- § 2873. Burglary—Robbery—What is necessary to constitute.
- § 2874. What is sufficient proof of ownership in charge of burglary.
- § 2875. Intent to steal necessary element to constitute burglary.
- § 2876. Prima facie case—Intent presumed.
- § 2877. How intent is manifested—Sound mind and discretion.
- § 2878. What constitutes a breaking.
- § 2879. Breaking into car.
- § 2880. Breaking into chicken coop.
- § 2881. What constitutes an entry.
- § 2882. In charge for burglary accused may be found guilty of larceny.
- § 2883. Time burglary committed generally immaterial—May be material.
- § 2884. Day time or night time.
- § 2885. Possession of stolen goods—Reasonable doubt.
- § 2886. Possession — Explanation must be reasonable.
- § 2887. Attempt of burglary—Cooperating with burglar.
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ROBBERY.

- § 2889. Robbery defined.
- § 2890. What acts would constitute robbery.
- § 2891. Not necessary that force be used.
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- § 2893. Intending to use whatever force is necessary.
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- § 2897. What is meant by taking from the person—Series.
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- § 2899. Taking from the person or in his presence by putting in fear or by force and violence held sufficient.
- § 2900. Retaking of one's property by force and putting in fear.
- § 2901. Possession of the fruits of the robbery.
- § 2902. Case of each co-defendant to be considered separately—Common enterprise.

BURGLARY.

§ 2872. **Burglary Defined—Limitation.** The court instructs the jury that the allegation of time in the information filed in this case is only material for the purpose of fixing the commission of the crime within the statute of limitations, which, in the state of Nebraska, is three years for the crime of burglary. And if you find from the evidence, beyond a reasonable doubt, that the defendant forcibly, feloniously did, on or about the 28th day of May, 18—, in the night season, at the place charged in the information, break and enter the barn of X.,

by opening a closed door, as explained in these instructions, and after so entering said barn of said X. did feloniously take therefrom any property of any value belonging to said X., then your verdict should be guilty as charged in the information.¹

§ 2873. **Burglary—Robbery—What Is Necessary to Constitute.** (a) The court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that the defendants, at the county of P. and state of Mo., at any time within three years before the finding of this indictment, which was on the ———, did forcibly break the outer door of the dwelling house of M., and enter said building, and at the time of such breaking and entering there was a human being in said building, and that the defendants did break and enter said building with the intent to rob the said M. of any money or property that might be in said building, they will find the defendants guilty as charged in the indictment, and assess their punishment at imprisonment in the penitentiary for a term not less than ten years.

(b) The crime of robbing may be committed by taking the money or property of another from his person or presence, forcibly and against his will, or by violence to his person, or by putting him in fear of some immediate injury to his person.²

(c) The court instructs the jury that if you believe and find from the evidence that the defendant, W. S., at and in the county of D. and state of Mo., on the night of the 9th day of ———, did willfully and unlawfully break into and enter a certain storehouse, and if the said storehouse was at the time and place aforesaid in the possession of the D. Co., a corporation organized under the laws of the state of Mo., and if the said defendant broke into and entered the said store building, at the time and place aforesaid, with the intent then and there to take, steal, and carry away, and convert to his own use, and deprive the owners of the use thereof, of any

1—Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. 512.

The court said:

"The objection to this portion of the charge is twofold: First. The authorization of a conviction if the offense was committed at any time within the statute of limitations is claimed to be wrong. The decisions are the other way. The identical question was passed upon in *Palin v. State*, 38 Neb. 862, 57 N. W. 743, where this language was used: 'The allegation in the information as to the time the crime was committed is not material. The state was not required to prove that the transaction occurred on the day alleged, but it is sufficient if proven to have been committed within the time limited by the statute for the prosecution of the of-

fense.' In *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669, the same principle was stated and applied. The question has been set at rest by those decisions, if, indeed, it ever was a doubtful one in this state. The instruction quoted is further criticised for the use of the words 'on or about.' Time was not of the essence of the offense, and it was not error to direct the jury that it was sufficient to find that the crime was committed on or about the time charged in the information, *State v. Fry*, 67 Iowa 475, 25 N. W. 738; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *State v. Harp*, 31 Kas. 496, 3 Pac. 432."

2—*State v. Hale*, 156 Mo. 102, 56 S. W. 881 (1882).

valuable goods, wares and merchandise situate, kept and deposited in the said building, then you will find him guilty of burglary, and assess his punishment at imprisonment in the penitentiary for a term of not less than three years. And if you further believe and find from the evidence that this defendant, W. S., at the time and place aforesaid, did willfully and feloniously steal, take, and carry away from within said building, with intent to convert, to his own use, and deprive the owners of the use thereof, any goods, wares, and merchandise of any value whatever, and if such goods, wares, and merchandise were then and there the property of the D. Co., a corporation as aforesaid, you will also find him guilty of larceny, and assess his punishment for such larceny at imprisonment in the penitentiary for not less than two years nor more than five years.

(d) Although you may not believe and find from the evidence that the defendant broke into and entered the building in question, yet if you find and believe from the evidence that the defendant, W. S., on the night of ———, at and in the county of D. and state of Mo., did willfully and feloniously take, steal, and carry away any of the goods, wares and merchandise charged in the indictment, with the intent to convert the same to his own use, and to deprive the owners of the use thereof, and if said goods, wares and merchandise you may find to have been so taken by defendant, if you find they were so taken by him, were of the value of thirty dollars or more, and were at the time and place aforesaid the property of the D. Co., a corporation organized under the laws of Mo., you will find him guilty of larceny, and assess his punishment at imprisonment in the state penitentiary for a term of not less than two nor more than five years.³

§ 2874. What Is Sufficient Proof of Ownership in Charge of Burglary. Proof that a room in the building was entered with an intent to commit the misdemeanor charged, such room being used for an office, and in the possession of L., would sustain the charge in the indictment of the building being the property of L.⁴

§ 2875. Intent to Steal Necessary Element to Constitute Burglary. I charge you, gentlemen of the jury, that, in order to obtain at your hands a verdict of guilty, the state must establish by competent evidence to your satisfaction beyond a reasonable doubt every essential element of the crime of burglary. One of the essential elements of the crime of burglary, as charged in this indictment, is that, after breaking by force, the car described in the indictment, under circumstances such as would constitute a burglarious breaking under the instructions already given you, the defendant entered into such car with intent to steal the coal therein contained. This intent to steal thus required to be established by the state to your satisfaction beyond a reasonable doubt on the part of the defendant at the time

3—State v. Sprague, 149 Mo. 409,
50 S. W. 901.

4—State v. Tough, 12 N. D. 425,
96 N. W. 1025 (1027).

of breaking and entering the car must have been the intent on the part of the defendant to take, steal, and carry away the coal in said car contained, without the consent of the owner, and with the intent to deprive him thereof; such taking, stealing, and carrying away to be accomplished by fraud and stealth. If, therefore, the defendant's intent at the time of entering said car, or at the time of forcibly breaking the same, if you find he did so forcibly break the car under the instructions already given you, was not to steal the coal therein contained, but that such entry was made under the belief that he had a right to take the coal, or if you have a reasonable doubt that it was his intent to steal the coal, then your verdict must be not guilty.⁵

§ 2876. Prima Facie Case—Intent Presumed. If the jury believe, from the evidence, that the defendant was found, on the night in question, in the house of the said A. B., and in the bed-room of the witness E. D., and that he entered the house by raising a window, then such being in the house, unless explained in some way by the evidence, consistently with innocence, will justify the jury in presuming that such entry was made with a felonious intent, in manner and form as charged in the indictment.⁶

§ 2877. How Intent Is Manifested—Sound Mind and Discretion. In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The essence of every crime is criminal intent without which the offense cannot be committed. It is the intent with which an act is done that constitutes its criminality. The act and criminal intent must concur to constitute the crime. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. * * * As to the intent or intention, you must arrive at it from all the testimony in the case, and all the acts, conduct or circumstances shown in the case.⁷

§ 2878. What Constitutes a Breaking. (a) The court instructs the jury, that while it is necessary, in order to constitute the crime of burglary, that there should be a breaking and an entry of the building described in the indictment, with the intent therein charged, yet to constitute a breaking into the building it is not necessary that any injury should be done to the building, its doors or windows; such breaking may be actual or constructive. An actual breaking may be by lifting a latch and opening a door, by turning back or opening the lock and opening the door, removing or breaking a pane of glass, or raising a window, or anything by which an obstruction to entering the building by the body, or any part of it, is removed, is a breaking within the meaning of the law.⁸

5—*Leslie v. State*, 35 Fla. 171, 17 So. 555 (558).

6—*Com. v. Shedd*, 140 Mass. 451.

7—*People v. Gilmore*, — Cal. —, 53 Pac. 806 (807). Not reported.

8—*Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376; *Dennis v. People*, 27 Mich. 151; *State v. Reid*, 20 Ia. 413; *Harris v. People*, 44 Mich. 305, 38 Am. Rep. 267.

(b) A constructive breaking is committed when admission is obtained by threats, or by fraud, or false pretenses.⁹

§ 2879. **Breaking into Car.** If you find from the evidence, and beyond a reasonable doubt, that at the time and place named in the indictment the witness A., or any other person or persons, unlawfully broke and entered the car in question, and that said car was then under the charge and control of the Railway Company, and was sealed, and contained goods and merchandise for transportation, and that the defendant B. aided and abetted such other person or persons in the acts just named herein, then the defendant is guilty as charged in the indictment, and you should so find.¹⁰

§ 2880. **Breaking into Chicken Coop.** If the jury believe from the evidence in this cause and beyond a reasonable doubt that the defendant, on or about the 8th day of — at the county of — and state of —, broke into and entered in the night time the chicken house of one L. S., by forcibly unfastening the latch of the outer door of said chicken house building and forcibly pushing said door open, and that there were at said time in said chicken house building goods, wares, and merchandise, and other valuable things, to wit, chickens and turkeys, kept and deposited, and further believe from the evidence and beyond a reasonable doubt that the defendant did so break into and enter said chicken house building with the intent of stealing, taking and carrying away, converting to his own use, and of depriving the owner permanently of his property, and against the owner's consent, and without any honest claim of right thereto, any of the chickens and turkeys then in said chicken house and belonging to said L. S., then the jury will find the defendant guilty of burglary in the second degree, and will assess his punishment at imprisonment in the penitentiary for a term of years not less than three years.¹¹

§ 2881. **What Constitutes an Entry.** And to constitute an entry within the meaning of the law it is not necessary that the whole body should be introduced into the building. It is sufficient if the hand, or even a finger, or any instrument held in the hand is introduced into the building for the purpose and with the intent charged in the indictment.¹²

§ 2882. **In Charge for Burglary Accused May Be Found Guilty of Larceny.** The jury are instructed that under an information for burglary the accused may be found guilty of larceny; and if, in this case, the jury are not satisfied from the evidence beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described

9—Johnson v. Com., 85 Penn. St. 54, 27 Am. Rep. 622.

10—State v. Berger, 121 Iowa 581, 96 N. W. 1094.

11—State v. McGuire, 193 Mo. 215, 91 S. W. 939 (940).

12—1 McClain Crim. Law, § 503.

in the information from the possession of the said X., then the jury may, under this information, find the defendant guilty of larceny.¹³

§ 2883. **Time Burglary Committed Generally Immaterial—May Be Material.** Perhaps I ought to charge you that the time this burglary was committed, if you believe that a burglary was committed, is immaterial. The law allows the state to go back four years, in cases of this sort, prior to the date when the bill of indictment was found. But if, upon the testimony, the time is made by the evidence material, it may be made from the run of the evidence material, and therefore, if that is the case, you are to consider the time.¹⁴

§ 2884. **Day Time or Night Time.** If you find that the defendant was guilty of breaking and entering the house of the said X. with the intent charged, but have a reasonable doubt as to whether such breaking and entering was done in the night time, then the defendant would not be guilty of the offense of burglary, but he would, under such circumstances, be guilty of the offense of breaking and entering in the day time.¹⁵

13—Ferguson v. State, 52 Neb. 432, 72 N. W. 590 (591), 66 Am. St. 512.

"The objection brought forward against the foregoing is that it assumed that a burglary had been committed, and withdrew that question of fact from the consideration of the jury; and Metz v. State, 46 Neb. 547, 65 N. W. 190, is relied upon to sustain the argument. This criticism is absolutely without foundation. From the language complained of, no fair inference can be drawn that the trial court assumed or stated as a fact that a burglary had been committed by any one, much less by the defendant. That question was left for the jury to ascertain from the evidence; and, if they failed to find that the crime of burglary had been committed, as charged in the information, then the jury were directed to ascertain and determine whether or not the accused was guilty of larceny of the harness. The decision in the Metz case lacks analogy. There the trial court instructed the jury that 'If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse or warehouse of the said B., and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant, M., you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt.' Undoubtedly, the foregoing

practically told the jury that the storehouse had been burglarized and that the corn had been stolen therefrom; and this court so held. The mere quoting of the two instructions is sufficient to make plain that the case cited has no bearing upon the question under consideration."

14—Johnson v. State, 92 Ga. 577, 20 S. E. 8 (9).

15—State v. Jordan, 87 Iowa 86, 54 N. W. 63 (64).

The court said:

"It is said that the giving of this instruction is erroneous, because the defendant is not charged with such a crime, and there is no evidence to sustain it. In State v. Frahm, 73 Iowa 355, 35 N. W. 451, this court held that 'burglary of a dwelling house is of two degrees—the first, the breaking and entering in the nighttime with intent to commit a felony; the second, the breaking and entering in the daytime.' Code, § 4465, is as follows: 'Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.' The statute is authority for the instruction. Breaking and entering in the daytime is a degree of the offense charged. As to there being no evidence of such an offense, we need only say there is testimony on which the jury found that there

§ 2885. **Possession of Stolen Goods—Reasonable Doubt.** (a) The court charges the jury, while the law is that the recent possession of stolen goods, if unexplained, may justify a conviction yet, if defendant has explained his possession of the goods to the reasonable satisfaction of the jury, and if, upon a fair consideration of all the evidence, the jury have a reasonable doubt growing out of any part of the evidence, as to defendant's guilt the jury must acquit him.

(b) The court charges the jury that if, after considering all the evidence the jury have a reasonable doubt as to defendant's guilt growing out of the evidence of B. G. the jury must acquit the defendant.¹⁶

(c) The exclusive possession of stolen property by the prisoner soon after the theft, the property being shown by the evidence to have been stolen from a building entered, such possession, unexplained, is sufficient to warrant a conviction of the offense charged.¹⁷

(d) Possession of goods recently stolen does not in itself create presumption or amount to *prima facie* proof that the possessor is guilty of breaking and entering the building in which the goods were kept; but if other evidence in the case shows beyond a reasonable doubt that the building was broken and entered by some one, that the theft of the goods was accomplished at the time and by means of the breaking and entering, proof of possession unexplained, or in the absence of circumstances raising a reasonable doubt as to whether the possession of the goods had been acquired otherwise than by the crime charged, is sufficient to warrant a conviction.¹⁸

(e) If you find from the evidence, beyond a reasonable doubt, that on or about the 18th of March, 19—, a building belonging to or in the possession or occupancy of —, and situated in Benton County, Iowa, was broken into and entered, and that personal property was stolen therefrom, and you further find that within a few

was a breaking and entering at some time, with the felonious intent necessary to constitute burglary. This breaking and entering must have been either in the nighttime or in the daytime. If the evidence did not, with that degree of certainty necessary to convict, show the offense to be of the highest degree, it was the duty of the jury, under a familiar rule, to find it of the lower degree and hence, if there was evidence to convict of burglary, it is certainly sufficient to sustain a verdict for the lower degree."

16—Hale v. State, 122 Ala. 85, 26 So. 236 (237).

The first charge, the court said, should have been given. "It correctly states the law in respect of possession of stolen goods, and the explanation offered of such possession, and declares that if the pos-

session shown in this case has been explained to the reasonable satisfaction of the jury, and upon a fair consideration of all the evidence they have a reasonable doubt, growing out of any part of the evidence, as to defendant's guilt, he should be acquitted. This instruction does not authorize acquittal on a reasonable doubt resting on a part of the evidence only, but upon such doubt which may have been created by a part of the evidence, but remains after a fair consideration of all the evidence and thus rests upon the whole evidence. The second charge refused to the defendant is, upon like considerations, free from infirmity."

17—"There was no error in giving this charge." Leslie v. State, 35 Fla. 171, 17 So. 555 (558).

18—State v. Donovan, 129 Ia. 239, 101 N. W. 122 (123).

hours thereafter the property so stolen was in the possession of the defendants, you will, in such case, be warranted in concluding and finding that such property was stolen by the defendants from said building by breaking and entering the same, unless the facts and circumstances disclosed, or the evidence introduced by the state or the defendants, raises in your minds a reasonable doubt as to whether the defendants did not come honestly into the possession of such property. If such reasonable doubt has been raised in your minds by the testimony and facts and circumstances introduced and appearing in the case, then you should not act upon said presumption in convicting the defendants, and should not convict the defendants, unless their guilt has otherwise been proven, as you are directed it must be.¹⁹

(f) The jury are instructed, if they believe from the evidence that the house of X. was burglariously entered by some person about the time alleged in the indictment, and recently thereafter defendant was found in possession of the property which was situated and contained in the house of X. at the time it was burglarized, which had been stolen from said house at the time said burglary was committed, if it was, and, when his possession of said property was first questioned, he made an explanation how he came by it, and accounted for his (defendant's) possession in a manner consistent with his innocence, and you believe such explanation is reasonably and probably true, then you should acquit the defendant.²⁰

(g) I charge you, gentlemen, that the mere fact of the defendant having in his possession, and disposing of the property alleged to have been stolen; that is, if you are satisfied beyond a reasonable doubt that he had in his possession the property alleged to have been stolen, and attempted to dispose of it—I say that these facts are only

19—State v. Ryan, 113 Iowa 536, 85 N. W. 813.

The court said:

"This instruction is supported by the following cases: State v. Taylor, 25 Iowa 275; State v. Hessians, 50 Iowa 137; State v. Richart, 57 Iowa 246, 10 N. W. 657; State v. Kelly, 57 Iowa 645, 11 N. W. 635; Johnson v. Miller, 63 Iowa 538, 17 N. W. 34, 50 Am. Rep. 758; State v. Golden, 49 Iowa 49; State v. Rivers, 68 Iowa 616, 27 N. W. 781; State v. La Grange, 94 Iowa 61, 62 N. W. 664. Other cases might be cited to the same effect. Williams v. State, 60 Neb. 526, 83 N. W. 681, is not in point, as a different rule prevails in that state. The defendant, having testified in his own behalf, the court instructed that such weight and influence should be given to his testimony as it was entitled to, and that 'in weighing his testimony you have the right to and should take into consideration the fact

that the defendant is on trial charged with an offense, and is an interested witness; but, while this should not cause you to disregard his testimony, yet you should consider that fact while weighing his testimony.' This instruction is fully sustained in State v. Moelchen, 53 Iowa 316, 5 N. W. 186; State v. Sterrett, 71 Iowa 388, 32 N. W. 387." 20—McCoy v. State, — Tex. Cr. App. —, 81 S. W. 46, 78 Am. Dec. 520.

"This charge is a substantial copy of the first portion of the charge approved by this court in Wheeler v. State, 34 Tex. Cr. R. 350, 30 S. W. 913. The latter clause of the charge approved authorized the jury to consider the falsity of the explanation as a circumstance, if they believed it was false. This portion was not given to the jury. The charge given in this case is correct."

circumstances tending to show guilt, but they are not of themselves sufficient to prove that he committed the burglary. And if the defendant has explained satisfactorily how he came into possession of the alleged stolen property, and from such explanation you believe that he did not participate in the burglary, and there is no other evidence connecting him with the crime, then you will return a verdict of not guilty.²¹

§ 2886. Possession—Explanation Must Be Reasonable. Where property taken by breaking and entering with intent to commit a felony is found in the exclusive possession of the defendant being tried on the charge, recently after the breaking and entering and the theft of the goods so found, when standing alone, is sufficient to cast upon him or them the burden of explanation how he came by them, or of giving some explanation; and if he fail to do so, to warrant the jury of convicting him of the crime charged. The explanation given must not only be reasonable; it must be credible, or enough so to raise a reasonable doubt in the minds of the jury, who are the judges of the reasonableness and probability as well as credibility.²²

§ 2887. Attempt of Burglary—Co-operating with Burglar. You have observed that the charge is that defendant attempted to break and enter into said building with intent to commit a larceny. If another man than the defendant feloniously broke and entered said building with intent to commit a larceny, he must first have attempted to do so before consummating the breaking and entering and if the defendant was concerned in the commission of that offense, and co-operating with the person committing it in its commission, then he is chargeable with the attempt made by such a person the same as if he had made the attempt himself. If such a breaking and entering was with intent to commit a larceny and the defendant was concerned in the

21—*People v. Lang*, 142 Cal. 482, 76 Pac. 232 (234).

State v. Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. 864, is authority for the following instruction:

One of the gentlemen from Canada—I think Mr. M.—testifies that this respondent, when telling about the shirts taken from him, told him that he obtained these shirts between this place and that, without saying where. The respondent R. testifies that the shirts were given to H. south of here, in that barn. If you are satisfied beyond a reasonable doubt that this respondent did tell M. that he obtained these shirts between this place and S., and are satisfied that that was not true, and that he obtained the shirts as the respondent R. says he obtained them, and find that this respondent falsified in respect to when and where he got the shirts, then that falsification is evidence

tending to show guilty knowledge on his part, and it is evidence, with the other circumstances in the case, tending to show that he is guilty of the crime with which he stands charged. The mere possession of these shirts, although they were stolen property, is not sufficient of itself, to convict him of a crime; but if you are satisfied, as I say, beyond a reasonable doubt, that he falsified about the time and place and manner in which he became thus possessed of the shirts, that is evidence tending to show his guilt.

22—*Robertson v. State*, 40 Fla. 509, 24 So. 474 (479), 52 L. R. A. 751.

The court said:

"This instruction was correct and strictly in line with the decisions of this court," citing *Tilly v. State*, 21 Fla. 242; *Leslie v. State*, 35 Fla. 171, 17 So. 555; *Rimes v. State*, 36 Fla. 90, 18 So. 114.

commission of the breaking and entering with that intent he is chargeable with such an intent. If you find beyond a reasonable, well founded doubt upon all the evidence that the defendant did thus attempt to break and enter into said building, and the said attempt to break and enter was with intent to commit a larceny, then you will find him guilty; but if upon a view of the whole evidence you have a reasonable doubt of his guilt as charged, you will acquit him.²³

§ 2888. **Must Prove Defendant Committed Burglary Beyond Reasonable Doubt.** (a) The court instructs the jury that it was incumbent upon the state to show beyond a reasonable doubt that the defendant at the time and in the county alleged, entered the house alleged, with the parties named in the accusation, and after entering said house, did privately, with the parties named in the accusation steal therefrom the property described.²⁴

(b) If you have a reasonable doubt whether the defendant broke into the office of the company in this case, you will find him not guilty.

(c) Before the jury should convict the defendant, the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with all of them.

(d) If you believe that the defendant has reasonably accounted for his possession of the stolen checks in this case, you should find him not guilty.²⁵

ROBBERY.

§ 2889. **Robbery Defined.** The term "robbery," as mentioned in these instructions, means the felonious taking of the money or property of another from his person or in his presence, and against his will, either by violence to his person, or by putting him in fear of some immediate injury to his person, with the intent to permanently deprive the owner of such money or property, and without any honest claim to it. An attempt to perpetrate a robbery means the willful doing of an act or acts towards the commission of a robbery for that purpose with that intent, but a failure in the perpetration thereof.²⁶

§ 2890. **What Acts Would Constitute Robbery.** If the jury believe, from the evidence, beyond a reasonable doubt, that some time about the day of, etc., A. B. was at the saloon of E. M., in this county, and that he then had in his possession any of the treasury notes or bank

23—State v. Mahoney, 122 Iowa 168, 97 N. W. 1089 (1090).

24—Hargrove v. State, 117 Ga. 706, 45 S. E. 58.

25—Brown v. State, 118 Ala. 111, 23 So. 81.

26—State v. McGinnis, 158 Mo. 105, 59 S. W. 83 (87), citing State

v. Schmidt, 136 Mo. 651, 38 S. W. 719; Same v. Foster, 136 Mo. 655, 38 S. W. 721; Same v. Hopkirk, 84 Mo. 278; Same v. Meyers, 99 Mo. 107, 12 S. W. 516; Same v. Donnelly, 130 Mo. 642, 32 S. W. 1124, 61 Am. St. 585.

bills described in the indictment in this case, and that such notes or bills were genuine, and of some value, and further, that one C. D. requested the said A. B. to loan him some money, and that thereupon the said A. B. took out his said treasury notes or bank notes for the purpose of making such loan, and further, that the said defendant then grabbed the said money and forcibly took the same from the person of the said A. B., and then ran away with said money, with the intention of stealing the same, this would constitute robbery on the part of the defendant, and the jury should find him guilty, in manner and form as charged in the indictment.²⁷

§ 2891. Not Necessary that Force Be Used. The jury are instructed that, to constitute the crime of robbery, it is not necessary that any force be used to obtain possession of the property. It is sufficient if such possession is obtained from the person of the owner, against his will, by threats or menaces of personal violence against him.²⁸

§ 2892. Violence Used Must Not Be Subsequent to the Taking. The jury are instructed that violence, in order to constitute an assault with intent to rob, must not be subsequent to the attempt to take the property.²⁹

§ 2893. Intending to Use Whatever Force Is Necessary. You are further instructed that you should convict the defendant of assault with an intent to commit robbery if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault, or aided or advised the assault upon the prosecuting witness for the purpose of robbery and that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose,—that of robbery.³⁰

§ 2894. Holding Up a Train—Intent. The court instructs the jury that to flag and stop a train is not in itself unlawful, unless coupled with evidence of an intent to commit the specific crime charged in the indictment.³¹

27—Roscoe's Crim. Evi. 893.

McClain, in his Criminal Law, vol. 1, sec. 469, states that the mere snatching of property from the hand of another before any resistance is made is not sufficient, but if resistance, however slight, is overcome, the violence is sufficient; so, where a handbag carried on the arm was taken with such force as to bruise the arm, the violence was held sufficient, citing *Klein v. People*, 113 Ill. 596.

28—*Shinn v. State*, 64 Ind. 13, 31 Am. Rep. 110, 3 Am. Cr. Rep. 396.

29—*Hanson v. State*, 43 Ohio 376, 1 N. E. 136 (137), 5 Am. Cr. Rep. 625.

"The testimony tended to show that after the taking of the property had been abandoned by the defendant, a struggle to avoid an arrest ensued. However violent this struggle, it did not characterize the attempt to take the diamond stud. The jury should have been plainly told that the charge of assault with intent to rob by violence was not proved by subsequent violence used to avoid an arrest."

30—*State v. Fenton*, 30 Wash. 325, 70 Pac. 741 (742).

31—*State v. West*, 157 Mo. 309, 57 S. W. 1071 (1076).

§ 2895. **Taking from the Immediate Presence Does Not Necessarily Mean the Immediate View.** You are further instructed that it is not necessary, to constitute the stealing or carrying away from the immediate presence of the deceased, that it should have been done, if done, in his immediate view, where he could see it done; and if you find from the evidence beyond a reasonable doubt that he made a violent assault upon the deceased, by choking him and causing him to fall upon the ground, and that he then took from his pockets the sum of money as charged in the information, then you will find the defendant guilty of robbery as charged in the information.³²

§ 2896. **Taking Must Be from the "Person" of Another.** If a convict take a gun from a guard forcibly for the purpose of making safe his escape, but not feloniously, with intent to appropriate the same to his own use, the offense would not be robbery, and not a felony.³³

§ 2897. **What Is Meant by Taking from the Person—Series.** (a) It is provided by our statutes that if any person with force or violence, or by putting in fear, steal and take from the person of another any property that is subject of larceny, he is guilty of robbery.

(b) Under this statutory provision, it is not essential that the stealing and taking, if any, was literally from the person, or, in other words, that the property, if any, was on, or attached to, or touching, the literal physical person of the party alleged to have been robbed, but it is sufficient if the stealing and taking, if any, was done in the immediate presence of such person, and while the property was under the control and in the custody of such party.

(c) If, therefore, you find from the evidence, beyond a reasonable doubt, that the defendant, in this county and state, at a time within three years next preceding the finding of the indictment in this case, did steal and take from the immediate presence of the said N. B., named in the indictment, the property named in the indictment, or some part of it, and that the stealing and taking, if any, was accomplished with force or violence towards said N. B., or by putting her in fear, and you further so find that the property, if any, thus stolen, was at the time owned by, or in the possession of, said N. B., and was of some value, then and in such case you should return a

32—State v. Mitchell, 32 Wash. 64, 72 Pac. 707 (708).

33—State v. Whittle, 59 S. C. 297, 37 S. E. 923 (926).

"This charge was upon a hypothetical statement of facts, which it has frequently been held is not a charge in respect to matter of fact, in violation of the Constitution prohibiting the same. Nor was the charge contrary to the law of Georgia as to felony. It appears, from the Criminal Code of Georgia, offered in evidence by the defendants (section 151), that 'robbery is the wrongful, fraudulent and vio-

lent taking of money, goods or chattels from the person of another by force or intimidation without the consent of the owner.' By this statute, as at common law, it is essential to the crime of robbery that the taking shall be 'from the person' of another. As the fact hypothetically stated did not necessarily include a taking from the person, the charge was not erroneous, even if under the Georgia statute, the *animus furandi* is eliminated as an essential element of robbery."

But see next section.

verdict of guilty of robbery; but if you do not so find as to these several matters, you cannot find the defendant guilty of robbery.

(d) It is not necessary, in order to constitute a stealing and carrying away in the immediate presence of the said N. B., that it should have been done, if done, in her immediate view or where she could see it done. And if you find, from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said N. B. by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her hands and feet for the purpose and with the intention of stealing some money or property in the house, and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms, and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said N. B., take and carry away from said room or rooms the property described in the indictment, or some part thereof, and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said N. B., and was without any right or claim of right of defendant in said property, and with the intent to permanently deprive her thereof, then, and in such case, there would be a sufficient stealing and taking from the immediate presence of the said N. B., within the meaning of the law.

(e) It is charged in the indictment that, at the time of the alleged robbery, the defendant was armed with a dangerous weapon, with intent, if resisted, to kill or maim the said N. B., and, being so armed, did wound said N. B. If you find the defendant guilty of robbery, you will determine whether this charge in the indictment is sustained. The only evidence relied upon by the state, as tending to show that defendant was armed with a deadly weapon, is the evidence tending to show that, at the time of the alleged robbery, the defendant had with him the piece of cord or rope introduced in evidence. It is for you to say from the evidence, whether he did have and used such cord or rope; and if he did, whether the same was a dangerous weapon; and, if it was, whether he intended by the use of it (if he did use it) if resisted, to kill or maim said N. B. therewith or did wound her.

(f) A dangerous weapon is one which, from the use made of it at the time, is likely to produce death, or do great bodily harm; and unless you find that said cord or rope was of such a character you cannot find that the defendant was armed with a dangerous weapon. If it was only calculated to produce, from the use of it (if used), a slight injury upon the person of the said N. B., then it would not be a dangerous weapon within the meaning of the law.³⁴

34—The above instructions for the State was sustained in *State v. Calhoun*, 72 Ia. 432, 34 N. W. 194, 2 Am. St. 252.

The facts in the case were as follows: The defendant bound the prosecuting witness and putting her in fear by this violence he extorted

§ 2898. Taking from the Very Person Not Necessary. If you find that X. was holding Y., and that Y., to keep defendants from taking his money, threw his pocketbook down on the ground, and tried to kick the same under a railroad tie, and the defendant Z. picked it up and ran away with it, then the fact, if it be a fact, that the defendant did not get the pocketbook out of the pocket of Y., but off the ground, where Y. had thrown it, would not make the act any the less robbery.³⁵

§ 2899. Taking from the Person or in His Presence by Putting in Fear or by Force and Violence Held Sufficient. The court instructs the jury that if you find and believe from the evidence that at any time within three years next before the 19th day of December, 1903, D., either alone or acting in concert with another or others, took and carried away any money or property described in the information, the property of one T., from his person, or in his presence, and against his will, by force and violence to his person, by putting him in fear of an immediate injury to his person, without honest claim to such money or property on the part of the defendant, and with the intent to deprive said T. of his ownership therein, and convert the same to his own use, then you will find defendant guilty of robbery in the first degree, and assess his punishment at imprisonment in the State Penitentiary for any term not less than five years.³⁶

§ 2900. Retaking of One's Property from Another by Force and Putting in Fear. Although you might believe from the evidence that M. had taken the property from defendant, or from defendant and W., and had the same in his possession at the time of the alleged robbery, such fact would not justify the defendant and the said W., or either of them, in assaulting and putting M. in fear of life or bodily injury, and thereby fraudulently taking from his person and possession the money described in the indictment; but their act in so doing would be robbery, and you should find the defendant guilty, provided you believe from the evidence, beyond a reasonable doubt, that defendant, acting alone, or in connection with the said W., in such manner as to make him a principal offender, took said money from

from her information of the place where she kept her money and watch in another room of the house. Leaving her bound he went into that room and took the money. The Supreme Court of Iowa held that the money was taken from her person in the sense of the words used in the statute. Citing 2 Bish. Crim. Law, § 975; Whart. Crim. Law, § 1696.

But see previous section.

35—*Rains v. State*, 137 Ind. 83, 36 N. E. 532 (533).

36—*State v. Davis*, 186 Mo. 533, 85 S. W. 354 (355).

To this instruction "the insistence

is that, as the statute is in the disjunctive, by the omission of the word 'or' after the phrase, 'by force and violence to his person,' and before the phrase 'by putting him in fear of an immediate injury,' etc., in its effect tells the jury the two phrases are equivalents. We cannot take the view that this instruction could have misled the jury. All the evidence tended to show robbery 'by force and violence,' and so much of the instruction as related to putting in fear was unnecessary and useless surplusage."

the said M. under such circumstances as to make him guilty of robbery as explained to you in another part of this charge.³⁷

§ 2901. **Possession of the Fruits of the Robbery.** (a) The possession of the fruits of a crime recently after the crime, if unexplained to the satisfaction of the jury, becomes a very strong circumstance of guilt. In this case, the witness ———— was knocked down and robbed on the streets of ———— the night of ————, 18—. The defendant is seen next day with his watch, and gives his explanation of his possession. A few days later he gives other explanations of his possession, and in his testimony here on the stand gives his explanation. The witness M., from whom he claims, personally testifies, denying having had the watch; and it is for you to consider all these matters and determine whether the defendant has explained his possession of the watch in such a way as to raise a reasonable doubt in your mind as to his guilt. If he has not, then the law makes that possession a very strong presumption of guilt, and very justly so, for the reason that any one getting property honestly can usually present ample proof of it.³⁸

(b) The jury are instructed that if the defendant obtained from J. S. possession of any of the property described in the indictment, or if any other persons were in company with defendant and obtained possession of any of such property from J. S., yet if you believe that such possession of said property was obtained by purchase or by gift, or by both purchase and gift, from said J. S., or if you have a reasonable doubt as to whether said possession of the property was obtained by purchase or gift, or by means of assault, violence or putting said S. in fear of his life or bodily injury, then you must acquit the defendant.³⁹

§ 2902. **Case of Each Co-defendant to Be Considered Separately—Common Enterprise.** Bearing in mind what I have said, you are to consider the case of the defendants separately. In order to convict either defendant however of the charge made against him in this information there should be evidence against such defendant which convinces you beyond a reasonable doubt of the guilt of that particular defendant. While these defendants are tried together, and are charged with a joint offense, it is necessary that evidence should be given against each one of them, and it is within the power of the jury, and it is the duty of the jury, to consider the case of each defendant separately, as though he were on trial here alone; and if the evidence is not sufficient to convict him, no matter whether it is sufficient to convict the other or not, then you should consider the case of each one, just the same as if he were on trial alone, and you can render a verdict with regard to one which may be one way, and

37—Beard v. State, 44 Tex. Cr. App. 402, 71 S. W. 960 (961).

38—State v. Harris, 97 Ia. 407, 66 N. W. 728 (730).

39—Ford v. State, 41 Tex. Cr. App. 1, 51 S. W. 935 (937).

with regard to the other which may be the other way. Now if you find from the testimony in this case beyond a reasonable doubt, that both the men who are accused in this case, that is McL. and B. had hold of the peddler with the intention of robbing him, and that McL. did not take anything from the person, and that B. did, you can find both guilty of robbery. If you find from the testimony in this case that they were not engaged in this common purpose, but that McL. intended to rob without having any knowledge or taking any part in B.'s acts and intentions, and was prevented from doing so, you can find him guilty of assault with intent to rob. In either case as I said you must be satisfied beyond a reasonable doubt that they are guilty, or else it is your duty to acquit them.⁴⁰

40—People v. Blanchard, et al., 136 Mich. 146, 98 N. W. 983.

CHAPTER XCV.

CRIMINAL—CONSPIRACY.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2903. Conspiracy defined.</p> <p>§ 2904. What must be proved to convict.</p> <p>§ 2905. Sufficient to prove conspiracy by circumstantial evidence—What is and what is not necessary to prove.</p> <p>§ 2906. Sufficient proof of common design.</p> <p>§ 2907. Act of one is act of all.</p> <p>§ 2908. One conspirator responsible for acts of all until he withdraws—Rule after he withdraws—When previous agreement is entered into.</p> <p>§ 2909. What facts tend to show conspiracy.</p> <p>§ 2910. Participants after the conspiracy is formed.</p> <p>§ 2911. Not necessary that the design should succeed.</p> | <p>§ 2912. Not necessary that the meeting should have been for an unlawful purpose.</p> <p>§ 2913. Conspiracy to commit murder.</p> <p>§ 2914. Conspiracy to rob or murder—Former acquittal of one conspirator—Testimony of conspirator.</p> <p>§ 2915. Conspiracy to escape from prison.</p> <p>§ 2916. Conspiracy to escape, when a felony or misdemeanor.</p> <p>§ 2917. Conspiracy to tar and feather.</p> <p>§ 2918. Assent to or knowledge of conspiracy by defendant—Identity.</p> <p>§ 2919. Intoxication as defense to conspiracy.</p> <p>§ 2920. Proof of conspiracy beyond reasonable doubt.</p> |
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§ 2903. **Conspiracy Defined.** The court instructs the jury, as a matter of law, that a conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means.¹

§ 2904. **What Must Be Proved to Convict.** (a) The court charges the jury that before you can convict defendant upon the theory of a conspiracy between defendant and J., S., and B., his alleged associates, you must find from the evidence beyond a reasonable doubt, and to a moral certainty, that they conspired together, before the blow was struck, to do some unlawful act, or to do some lawful act in an unlawful manner, and that the fatal wound was inflicted by one of them, and in furtherance of the purpose for which they had so conspired.²

(b) The court instructs you that if the evidence before you shows any conversations between parties other than defendant, you will not consider such conversations as evidence against this de-

1—State v. Rowley, 12 Conn. 101;
Smith v. People, 25 Ill. 17, 76 Am.
Dec. 780; Alderman v. People, 4
Mich. 414, 69 Am. Dec. 321.

2—Liner v. State, 124 Ala. 1, 27
So. 438 (440).

fendant, unless the state has established beyond a reasonable doubt that a conspiracy had been formed to slay A., and that this defendant was a party to this conspiracy, or had guilty knowledge of the same, and with such knowledge, aided by words or acts in pursuance of such common design; and you are the judges of the evidence, and you can only say if such conspiracy existed, and if defendant acted in pursuance of the same.³

§ 2905. Sufficient to Prove Conspiracy by Circumstantial Evidence—What Is and What Is Not Necessary to Prove. (a) The court instructs the jury that evidence in proof of conspiracy will generally be circumstantial, and it is not necessary, for the purpose of showing the existence of the conspiracy, for the state to prove that the defendant and some other person or persons came together and actually agreed upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon. It is sufficient if such common design and purpose is shown to your satisfaction by circumstantial evidence.

(b) The court instructs the jury that while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose; that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, provided they all were leading to the same unlawful result.⁴

(c) The court instructs the jury, as a matter of law, that the evidence in proof of a conspiracy will, in general, be circumstantial; and, although the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design and to pursue it by common means.⁵

(d) The court instructs the jury, as a matter of law, that if the jury, from the acts of the parties, as proven, and from all the

3—*Nelson v. State*, 43 Tex. Crim. App. 553, 67 S. W. 320.

4—*Musser v. State*, 157 Ind. 423, 61 N. E. 1 (7).

The court said that "the law as declared in said instructions is sustained by many authorities. 3 Greenl. Ev. para. 93; 3 Russ. Crimes (9th Am. Ed.) marg. pp. 165, 166; Whart. Cr. Law (9th Ed.) paras. 1398, 1399, 1401; Whart. Cr. Ev. paras. 32, 698; *McKee v. State*, 111 Ind. 378, 383, 12 N. E. 510; *Archer v. State*, 106 Ind. 426, 432, 7 N.

E. 225; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342, 350; *People v. Arnold*, 46 Mich. 277, 9 N. W. 406; *Dayton v. Monroe*, 47 Mich. 194, 196, 10 N. W. 196; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, 395, and note page 476, Am. St. Rep., 5 Am. Cr. Rep. 637, 6 Am. Cr. Rep. 570."

5—*Spies et al. v. People*, supra; *The Mussel-Slough Case*, 5 Fed. Rep. 680; *Tucker v. Finch*, 66 Wis. 17, 27 N. W. 817.

facts and circumstances in evidence, believe, beyond a reasonable doubt, that the defendants did pursue the common object of, etc., as charged in the indictment, and by the same means, one performing one part, and another another part, so as to accomplish the common object, then the jury would be justified in the conclusion that the defendants were engaged in a conspiracy to effect that object.⁶

§ 2906. Sufficient Proof of Common Design. The court instructs the jury, as a matter of law, that while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action to accomplish the criminal or unlawful purpose alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose; the combination, or common design, or object, may be regarded as proved, if the jury believe, from the evidence, beyond a reasonable doubt, that the parties charged were actually pursuing, in concert, the unlawful object stated in the indictment, whether acting separately or together, by common or different means; providing all were leading to the same unlawful result.⁷

§ 2907. Act of One Is Act of All. If two or more persons, moved and influenced by a common intent and purpose to feloniously assault another with deadly weapons and take his life, and each knows of the common felonious intent and purpose of the other to make such a felonious assault upon such person, and take his life, then the law says, under such circumstances, the act of one is the act of all the assailants; the blow of one is the blow or shot of all; they are all responsible under such circumstances, for the acts of each other.⁸

§ 2908. One Conspirator Responsible for Acts of All Until He Withdraws—Rule After He Withdraws—When Previous Agreement Is Entered Into. (a) But in a second case, where a conspiracy arises out of a concert of action simply, and without any previous agreement of compact as to its extent or purpose, the responsibility of any one of the parties thereto would cease when he abandoned the common purpose and withdrew from any further concert of action with the others, and withdrew all his aid, countenance, and encouragement from the enterprise; but his responsibility for the acts of all, done in furtherance of the common purpose, would continue until he did this.

(b) Accordingly, if the evidence in this case is such as to lead you to believe that a large body of these striking miners, including this defendant, assembled together on ———, without any spe-

6—Rosc. Crim. Ev. 416; *Smith v. People*, 25 Ill. 1.

In *Caddell v. State*, 136 Ala. 9, 34 So. 191 (192), the instruction:

"The court instructs the jury

that conspiracy need not be proven by direct evidence," was approved.

7—*U. S. v. Cole*, 5 M. C. Lane 513.

8—*Hinkle v. State*, 94 Ga. 595, 21 S. E. 595 (601).

cific agreement or understanding as to what they would do; that they united in attacking the men from the Standard mine, and drove them away; that defendant took part in such attack; but that, when the same was ended, he withdrew from the crowd, and withdrew all his aid, countenance, and encouragement, in any further action; that he neither went to Keystone No. 2, nor aided, encouraged, nor advised the others in going there; and that previous to their going there the defendant had withdrawn entirely from any and all concert of action with the others, and had withdrawn all his aid, countenance and encouragement from the enterprise,—he will not be responsible for any acts of the other parties after he had so severed his connection with them; and, if you find this to be the state of the case, the defendant should be acquitted. But if he went to Keystone No. 2, and assisted in attacking the house where M. and his comrades were; or if he did not in fact go there himself, but if he advised, aided or encouraged others to go there, for the purpose of driving or taking the new miners away, and in the prosecution of that purpose the house where Munson and the other new miners were, was attacked and fired into by them, and M. was killed by any of such shots,—the defendant will be liable, with all the others so engaged with him, for such killing.⁹

§ 2909. **What Facts Tend to Show Conspiracy.** The court further instructs the jury that if they believe from the evidence in this case that the prisoner assaulted and beat B., and inflicted upon him injury, in this county, on or about the night of ———, and that D. and E. were present when said assault was so made by said defendant, upon said B., and that they aided and abetted said defendant in said assault and battery, either by preventing others from interfering to prevent or stop said assault, or by assisting in administering punishment to said B. themselves, then they must presume that said assault was made and such injury inflicted in pursuance of a combination and conspiracy between said prisoner, D., and E.; and the burden of proving that such combination and conspiracy did not exist, and that such assault was not made and such injury inflicted in pursuance thereof, is upon the prisoner, and unless he shows by clear, satisfactory, and convincing proof that such combination and conspiracy did not exist, or it appears from the whole circumstances and evidence of the case, then they must find the prisoner guilty.¹⁰

9—State v. McCahill, 72 Iowa 111, 33 N. W. 599-601.

"The instructions read together present the correct rule of law.

Counsel think the court erred in repeating in three or four instructions, the thought that defendant is guilty if he aided, abetted, or encouraged others to commit the crime, even though he was not

present. The rule announced cannot be questioned, and we can discover no possible prejudice resulting to defendant from its repetition. It does not appear to us that it was brought to the attention of the jury in an improper connection."

10—State v. Bingham, 42 W. Va. 234, 24 S. E. 883.

§ 2910. **Participants After the Conspiracy Is Formed.** The court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed and aid in executing them, are fellow conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit the offense when they become partners to the transaction, or further the original plan.¹¹

§ 2911. **Not Necessary that the Design Should Succeed.** (a) The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their designs. Nor is any overt act necessary to complete the crime; the offense is complete when the confederacy to pursue the common purpose is made.¹²

(b) The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the indictment, and that any act was done in furtherance of such design by any one of the conspirators. If the conspiracy, charged in the indictment, has been proved to the satisfaction of the jury, beyond a reasonable doubt, then the act of any one of the conspirators, in furtherance of the common design, if proved, will be regarded as the act of all.¹³

§ 2912. **Not Necessary that the Meeting Should Have Been for an Unlawful Purpose.** Though the jury may believe, from the evidence, that when the parties came together upon the occasion in question, they met for some lawful purpose, yet, if the jury further believe, from the evidence, beyond a reasonable doubt, that they then joined in attempting to accomplish the unlawful purpose stated in the indictment, in manner and form as therein alleged, then this would be sufficient evidence of a conspiracy to accomplish such purpose, and it is unnecessary to prove any previous plan or understanding to that effect by the parties.¹⁴

§ 2913. **Conspiracy to Commit Murder.** (a) The court instructs the jury, as a matter of law, that if they believe, from the evidence, beyond a reasonable doubt, that the defendant and others, known or unknown, conspired and agreed to kill S., and in pursuance of such conspiracy S. was killed, the defendant, B., is guilty of murder, whether present at the killing or not.

(b) The court instructs the jury, that if you believe, beyond a reasonable doubt, that the defendant shot and killed S., or that he

11—People v. Mather, 4 Wend. 229 (N. Y.), 21 Am. Dec. 122.

12—State v. Ripley, 31 Me. 386; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; State v. Pulle, 12 Minn. 164; State v. Straw, 42 N.

H. 393; Johnson v. State, 3 Tex. App. 590.

13—State v. Norton, 23 N. J. L. 33; Com. v. Crowninshield, 10 Pick. 497 (27 Mass.).

14—Lowery v. State, 30 Tex. 402.

aided or abetted any other person or persons, in pursuance of a conspiracy or agreement, it matters not that such evidence is circumstantial.¹⁵

(c) If you should find that C. H. and P. D., or either of them, unlawfully killed J. J., you cannot convict the defendant, J. M., of the homicide, unless you further believe from the evidence before you beyond a reasonable doubt either that such killing was the result of a previously formed conspiracy between said defendant and the party who did the same, or that the defendant was present when the same was done, and knew the unlawful intent of the party who did such killing, and aided such party by acts, or encouraged him by words or gestures to do such killing, in such manner as to make him a principal thereto, as the term "principal" is herein explained.¹⁶

(d) Some testimony has been admitted tending to show that X., who was jointly indicted with the defendant for the murder, shortly after the alleged murder was committed had in his possession large sums of money, which, it is claimed by the state, was the property of the deceased. This fact, if it has been proved, is proper for you to consider, together with all the other facts and circumstances proved on the trial, in determining the guilt or innocence of the defendant, if you further find that said money, or any part thereof, was obtained or procured by said X., and from the deceased, as the fruits of a conspiracy theretofore entered into by and between the defendant and the said X., or by and between the defendant, Y., and some other person or persons, for the robbing and murder of the deceased, or for the burglarizing of the house of the deceased; and said facts, if any such facts have been proven, must be considered by you with all the other facts and circumstances proved, in determining the guilt or innocence of the defendant, whether the defendant was or was not present at the time said X. was seen with said money, or any part thereof, in his possession.¹⁷

15—Boone v. People, 148 Ill. 440 (446, 451), 36 N. E. 99.

"The last clause of the instruction does not require that the conspiracy or agreement, in which the defendant aided any other person or persons, was one to kill S., and left it to the jury to speculate as to whether the defendant was an accessory after the fact, and, there was no evidence on which to base it."

16—Moore v. State, 44 Tex. Cr. App. 45, 68 S. W. 279 (281).

17—Musser v. State, 157 Ind. 423, 61 N. E. 1 (4).

The court said in approving the instruction, that "the evidence was concerning a physical fact, and tended to prove the guilt of —, and was considered in connection with all the other evidence in the

case also tending to prove the guilt of appellant. There was no doubt that a homicide had been committed. The question of the guilt or innocence of appellant was to be determined by the jury. There was evidence tending to show that three persons were present at the commission of the crime, and any fact tending to connect any of them with the crime was competent evidence against the others. That evidence of this character is admissible is well settled. Frazier v. State, 135 Ind. 38, 40, 41, 34 N. E. 817; Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; St. Clair v. U. S., 134, 139, 14 Sup. Ct. 1002, 38 L. Ed. 936; People v. Cleveland, 107 Mich. 367, 65 N. W. 216; Angley v. State, 35 Tex. Cr. R. 427, 34 S. W. 116; Pierson v.

§ 2914. Conspiracy to Rob or Murder—Former Acquittal of One Conspirator—Testimony of Conspirator. (a) The court instructs the jury if you believe beyond a reasonable doubt from all the facts and circumstances in evidence, that defendant and said X., or defendant, X., and some other person or persons, entered into a conspiracy to commit the offense charged, such proof is sufficient to establish the existence of such conspiracy, though no direct evidence showing such conspiracy was introduced.

(b) The court instructs the jury that the declarations of X. before the crime charged was committed, in the absence of the defendant, are proper to be considered by you, with all the other facts and circumstances proven on the trial, in determining the guilt or innocence of defendant, if the jury believe, from the evidence, beyond a reasonable doubt, that defendant prior to the murder entered into a conspiracy with said X. to rob or murder or to burglarize the house of the deceased, and that such declarations were made in furtherance of such conspiracy or common design; and the fact, if it be a fact, that X. has been tried and acquitted of said charge, will not make such statements or declarations incompetent, if such conspiracy has been shown by the evidence.¹⁸

State, 18 Tex. App. 524; Mimmis v. State, 16 Ohio St. 221; Allen v. State, 80 Tenn. 424; Ryan v. State, 83 Wis. 486, 53 N. W. 836; Clark v. State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. 817; Jackson v. State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. 839; Pace v. State (Tex. Cr. App.), 20 S. W. 762; Conde v. State, 33 Tex. Cr. Rep. 10, 24 S. W. 415, 60 Am. St. 22; Thompson v. State, 35 Tex. Cr. R. 511, 34 S. W. 629; Armstrong v. Com., 16 Ky. L. 494, 29 S. W. 343; Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403."

In Renner v. State, 43 Tex. Cr. App. 347, 65 S. W. 1102 (1103-4), the court said that the following charge, taken in connection with the charge requested by appellant to be given the jury in answer to their query, should have been given, or the principle announced in the two charges should have been given the jury:

The court instructs you, in answer to your query, that if you find the facts to be as stated, you will acquit the defendant. Before you can find him guilty, you must find beyond a reasonable doubt that he was actually present at the time the fire was ignited, and, knowing the unlawful intent of C. and F., aided and abetted therein. If his participation therein was without knowledge of their unlawful intention, he could not be

guilty. His failure to try to extinguish flames would not make him guilty, unless, as hereinbefore stated, he had knowledge of the unlawful intent of the other parties. If what he did was in a joke, you are told to acquit him. Before he could be bound by the acts of others, he must have had a knowledge of their guilty intentions.

You are instructed that, if you should find and believe beyond a reasonable doubt that an unlawful conspiracy to slay C. P. B. had been formed between J. C. and E. F. at the time of or before the defendant entered C. & F.'s saloon, then, in that event, before this defendant could be convicted, he must have had knowledge of the conspiracy, if any, and aided and abetted therein, as charged in the main charge.

18—Musser v. State, 157 Ind. 423, 61 N. E. 1 (8).

"The instructions," said the court, "are to be read and construed together as an entirety (Shields v. State, 149 Ind. 395, 406, 407, 410, 49 N. E. 351), and when so construed it appears that on the subject of proof of the facts constituting the conspiracy they were more favorable to appellant than he was entitled to demand. It is clear from what we have already said on the admissibility of the record of X.'s

(c) A conspiracy cannot be established by the testimony of an accomplice or accomplices alone, and in this connection I charge you that unless you believe from the evidence outside of the evidence of P. D., and also outside of the evidence of B. J., if you find that B. J. was also an accomplice, that there was a conspiracy to rob J. J., or rob and murder J. J., then the evidence is not sufficient to establish a conspiracy, and you cannot consider any of the acts or declarations of P. D., or any of the acts and declarations of C. H., as to such conspiracy, against the defendant in this case.¹⁹

§ 2915. **Conspiracy to Escape from Prison.** If a person serving a sentence for a misdemeanor enter into a conspiracy to make his escape, and not to commit murder the offense is not a felony. If a convict or a person under sentence as for a misdemeanor is serving out that sentence, and enters into a conspiracy to make his escape for the purpose of escaping and not to commit murder, the offense is not a felony; that is, a conspiracy to escape is one offense,—a misdemeanor; a conspiracy to murder is another offense, and of a higher grade.²⁰

§ 2916. **Conspiracy to Escape, When a Felony or Misdemeanor.** If a person serving sentence for a misdemeanor enters into a conspiracy to make his escape, and not to commit murder, the offense is not a felony.²¹

§ 2917. **Conspiracy to Tar and Feather.** If you find from the evidence in this case, beyond a reasonable doubt, and to a moral certainty, that the defendant and some other person or persons entered into a conspiracy to go to jail at — at the time and place alleged in the information for the purpose of unlawfully tarring and feathering the deceased, and that said defendant and others, in pursuance of said act, also agreed and conspired together at the —, on the way to the jail, after they had arrived at the jail, or at any other time and place, that they or either of them would shoot and kill the deceased, if necessary in order to carry out

acquittal that the court did not err in informing the jury, in the instruction last quoted, that the declarations of X. referred to in said instruction were to be considered by the jury, even if X. had been tried and acquitted on said indictment, if the conspiracy was proven by the evidence. *Holt v. State*, 39 Tex. Cr. R. 282, 45 S. W. 1016, 46 S. W. 829; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556."

19—*Moore v. State*, 44 Tex. Cr. App. 45, 68 S. W. 279 (281).

20—*State v. Whittle*, 59 S. C. 291, 37 S. E. 923 (925).

21—*State v. Whittle*, *supra*.

The court held that it is not shown "that by the law of Georgia

a conspiracy to escape from serving under a sentence for a misdemeanor is more than a misdemeanor. On the contrary, it appears in the brief that escaping from a chain gang under sentence for selling liquor is in Georgia a misdemeanor, and punishable not exceeding one year on the chain gang. It further appears by section 2, Cr. Code Ga., offered in evidence, that the term 'felony' means an offense for which the offender on conviction shall be liable to be punished by death or imprisonment in the penitentiary and not otherwise. From these it does not appear that there was any error in the charge, as complained of."

the unlawful design of tarring and feathering the deceased, then I instruct you that under such circumstances, if you should find beyond all reasonable doubt that defendant feloniously and of his malice aforethought shot and killed the deceased, your verdict should be guilty; and should you have a reasonable doubt in your minds as to whether the defendant fired the shot that killed the deceased, and still you believe beyond a reasonable doubt that he fired a shot feloniously at the deceased, and about the same time, or shortly afterwards, another shot was feloniously and with malice aforethought fired at the deceased, which caused his death, and that said shot was fired feloniously in furtherance of the unlawful design and conspiracy so entered into by defendant and the other person or persons, then I instruct you that under such circumstances it would be your duty to find the defendant guilty, and then proceed to determine from the evidence and instructions of the court, whether it is murder in the first degree, murder of the second degree, or manslaughter.²²

§ 2918. Assent to or Knowledge of Conspiracy by Defendant—Identity. (a) If you should believe from the evidence that there was a conspiracy to commit a robbery, as before explained, and that the same was so undertaken, and that said B. was killed, yet if you have a reasonable doubt whether such general purpose was contemplated and assented to by defendant, or whether it was done, if at all, with his knowledge, and in furtherance of a common design to commit said offense; or if you have a reasonable doubt of defendant's identity as one of the persons engaged in such robbery, if any, or if you have a reasonable doubt of the presence of defendant at the robbery, if any, at the time thereof,—in either event you will find him not guilty.²³

(b) You are charged that mere knowledge of the existence of a conspiracy, on the part of defendant does not make him a party to such conspiracy, but the evidence must show beyond a reasonable doubt that the defendant not only knew of the conspiracy, but participated in such conspiracy, and, if you do not so find from the evidence, you will not consider the evidence of acts and declarations of S. and Mrs. S., but disregard the same in your consideration of the case.²⁴

§ 2919. Intoxication as Defense to Conspiracy. It is claimed by the state that the defendant conspired with others to go to C.'s barn for the purpose of engaging in an unlawful act, and it is claimed on the part of the defendant that he was so drunk at the time as to be incapable of entering into such a conspiracy with a free will and understanding. Now you are instructed on this branch of the case that if

22—*People v. Cowan*, 1 Cal. App. 411, 82 Pac. 339.

23—*Nite v. State*, 41 Tex. Cr. App. 340, 54 S. W. 763 (767).

The court said:

"We think this charge very

clearly, fairly and succinctly states the law applicable to the defense urged by appellant."

24—*Smith v. State*, — Tex. Cr. App. —, 89 S. W. 817.

you find that the defendant was so drunk as to be incapable of knowing and understanding the nature of the contemplated conspiracy and the consequences thereof, in going to C.'s barn then you should find him not guilty of entering into such a conspiracy.²⁵

§ 2920. **Proof of Conspiracy Beyond Reasonable Doubt.** (a) The court further instructs the jury that, before you can find the defendant, J. R., guilty as charged in the indictment, you must believe beyond all reasonable doubt that he entered into a conspiracy and confederation with T. H., E. M., M. P. and J. R., or any one of them, for the purpose of robbing B., and in pursuance of such conspiracy said B. was robbed, as charged in the indictment and that such belief must be founded upon the evidence adduced before them in the trial of this case.²⁶

(b) The court charges the jury that if you find from the evidence that defendant and his associates acted illegally and maliciously in what they did, with the same end in view, yet, unless you are satisfied from the evidence beyond a reasonable doubt, and to a moral certainty that their acts were done pursuant to a mutual agreement, you should convict the defendant, unless you believe from the evidence beyond a reasonable doubt, and to a moral certainty, that defendant inflicted the fatal wound, or aided or abetted whoever did inflict it; and if you have a reasonable doubt of defendant's guilt, under the rules above stated, you should acquit the defendant.²⁷

(c) If the jury are in doubt as to which of the prisoners shot the deceased, and have a reasonable doubt as to whether E. shot the deceased, or whether C. shot him, then the verdict should not be guilty as to both, unless the jury shall be satisfied beyond a reasonable doubt that there was a conspiracy on the part of the prisoners to kill the deceased, or that they were aiding or abetting each other.²⁸

25—State v. Pasnau, 118 Ia. 501, 92 N. W. 682 (683).

26—State v. Roberts, 50 W. Va. 422, 40 S. E. 484 (486).

27—Liner v. State, 124 Ala. 1, 27 So. 438 (440).

28—State v. Edwards, 126 N. C. 1051, 35 S. E. 540 (541).

CHAPTER XCVI.

CRIMINAL—EMBEZZLEMENT—FALSE PRETENSES— FORGERY.

See Erroneous Instructions, same chapter head, Vol. III.

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FALSE PRETENSES.

FORGERY.

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- § 2951. Drunkenness as a defense to forgery.
- § 2952. Forgery of telegram—Inducing girl to marry through forging mother's name to telegram—Series.

EMBEZZLEMENT.

§ 2921. Meaning of the Term—No Embezzlement, Unless Done Secretly, with Intent to Defraud. The court instructs the jury,

that the meaning of the word embezzlement is the fraudulently removing or secreting personal property, with which a party has been intrusted, for the purpose of applying it to his own use. There can be no embezzlement, within the legal meaning of the word, unless the party, when he takes the property or money, does it secretly, with an intent to defraud the owner.¹

§ 2922. **Ownership of Property—Intent.** (a) If you find from the testimony, or have reasonable doubt in the matter, that the defendant honestly believed that he was entitled to the \$20,500 so paid to him by check on the First National Bank of Seattle, Washington, and that he, so believing retained the money as his part of the transaction by which the money was obtained, then your verdict must be "Not guilty." There can be no conviction of embezzlement, unless there was a criminal intent at the time, on the part of the defendant; and, that if the defendant believed he was entitled to keep the money, no matter how groundless you may find that belief was, yet he cannot be convicted of embezzlement if you have a reasonable doubt as to whether or not he believed it was his money, and he was entitled to keep it.

(b) If you find from the evidence in this case that the defendant H. was the owner of \$20,500 referred to in the information, or that Torrence paid the defendant that amount, by check or otherwise, in part payment of mining claims owned by the defendant, referred to in the mining deed introduced in evidence, you must find the defendant not guilty.

(c) If, after hearing all the evidence in the case, you have any reasonable doubt as to whether the said sum of \$20,500 was or was not the property of the defendant in part settlement of such mining claims, you must return a verdict of not guilty.²

§ 2923. **Felonious Intent Necessary.** To constitute the crime of larceny a felonious intention, that is an intention to steal, must always exist. And, under our statute, making the conversion of property to his own use by a bailee larceny, the crime is not made out by merely showing a conversion of the property to his own use by the bailee, but it must further appear that such conversion was with an intent to steal the same. The jury are instructed, that the taking or conversion of personal property which renders a person guilty of simple larceny, or of embezzlement, is a feloniously taking or conversion, and before you can convict the defendant in this case, you must be satisfied, from the evidence, beyond a reasonable doubt, that the property mentioned in the indictment, or some part of it, was converted to his own use by the defendant, with an intention, at the time, to steal the same.³

1—People v. Hurst, 62 Mich. 304, 23 N. W. 838.

2—State v. Hoshor, 26 Wash. 643, 67 Pac. 386 (390).

3—Phelps v. People, 55 Ill. 334;

People v. Husband, 36 Mich. 306; Hill v. State, 57 Wis. 377, 15 N. W. 445; People v. Galland, 55 Mich. 628, 22 N. W. 81.

§ 2924. **No Felonious Intent, When.** If the jury believe, from the evidence, that the defendant, as clerk or salesman of the said A. B., received moneys belonging to him, and honestly and fairly charged himself with the same on the account books kept for that purpose, and afterwards used the money for his own benefit, without the knowledge of the said A. B., never attempting to conceal the fact, but acknowledged the same when spoken to about it, and promised to repay it as soon as he was able, these facts are all proper to be taken into account by the jury, with all the other evidence in the case, in determining the question whether the defendant used the money with any felonious or fraudulent intent; and if, upon a consideration of all the facts and circumstances proved, the jury have any reasonable doubt of such felonious and fraudulent intent, they should find the defendant not guilty.⁴

§ 2925. **Felonious Intent Inferred from the Act—Embezzlement by Employee.** (a) The court instructs the jury that the law presumes that every man intends the natural and probable consequences of his own acts, and if you find from the evidence that the defendant unlawfully converted the money alleged in the information to have been embezzled, to his own use, you will be authorized to infer therefrom the criminal intent, and that he did at the time intend to embezzle and convert the same to his own use, and to deprive E. B. of it. The court further instructs the jury that "feloniously" means a wrongful act willfully done.⁵

(b) The court instructs the jury that every sane person, old enough to be accountable for his acts, is presumed to intend to do

4—2 Bishop on Cr. Law, § 360; 1 McClain Cr. Law, § 641.

5—State v. Lentz, 184 Mo. 223, 83 S. W. 970 (971), citing State v. Manley, 107 Mo. 364, 17 S. W. 800; State v. Pratt, 98 Mo. 483, 11 S. W. 977; State v. Adams, 108 Mo. 208, 18 S. W. 1000; State v. King, 86 N. C. 603; Bishop's New Cr. Law, Par. 300. "The taking of an employer's money by his clerks or agents is legally wrong in itself. The action of the trial court in giving the instruction was not erroneous.

This court, in State v. Silva, 130 Mo. 463, 32 S. W. 1007, in discussing the question of intent, as applicable to the offense of embezzlement, very clearly announced the correct rule. Gantt, J., speaking for this court, said: 'When the agent or servant takes his employer's money with the intent to convert it to his own use without the master's knowledge, that moment he is guilty of the criminal intent denounced by the statute. The law will not enter upon the inquiry

with him as to his further intention of returning the money at a later period, or making good his shortage when called to account. It suffices for the state to prove an intent on the part of the defendant to do that which the law in fact forbids. The effort of counsel to have the court require the jury to find some other or further intent was to open the door for argument that the defendant might knowingly and intentionally do the very act which the law denounced as criminal, and yet not be guilty, provided he did not intend to keep the money permanently, or intended to return it in the future. But when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of the offense, and no one, who violates a law which he is conclusively presumed to know, can be heard to say he had no criminal intent in doing it.'"

that which he does do, and is presumed to intend the natural and probable consequences of his voluntary acts; and such presumption becomes conclusive in the absence of evidence to the contrary.⁶

(c) The intent with which an act is done may be proved by direct and positive testimony, or the intent may be inferred from all the facts and circumstances surrounding and attending the act as shown by the evidence in the case, and the intent in this case must be determined from the evidence given in this case.⁷

(d) The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful and fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction.⁸

§ 2926. Embezzlement, from a Distracted Person—Consent. If Mrs. T. was a demented or distracted person, of unsound mind and memory, and not capable of transacting the ordinary business of life, and defendant knew it, it was not material whether she parted with the possession of the check willingly or unwillingly.⁹

§ 2927. Bailee Cannot Commit Embezzlement—Obtaining Possession by Trick, Device or Fraud Requisite. A bailee who has lawful possession cannot commit larceny. The possession, however, must have been originally obtained lawfully, and without the intent to ap-

6—Ford v. State, 46 Neb. 390, 64 N. W. 1082 (1085).

"Doubtless, where one who has the lawful possession of the property of another converts the same to his own use, the intent to convert alone might be inferred from the acts, rather than the intent to steal. But whether such inference shall be drawn depends upon the facts of each particular case. The mere proving of the conversion alone, not coupled with any criminalizing circumstances, would be insufficient to establish the intent to steal. The jury could not have un-

derstood by the instruction that, from the fact of the conversion of the ring, they were bound to find that the defendant had a specific intent to steal the same. The instruction, as entirety, left to the jury to determine the question of intent with which the act was committed, from a consideration of all the evidence adduced."

7—State v. Merkel, 189 Mo. 315, 87 S. W. 1186 (1187).

8—Agnew v. United States, 165 U. S. 36 (49), 17 S. Ct. 235.

9—Hobbs v. People, 183 Ill. 336 (338), 65 N. E. 692, 47 L. R. A. 795.

appropriate the property to his own use. One who obtains the possession by trick, device, or fraud, with intent to appropriate the property to his own use—the owner intending to part with the possession only—commits larceny when he subsequently appropriates it.¹⁰

§ 2928. Original Taking of Bailee Need Not Be Felonious—Gist of the Offense Is Conversion. If you find from the evidence, beyond a reasonable doubt, that defendant obtained the ring in question temporarily from said X., and that he afterwards, without the knowledge or consent of said X., unlawfully disposed of said ring at a pawn shop, and received money thereon, such an act on the part of the defendant would be a conversion of the property in question to defendant's own use; and if you find, beyond a reasonable doubt, that defendant unlawfully converted said ring to his own use, by disposing of the same at a pawn shop, and received money thereon, with intent to steal the same, then defendant would be guilty of larceny of said ring, the same as if he had originally feloniously stolen said property from the said X. at the time he obtained possession thereof from said X., if he did obtain it.¹¹

§ 2929. Venue of Conversion. Although the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant had in his possession, in this county, money of the said A., and afterwards converted the same to his own use, still, if you further believe, from the evidence, that he carried said money into the county of S., and then for the first time formed a purpose in his own mind of converting the same to his own use, and did afterwards convert the same, etc., in the said county of S., then the jury should find the defendant not guilty.¹²

§ 2930. Embezzlement of Money—Check Is Not Money. (a) The

10—Finlayson v. State, 46 Fla. 81, 35 So. 203.

The court said "the authorities sustaining the charge are abundant. Clark's Crim. Law, p. 250, and cases cited: Bish. Stat. Crimes, par. 419; 1 Whart. Crim. Law, par. 1009; Johnson v. People, 113 Ill. 99; State v. Woodruff, 47 Kan. 151, 27 Pac. 842, 27 Am. St. Rep. 285; Levy v. State, 79 Ala. 259; State v. Williams, 35 Mo. 229; People v. Smith, 23 Cal. 280."

11—Ford v. State, 46 Neb. 390, 64 N. W. 1082 (1084).

"It is argued that this instruction is fatally defective, in that it omitted the element of 'felonious taking'; and Mead v. State, 25 Neb. 444, 41 N. W. 277, and Barnes v. State, 40 Neb. 545, 59 N. W. 125, are cited to support the proposition. Those cases are clearly distinguishable from the one at bar. They were prosecutions for simple lar-

ceny, while this is for larceny as bailee. In the decisions referred to, the original taking must have been felonious in order to constitute the offense charged, while such is not the case in a prosecution like this. Here the gist of the offense is not the felonious taking of the ring, but the conversion thereof by F. without the knowledge and consent of the owner, with the intent to steal it. The statute under which the information in this case was filed (section 121b. Cr. Code) declares 'that, if any bailee of any money, bank bill or note, goods or chattels shall convert the same to his own use, with intent to steal the same, he shall be deemed guilty of larceny, in the same manner as if the original taking had been felonious.' The instruction includes every element of the offense described in the statute."

12—Campbell v. State, 35 Ohio 70.

court instructs the jury that a check is not money, and if you believe from the evidence that defendant received from Mrs. R. no money, then you must find him not guilty.

(b) If the state has failed to prove to the satisfaction of the jury, beyond all reasonable doubt, that C. was the agent of Mrs. R, and as such received her money, the jury will find him not guilty on the first count of the indictment.

(c) If the state has failed to prove, beyond all reasonable doubt, to the satisfaction of the jury—First, that C. was the agent of Mrs. R.; second, that C. received bank notes to his own use, or embezzled the same, then the jury will find him not guilty.¹³

§ 2931. Whether Wrongfully Converted or Drawn for Benefit of Bank. (a) If you are convinced the accused embezzled or wrongfully converted to their own use the money of the bank, it will be your duty to convict.

(b) If, on the other hand, you find that though the money of the bank was taken by the accused, or either, that it was not embezzled or wrongfully converted, but was drawn for the benefit of the bank, and was so used, it will be your duty to acquit.¹⁴

§ 2932. Pledging Bonds, Held as Treasurer, in Security for His Note—Intent. The court instructs the jury that intent in this case may be inferred from the fact if you find, from the evidence, beyond a reasonable doubt, that it is a fact that the defendant, while treasurer of the University of Illinois, pledged the bonds in question in this case, held by him, as such treasurer, as part of an endowment fund of the University, to secure his note to the First National Bank of Chicago; and the jury in considering the subject of intent should consider it with reference to the pledging of the bonds in question if the jury shall find that he did so pledge the said bonds as distinguished from his motive or purposes as to the use of any fruits of such pledge.¹⁵

§ 2933. Special or General Deposit. The state must prove to you, by evidence, all the material ingredients constituting the offense. Now, gentlemen of the jury, if the evidence leaves you a reasonable doubt as to whether or not the agreement between Mrs. R. and the defendant was that the defendant took the check, and to collect and account

13—Carr v. State, 104 Ala. 43, 16 So. 155 (158, 160), 53 Am. St. 17.

The court said that "each count of the complaint charges the defendant with having received in one form or another, money from Mrs. R. On one aspect of the evidence, he received only a check from her, directly or indirectly. Obviously, a check is not money; and obviously, also, unless he did receive money of hers, the jury should have acquitted him. The

first of above charges, asked by defendant, asserts this, and should have been given. Upon the same considerations, charges 2 and 3, having reference to the first and second counts of the indictment, respectively, should have been given."

14—State v. Nichols, 50 La. Ann. 699, 23 So. 980 (986).

15—Spalding v. People, 172 Ill. 40 (55), 49 N. E. 993.

for the money as ordinary or general depositors, with the understanding that it was to be held out as Mrs. R's. special fund, to prevent her husband's creditors from interfering with it, or whether it was a special deposit in law, then you must give the defendant the benefit of such doubt.¹⁶

§ 2934. **Embezzlement by Employee During Employment.** (a) The court instructs the jury that if you believe and find from the evidence in this cause that at any time within three years prior to the filing of the information in this cause that the defendant was the agent and attorney of a certain private person, to wit, E. B., and that the defendant during the time of his employment as such agent and attorney of said E. B. was not a person under the age of sixteen years, and that, during such employment as such agent, did, by virtue of his employment, take or receive into his possession, as the money of said E. B., the sum of eighty-nine dollars, or any portion thereof of the value of thirty dollars or more, and that after receiving said money the defendant did, at the county of Butler and state of Missouri, and within three years prior to the filing of the information in this cause, feloniously, unlawfully, and intentionally embezzle and fraudulently convert said money, or any portion of the same, to the amount of thirty dollars or more, to his (the defendant's) own use, without the assent of his employer, E. B., and that he (the defendant) did so convert the same with the felonious intent to deprive the said E. B. of the said money, and that said money so embezzled and converted by the defendant then and there belonged to, and was the property of, said E. B., then you should find the defendant guilty of embezzlement, as charged, and assess his punishment at imprisonment in the penitentiary for a period of not less than two nor more than five years.¹⁷

(b) You may take the books of defendant together with the expense bills, and consider them in connection with all of the evidence, and

16—Carr v. State, 104 Ala. 43, 16 So. 155 (158, 159), 53 Am. St. 17.

The court said that "there was also evidence upon which it was open to the jury to conclude that notwithstanding the pass book given Mrs. R. by C. described her deposit as a special deposit, and notwithstanding, also, that C. furnished her with a form of a filled-out check to be used in drawing on this fund, whereon he wrote the words 'Special Deposit,' the deposit was nevertheless a general one, and was called and written down a 'special deposit' only for the purpose of keeping it safe from the creditors of Mrs. R.'s husband, and not to the end that the bank should safely keep the particular money as hers, for her, and return it to her. If this was true, or if the

jury had a reasonable doubt, because of this evidence, whether the deposit was special or not, the defendant should not have been convicted, since a general deposit is not alleged in the indictment, and confessedly, if it had been, no criminal responsibility attached to the use of money so deposited by the defendant or the bank; it being the money of the bank, on account of which the relation of debtor and creditor only could exist between the parties. The charge above asserts this proposition and should have been given, unless its refusal may be justified on the ground that it refers a legal question to the jury."

17—State v. Lentz, 184 Mo. 223, 83 S. W. 970.

that if the books thus considered show, beyond a reasonable doubt, a shortage, and that the defendant knew it was as to money collected by him as agent of the S. Railway Company, and that said money belonged to said railway company, and that said defendant knowingly withheld said money, and knowingly failed to account for it, then this would be a circumstance tending to show a criminal intent.

(c) If the jury is satisfied from the evidence beyond a reasonable doubt, that in the county of Cherokee, and within three years before the finding of this indictment against the defendant, there was a shortage of more than \$25 of money collected by the defendant for the S. Railway Company; that at the time of said collection the defendant was the agent of said railway company, and that said money was the property of said railway company, and that the defendant knew it at the time of the collection, and that defendant collected said money by virtue of his employment as said agent, and that the defendant had fraudulently converted it to his own use—that then you must find the defendant guilty as charged in the indictment.¹⁸

§ 2935. Embezzlement—Right to Retain Commission by Agent. The jury are instructed that, if you believe, from the evidence, that she was, at the time of the alleged embezzlement, a collector for the company with the right to retain her commission, that is, that she was not required to pay over to the company the gross sum or sums of money collected by her, but might first deduct her commissions and then pay over the balance or net amount due the company,—she was not such an agent or servant as is contemplated in the statute defining embezzlement, and the verdict should be not guilty.¹⁹

§ 2936. Selling Horse as Own Property, Instead of as Agent, and Converting Proceeds. And so, if you believe from the evidence that defendant received from T.'s possession the horse in question, under the agreement that defendant should act as the agent of the said T. in the sale of said horse, and that defendant should sell said horse, and pay over to and deliver to said T. the proceeds which defendant should secure from the sale of said horse; and you further believe that defendant sold said horse as his own property, and not as the agent for said T., and that at the time of said sale defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use and benefit, without the consent of said T.,—you will find defendant guilty of embezzlement of said horse, etc.²⁰

§ 2937. Embezzlement by Banker—Illinois Statute. (a) If you

¹⁸—Willis v. State, 134 Ala. 429, 33 So. 226 (230).

¹⁹—McElroy v. People, 202 Ill. 473 (477-8), 66 N. E. 1058.

²⁰—Huggins v. State, 42 Tex. Cr. App. 364, 60 S. W. 52.

"We think," said the court, "that is a proper presentation of the law applicable to the facts, and are of

opinion that the evidence amply supports the verdict of the jury. Epperson v. State, 22 Tex. App. 694, 3 S. W. 789, as suggested by our able assistant attorney general, is almost identical with the case at bar. See, also, Leonard v. State, 7 Tex. App. 417."

believe, beyond a reasonable doubt, from the evidence, that the defendant was engaged in the business of banking, and in such business received on deposit with intent to defraud, from one S. D., the sum of \$—, or any other sum, that at the time such deposit was made said D. was not indebted to the defendant, that at the time of receiving said deposit the defendant was insolvent, and knew himself to be so, and that said deposit or any portion of it was lost to said D., then you should find the defendant guilty.

(b) It is not necessary that the prosecution should prove, by direct and positive evidence, that the defendant was insolvent on the — day of, etc., or that he knew he was insolvent, but it is sufficient, if you are satisfied beyond a reasonable doubt, from all the circumstances in evidence in the case, that he was insolvent at that time, and took and converted the deposit with fraudulent intent.

(c) It is your province, as jurors, to say under your oaths, from the evidence, whether or not the defendant was insolvent at the time he received the deposit.

(d) A depositor of money in a bank is a person who places his money therein for safe keeping.²¹

§ 2938. **Receipts as Evidence.** You are instructed that the receipts and other writings introduced in evidence in this case are only *prima facie* evidence of the receipt of the money, and are not conclusive, and may be qualified and explained by other competent evidence; and, in determining the truth in relation thereto, you will take into consideration all the evidence introduced bearing upon this point.²²

FALSE PRETENSES.

§ 2939. **False Pretenses, Some Property Must Have Been Obtained Thereby.** If the defendant at the time such representations were made obtained any of the property charged in the indictment from said B. by reason of the alleged false pretenses, the indictment may be sustained.²³

§ 2940. **False Pretenses—Knowledge and Intent.** Now if he knew, when he did that (made out the bill for services and attached the certificate) that she was not a stranger not belonging to this state and intended in presenting that bill to cheat and defraud the state out of the amount of the bill, and deceive the state by it, so that he

21—Murphy v. People, 19 Ill. App. 125.

In Carr v. State, 104 Ala. 43, 16 So. 155 (157), 53 Am. St. 17, the court held that collecting a check or certificate through a New York bank and not bringing it to the defendant's state, Alabama, would not be embezzlement.

22—Mills v. State, 53 Neb. 263, 73 N. W. 761 (766).

23—Approved in Commonwealth v. Lee, 149 Mass. 179, 21 N. E. 299 (300).

This instruction, said the court, "compelled the commonwealth to show that some definite portion of the property charged in the indictment had been obtained by the alleged false pretenses. Commonwealth v. Stone, 4 Metc. 43; Commonwealth v. Coe, 115 Mass. 481."

got the amount of his bill, then the offense is proved. * * * It is for you to say, when the respondent made up that bill and sent it to the Auditor General, did he know that she was a resident here? If he knew that, did he intend to cheat and defraud the state by making a state case out of that inquest in submitting that bill? If the state was deceived by it, and, relying on that bill, paid the money, and the facts are as set forth in the information then the offense is proved. It is not disputed that the defendant as coroner, submitted this bill, but the knowledge existing in the mind of the defendant at the time of the act is disputed. Was he aware that the representations made in the bill and certificate were false?²⁴

FORGERY

§ 2941. Forgery, Elements Necessary to Be Proved. If you find from the evidence, beyond a reasonable doubt, that said note is a forged instrument, and you further find from the evidence, beyond a reasonable doubt that the defendant uttered said note and published same as true, knowing that same was false or forged, with intent to defraud, then he is guilty of the crime of uttering a forged instrument, as charged in the indictment; but if you fail to find from the preponderance of the evidence either that said instrument was a forged instrument, or that the defendant uttered and published said note as true, knowing the same to be false or forged with intent to defraud then you should find the defendant not guilty, and so return your verdict.²⁵

§ 2942. Elements Constituting Forgery—Assisting or Encouraging Another to Commit though without Writing Same Himself. In order to establish defendant's guilt it is necessary for the state to prove beyond a reasonable doubt that the instrument described in the indictment is a writing obligatory; that it was not signed by T. or any one for him with his consent, and not afterwards ratified by him; and that the defendant made all of it, or a distinct part of it, and thereby intended to defraud the G— Company or the A— Company.²⁶

§ 2943. Intent to Defraud Must Be Proved Beyond a Reasonable Doubt, Gain or Profit Not Material—Presumption from Attempt to Utter. Defendant is indicted for forgery. Bill contains two counts. In order to convict under either count, the state must satisfy you from the evidence beyond a reasonable doubt of defendant's guilt. Now, what does it take to constitute the crime of forgery or the uttering and publishing of such? (Here the court reads the statutes).

24—People v. Hoffman, 142 Mich. 531 (575), 105 N. W. 838 (854).

25—State v. Rivers, 124 Ia. 17, 98 N. W. 785 (787).

26—King v. State, 43 Fla. 211, 31 So. 254 (259).

"The instruction," said the court, "so far as it goes, is correct, though it does not state all the circumstances under which a party

may become a principal in forgery. If a party be present, aiding, advising, assisting, or encouraging another to commit a forgery, he is guilty of forgery, though he writes no part of the instrument. The incompleteness of the instruction complained of does not operate against defendant but in his favor, and he has no ground to complain."

You will observe that in either case—that of forgery or that of uttering or publishing the instrument—the guilty intent to injure or defraud must appear. It is not necessary, in order to constitute the crime, that the person committing the forgery should be the gainer thereby, but it is sufficient if there is a fraudulent intent to deceive by a forged paper; and the fact that no one is defrauded is immaterial, the other elements of the crime being established. That where one is found in possession of a forged instrument, and is endeavoring to obtain money or advances upon it, this raises a presumption that the defendant either forged or consented to forging such instrument, and, nothing else appearing, the person would be presumed to be guilty. Therefore, if you are satisfied beyond a reasonable doubt that the paper (in this case the note) was a forgery and that defendant had it in his possession, and tried to obtain money from C. or S. or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty. If, upon the whole evidence, any reasonable doubt remains as to the innocence of defendant, you will give him the benefit of it, and return a verdict of not guilty.²⁷

§ 2944. Presumption that One Intends the Natural Consequences of His Act. The court instructs the jury that the law presumes a man to intend the reasonable and natural consequences of any act intentionally done.²⁸

§ 2945. Attempt to Utter or Pass for Personal Gain Must Be Proved. If you find from the evidence that the note referred to in the indictment was forged, you cannot convict, unless you find further, beyond a reasonable doubt, that defendant attempted to utter, pass or deliver said note for personal gain or for a fraudulent purpose.²⁹

§ 2946. Possession of Forged Instrument—Lack of Revenue Stamp, Invalid Instrument. (a) The possession of a forged paper does not raise even a *prima facie* presumption of guilt.

(b) It being shown by the state that the note did not bear upon it a revenue stamp, and such paper writing being one on which no action

27—State v. Peterson, 129 N. C. 556, 40 S. E. 9 (10), 85 Am. St. 756.

The court said that in this case "the defendant excepted to this charge because of the following instructions: '(1) Where one is found in the possession of a forged instrument, and is endeavoring to obtain money or advances upon it, this raises a presumption that defendant either forged or consented to the forging such instrument, and, nothing else appearing, the person would be presumed to be guilty.' In this there was no error. State v. Morgan, 19 N. C. 348; State v. Britt, 14 N. C. 122; State v. Allen,

116 Mo. 548, 22 S. W. 792. '(2) If you are satisfied beyond a reasonable doubt that the paper (in this case the note) was a forgery, and that defendant had it in his possession and tried to obtain money from C. or S. or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty.' This is also warranted by the precedents. 2 McClain, Cr. Law, par. 809, and cases there cited."

28—Spears v. People, 220 Ill. 72, 77 N. E. 112 (114).

29—State v. Peterson, *supra*.

of debt or contract might be based, you are instructed that in this case you cannot return a verdict of guilty.³⁰

§ 2947. **Possession and Uttering of a Forged Instrument is Strong Evidence of Forgery—Venue.** The court instructs the jury that, in order to find the defendant guilty under the indictment, it is not necessary for state to prove by direct evidence (that is, it is not necessary for witnesses who saw the act done) that the defendant signed the names of B. and H. to the note in controversy, but the same may be inferred from the proof of other facts and circumstances in the case. Therefore, if the jury find and believe from the evidence that the said note was in the possession of the defendant, in the county of Harrison, recently after the same is dated and purports to have been executed, and if you further believe that the defendant sold and delivered said note as a genuine note to the witness W., then these facts, if proven, unless satisfactorily explained by the defendant, will warrant you in finding that the names of B. and H. were actually written and signed by the defendant, and you will find the defendant guilty, as defined in other instructions.³¹

§ 2948. **Possession of and Claiming Under a Forged Deed Constitutes Strong Evidence of Guilt.** (a) The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and that the defendant had possession of the same in Saline county, Missouri, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed, then these facts constitute evidence that he committed the forgery of the same, or caused the same to be forged, and that he committed said forgery in Saline county and state of Missouri; and, unless he explains or accounts for his possession thereof in a manner consistent with his innocence, then these facts are sufficient to warrant the jury in finding him guilty of forgery, as charged in the information.

(b) The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and the defendant had had possession of the same in Saline county, Missouri, and that he made claim to the land described therein, or any part thereof, by virtue of

30—State v. Peterson, *supra*.

31—State v. Milligan, 170 Mo. 215, 70 S. W. 473 (474).

The court said this "instruction is in accordance with the rule announced in the case of State v. Yerger, 86 Mo. 33, wherein it is said that the possession of a forged in-

strument, or the uttering of it, by one in the county where the indictment is found, is strong evidence not only to show that he forged it, but to show that the forgery of the instrument was committed by him in the same county. State v. Burd, 115 Mo. 405, 22 S. W. 377."

and under said deed in said county of Saline, then such facts raise the presumption that he forged or caused the same to be forged in Saline county, state of Missouri, and that, unless such possession by the defendant of said deed and his claim thereunder are satisfactorily explained to the jury by the evidence in the case in a manner consistent with the innocence of the defendant, then such presumption of guilt becomes conclusive.³²

§ 2949. Forgery of the Name of a Deceased Party to a Deed of Certain Land. If the jury find and believe from the evidence that the defendant, at the county of Saline, in the state of Missouri, at any time within three years before the filing of the information in this case, to wit, November 27, 1901, caused or procured to be forged or falsely made the deed described in the information and read in evidence, or any part thereof (not including the acknowledgment of the same), purporting to be the act of one K., who was not then living, but had formerly lived and died in Saline county, Missouri, the name of said K. being affixed to said deed, by which an interest in the lands described in said deed and in the information purported to be transferred or conveyed to one P., and that the same was done feloniously (that is, wickedly and wrongfully), against the admonition of the law, and with intent on the part of the defendant to cheat and defraud, then you will find the defendant guilty under the second count of the information, and, so finding, will so state in your verdict, and assess his punishment at imprisonment in the penitentiary for a term of not less than ten years.³³

32—State v. Pyscher, 179 Mo. 140, 77 S. W. 836 (841).

"These instructions," said the court, "correctly declare the law as applicable to the facts of this case. . . . The possession of this deed by the defendant, and claiming the land described in it, if the jury first determine that the deed was forged, was sufficient to authorize a conviction. State v. Haws, 98 Mo. 188, 11 S. W. 574, 12 S. W. 126. The instructions now being discussed, while not strictly in accord with the approved precedents, are substantially correct. The court, in the instructions, fairly and fully submitted the question as to whether or not the deed had been forged. This being done, we think it is a clear legal proposition that if defendant had possession of the deed, and was claiming under it, it constituted strong evidence of guilt, and, unless explained upon some theory consistent with his innocence, authorized his conviction. It will also be noted that the pos-

session of this deed, and defendant's claim under it, were not denied. It was his defense that the deed was not forged, but was a valid instrument, properly executed and delivered to the defendant by Mrs. K. This issue was fairly submitted to the jury, and they found adversely to the defendant."

33—State v. Pyscher, *supra*.

The court held that "there is no merit in the complaint against this instruction. It is insisted that it is erroneous because it fails to tell the jury that they must find the facts as enumerated in the declaration beyond a reasonable doubt. There is no necessity for, and the law of this state does not require, the application of the term 'beyond a reasonable doubt' to each item of evidence introduced in the cause. It is sufficient to give a general instruction on that subject, applicable to the testimony as a whole. State v. Good, 132 Mo. 126, 33 S. W. 790."

§ 2950. **Proof that Part of a Forged Writing was in the Same Handwriting as the Balance as Evidence of Guilt.** The court instructs the jury that, although you cannot find the defendant guilty of the charge in the information upon proof that the acknowledgment to said deed was forged and fraudulently made, yet the jury are further instructed that if you believe from the evidence that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been made, was forged, and that the body of the deed, containing the names of the grantor and grantee, and the description of the land conveyed in said deed, was written by the same person who wrote said acknowledgment, then, in determining whether or not the deed was a forgery, you have a right to consider the fact that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been taken, were forgeries, along with the other facts and circumstances in evidence.³⁴

§ 2951. **Drunkenness as a Defense to Forgery.** Drunkenness, although not an excuse for crime, may be considered in passing upon a question of intent, and in an indictment for forgery the burden is on the state to establish a guilty knowledge and a guilty and fraudulent intent.³⁵

§ 2952. **Forgery of Telegram—Inducing Girl to Marry Through Forging Mother's Name to Telegram—Series.** (a) I charge you

34—State v. Pyscher, 179 Mo. 140, 77 S. W. 836 (842).

"It is insisted," said the court, "that this instruction is erroneous for the reason it does not restrict the purpose of the forgery of the acknowledgment to the question of intent on the part of the defendant. It is also urged that the instruction assumes the forgery of the acknowledgment. This contention is a misconception of the purposes of the acknowledgment. The testimony as to the forged acknowledgment and the introduction of the acknowledgment was not for the purpose of showing intent on the part of the defendant. If defendant in fact forged or caused to be forged the deed, it required no evidence of intent. The act itself carried with it the intent. But the evident purpose of showing the forgery of the acknowledgment—it being on the same paper, and so closely related to the deed—was that this fact might be considered in determining whether the deed had been, in fact, forged. The forgery of the deed was a fact that had to be proved in the case, and the testimony in respect to the ac-

knowledge was introduced, not for the purpose of showing intent on the part of defendant, but that it might be considered in the establishment of the important fact that the deed had been forged. An analysis of the instruction makes it apparent that this was the purpose, and also shows clearly that the fact that the acknowledgment was forged was not assumed, but the jury are expressly required, before considering it, to find that it was forged. While the defendant was not charged with the forgery of the acknowledgment of the deed, and the instructions all strictly guard his rights in that respect, yet the acknowledgment being so closely connected with the deed, its forgery may shed light, in very important particulars, upon the investigation of the forgery of the deed itself. There was no error in this instruction, and the cases cited relied upon by counsel for appellant (State v. Myers, 82 Mo. 558, 52 Am. Rep. 339; State v. Baynes, 88 Mo. 611), are not applicable to this instruction."

35—State v. Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. 766.

that even if you find that the defendant falsely represented himself as a man of wealth and social position to Norine S., and concealed from her the fact that he had previously been convicted of felony, and thereby induced her to marry him, that this of itself was not sufficient to convict the defendant, nor does it prove any element of the crime charged in the information.

(b) In the contract of marriage which forms the gateway to the marriage status, the parties take each other for better or worse, for richer or poorer, to cherish each other in sickness or in health; and consequently a mistake by one of the parties to the marriage, whether resulting from accident or in general from fraudulent practices in respect to character, fortune, health or the like, is not a crime under the laws of this state.

(c) The law indulges in no presumption, nor is a jury permitted to indulge in any presumption that it is more probable that a person previously convicted of felony will commit a subsequent crime.

(d) I charge you that if you find that Norine S. on the 23d day of February, 19—, was more than 18 years of age, that the consent of her mother or father or either of them was not essential or necessary to consummate a legal marriage between the said Norine S. and the defendant.

(e) I charge you that if you find that on February 23d, 19—, that Norine S. was more than 18 years of age, that she had the right to marry the defendant or any other person without the consent of either of her parents.

(f) I charge you that if you find on February 23d, 19—, that Norine S. was 18 years of age or more, that her parents or either of them had no right, by process of law or otherwise, to prevent the said Norine S. from marrying any man of her choice.

(g) If you find from the evidence that at the time of the sending of said telegram there was a preconceived arrangement between the defendant and Norine S. that such a telegram should be sent by the defendant without the consent, authority or knowledge of Marie S., and that at the time of the sending of the telegram the defendant did not intend to defraud, deceive or injure Norine S. by the sending of the said telegram, and if the said Norine S. knew when said telegram was received that it was sent without the authority of her mother then your verdict must be "We, the jury, find the defendant not guilty."

(h) If you find that Norine S. at the time she received said telegram at Crockett, knew that the said telegram was not signed, authorized or sent by her mother M. S., and knew that said telegram was sent in pursuance of an arrangement between her and the defendant, and that she was not deceived thereby, and that the defendant did not intend to deceive, defraud or injure her, in the sending of the said telegram, then your verdict must be not guilty.

(i) As has been stated to you, the defendant is on trial for the crime charged in this information, and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, and even if you find that the defendant's conduct has been very reprehensible morally, still if you are not convinced of his guilt beyond a reasonable doubt of the crime charged in the information, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise.³⁶

36—*People v. Chadwick*, 143 Cal. 116, 76 Pac. 884 (886).

CHAPTER XCVII.

CRIMINAL—HOMICIDE.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 2953. Murder defined—Alabama.</p> <p>§ 2954. Murder defined—Malice defined—Delaware.</p> <p>§ 2955. Murder—Essential elements—Illinois.</p> <p>§ 2956. Murder defined—Mississippi.</p> <p>§ 2957. Murder defined—Malice defined—North Carolina.</p> <p>§ 2958. Killing wife caught in adultery.</p> <p>§ 2959. Killing by corporal punishment.</p> <p>§ 2960. Killing servant or child by cruel treatment.</p> <p>§ 2961. Killing policeman in pursuance of unlawful conspiracy.</p> <p>§ 2962. Homicide — Preventing escape of prisoner.</p> <p>§ 2963. Conspiracy to kill—Conspirators equally liable.</p> <p>§ 2964. Death caused by reckless driving of horses.</p> <p>§ 2965. Homicide — Previous relations of parties.</p> <p>§ 2966. Shooting at one man, killing another.</p> <p>§ 2967. Defendant charged with killing one, evidence of killing of another not to be considered.</p> <p>§ 2968. Mutual threats to kill both carrying deadly weapons.</p> <p>§ 2969. Shooting with gun or pistol, loaded with power and leaden balls.</p> <p>§ 2970. Homicide—Discharging of gun into the air.</p> <p>§ 2971. Mere peacemaker should be acquitted.</p> <p>§ 2972. Killing by accident excusable.</p> <p>§ 2973. Wound not necessarily fatal—Death from neglect.</p> <p>§ 2974. Murder—No defense that life might have been saved.</p> <p>§ 2975. Defense of death from other causes.</p> <p>§ 2976. Turbulent disposition of deceased.</p> <p>§ 2977. Immaterial whether defendant angry or excited.</p> <p>§ 2978. Instruction to jury to consider only unlawful homicide.</p> | <p>§ 2979. Essential elements to convict—Must be proved beyond reasonable doubt.</p> <p>§ 2980. Recommending a person to mercy.</p> <p>§ 2981. Furnishing forms of verdicts.</p> <p>§ 2982. Homicide — General summary.</p> <p>§ 2983. Murder in first or second degree—Series.</p> <p>§ 2984. Homicide—Various elements—Series.</p> <p style="text-align: center;">MURDER IN FIRST DEGREE.</p> <p>§ 2985. Murder in the first degree—What constitutes.</p> <p>§ 2986. Murder first degree—What constitutes — Duration of deliberation.</p> <p>§ 2987. Murder in the first and second degree distinguished.</p> <p>§ 2988. Whether murder or manslaughter.</p> <p>§ 2989. Murder in the first and second degree and manslaughter defined and distinguished—Elements of—Michigan.</p> <p>§ 2990. Murder in the first degree—Idaho statute.</p> <p>§ 2991. Order in which jury may consider the issues—New York code.</p> <p>§ 2992. Deceased assaulting defendant—Defendant killing deceased after cooling time.</p> <p>§ 2993. Seeking quarrel with deceased with expectation of shooting him.</p> <p>§ 2994. Deceased making first hostile demonstration—Direct evidence not necessary.</p> <p>§ 2995. Murder by poison—Essential facts.</p> <p>§ 2996. Deceased having had illicit intercourse with defendant's wife.</p> <p>§ 2997. Murder in the first degree—Definition of—Murder committed in perpetration of robbery.</p> <p>§ 2998. Murder—Attempt to escape.</p> <p>§ 2999. Killing while attempting to commit rape.</p> <p>§ 3000. Fatally wounded by striking with billiard cues.</p> |
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§ 2953. **Murder Defined—Alabama.** If the deceased died from the effects of a wound inflicted by a gun in the hands of the defendant, and such wound was intentionally inflicted in pursuance of a previously formed design to take his life, he would be guilty of murder.¹

§ 2954. **Murder Defined—Malice Defined—Delaware.** Murder is the unlawful killing of a human being, under the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from manslaughter and every other kind of homicide, and therefore indispensably necessary to be proved, is malice preconceived or aforethought. This term "malice," is not restricted to spite or malevolence toward the deceased in particular, but, in its legal sense, it is understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief. Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be. For the law considers that he who does a cruel act voluntarily, does it maliciously.²

§ 2955. **Murder—Essential Elements—Illinois.** You are further instructed that, if you believe, from the evidence in this case, beyond a reasonable doubt, that the defendant, with malice aforethought, either expressed or implied, inflicted upon the deceased, H. M., the mortal wound or wounds in manner and form as charged in the indictment, not in self-defense as the same is defined in these instructions, and not upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, and that the said H. M. did thereafter die from said mortal wound or wounds, in manner and form as charged in the indictment, then the jury should find the defendant guilty of murder.³

§ 2956. **Murder Defined—Mississippi.** The court instructs the jury that murder is the killing of a human being with the deliberate design to effect the death of the person killed, [without authority of law,] and if the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendant so killed the deceased, then the jury will find the defendant guilty as charged.⁴

1—Harkness v. State, 129 Ala. 71, 30 So. 73 (74).

2—State v. Brinte. — Del. —, 58 Atl. 258 (262), citing State v. Goldsborough, Houst. Cr. Cas. 314.

3—Carle v. People, 200 Ill. 494 (500), 66 N. E. 32, 93 Am. St. 208.

"This instruction contains all the elements of the crime of murder in the facts which it assumes to exist, and if those elements were established by the testimony, it

was the duty of the jury to find the defendant guilty of murder. This being so, the concluding words were proper."

4—Ivy v. State, 84 Miss. 264, 36 So. 265 (266).

"The above instruction for the state ought to have contained the words 'without authority of law,' since it was manifestly drawn under the statute."

§ 2957. **Murder Defined—Malice Defined—North Carolina.** It is murder when a person of sound mind and discretion unlawfully killeth any reasonable creature in being and under the peace of the state, with malice aforethought, either express or implied. By sound mind and discretion is meant that the one doing the killing has a will or legal discretion. Malice is a wicked intention to do the injury, and is of two kinds—express malice and implied malice. When a party evinces an intention to commit the crime it is express malice. When a person commits an act unaccompanied by any circumstances justifying its commission it is implied malice; the law presumes he has acted advisedly, and intended the consequences produced by his act.⁵

§ 2958. **Killing Wife Caught in Adultery.** The law is that if a man discovers his wife in the act of adultery, and his passion is greatly aroused, and through this passion he strikes and kills his wife, it would not be murder, but manslaughter. The law does not say that under all circumstances a man is not guilty of murder if he kill his wife, even if in the act of adultery at the time of the killing. The test is, does the slayer slay by reason of passion aroused or induced by revenge or malice? If a wife has lost her virtue and continues to defile her marriage bed, and the husband knows this, and after so knowing, and after reflection, while the mind is coolly operating, kills her to avenge his wounded honor, and not by reason of passion, it would be murder, not manslaughter. Therefore, in the case at bar, gentlemen of the jury, if you should find from the evidence that the defendant caught her in the act, and through the influence of passion, shortly thereafter killed her, this would be manslaughter; but if you should find that the defendant caught his wife in the act of adultery, and before the killing there was sufficient cooling time, and he killed her through hatred and revenge, this would be murder and not manslaughter.⁶

5—State v. Mills, 116 N. C. 992, 21 S. E. 106 (107).

6—McNeill v. State, 102 Ala. 121, 15 So. 352 (354), 48 Am. St. 17.

The court said that the several sentences of the general charge should be read in the light of the context. Citing *Montgomery, etc., R. R. Co. v. Stewart*, 91 Ala. 421, 427, 8 So. 708; *Williams v. State*, 83 Ala. 68, 3 So. 743; *O'Donnell v. Rodger*, 76 Ala. 222, 52 Am. Rep. 322; *Louisville R. R. Co. v. Orr*, 94 Ala. 602, 10 So. 167.

Continuing the court said:

"Considered in this way and probably without reference to the principle just stated, that part of the court's general charge to which exceptions were reserved asserts no more than this: That if a man find his wife in the act of adultery,

and provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only; but that on the other hand if he does not strike and kill until after there has been time for his passion to cool and for reason to reassert itself, or if he strikes and kills immediately, but is not moved thereto by the heat of passion, but by prior malice or hatred, a desire to avenge the wrong done him, or by any other motive, or upon any design whatever, except such as is presently engendered by the paroxysm of rage into which he is thrown by this extreme provocation he is guilty of murder. And this beyond all doubt is the law."

§ 2959. **Killing by Corporal Punishment.** Where a killing is effected by unlawful means, productive of corporal punishment, and the natural consequence of which is to produce death, it may be murder or manslaughter, though there was no specific intention to kill, such as where one in cold blood unlawfully and deliberately beats another so that he dies, it might be murder, though he did not intend to kill, if the instrument or manner of beating be apt to kill, or the natural consequence of which was to produce death.⁷

§ 2960. **Killing Servant or Child by Cruel Treatment.** Killing by cruel treatment might be murder, though the murderer might have the authority to correct in a reasonable and proper manner,—as a father his child, or a master his servant.⁸

§ 2960a. **Policeman—When Not Justifiable in Killing Citizen.** If defendant used the warrant of arrest as a mere pretext for killing deceased, or if defendant did shoot deceased before deceased manifested any intention of offering serious resistance, or if, at the time of shooting, defendant knew his own life was not in danger, nor was he threatened with great bodily injury, then he would not be justified in taking the life of deceased.⁹

§ 2961. **Killing Policeman in Pursuance of Unlawful Conspiracy.** Although you may believe that said M. had threatened to arrest defendant and parties with him, and had exhibited his pistol for that purpose, and although you may further believe that said M., as an officer, had no right to arrest said parties outside of the corporate limits of D., still if you believe beyond a reasonable doubt, from the evidence, that said killing was done in compliance with and in furtherance of an unlawful conspiracy, such killing would be murder.¹⁰

§ 2962. **Homicide—Preventing Escape of Prisoner.** (a) The court instructs the jury that, if you believe from the evidence deceased was drunk and disorderly in the presence of appellant, the latter, as marshal of the town of McH., had the right to arrest him without a warrant, and to hold him in custody until the presence of the police judge could be secured to make some disposition of the case, and, if you further believe from the evidence that, after the arrest of the deceased, and while appellant had him in custody, deceased attempted by force or violence to effect his release from appellant's custody as an officer, appellant had the right to use such force as was necessary or what reasonably appeared to him to be necessary, but no more, to overcome the forcible resistance of deceased, and if, under these circumstances, he shot and killed deceased, the killing was excusable, if appellant could not otherwise overcome the

7—Winter v. State, 123 Ala. 1, 26 So. 949 (950).

8—Winter v. State, 123 Ala. 1, 26 So. 949 (950).

9—Bartay v. State, — Tex. Cr. App. —, 67 S. W. 416 (417).

10—Bruner v. United States, 4 Ind. Ter. 80, 76 S. W. 244 (246).

forcible resistance of deceased, or it reasonably appeared to him that he could not do so.¹¹

(b) If an officer has lawfully in his custody a person charged with having committed a crime not a felony, the officer is not authorized in order to prevent his escape to shoot him or at him or to draw a dangerous weapon for the purpose of preventing such escape.¹²

§ 2963. **Conspiracy to Kill—Conspirators Equally Liable.** (a) If you believe from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants and the father to take the life of the deceased or do him great injury, and the father of defendants fired the fatal shot that killed the deceased, then defendants would be equally liable with the father, if the shooting by the father was done in carrying out the conspiracy previously entered into by them.¹³

(b) If you cannot say from the evidence beyond a reasonable doubt who killed G. (that is, whether it was H. or T.) but can say from the evidence beyond a reasonable doubt that one of the two killed him, and that H. and T. were acting together in the killing, the defendant would be guilty, and it would be your duty to convict him.¹⁴

(c) The court instructs the jury that when two or more persons act together in the commission of an unlawful act or purpose, that what either does in carrying out such unlawful act or purpose is, in law, the act of each of said persons.¹⁵

§ 2964. **Death Caused by Reckless Driving of Horses.** If you find from the evidence in the case that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision both on the part of the deceased and the defendant, then in that event such killing would be accidental and not criminal, and your verdict should be not guilty. In connection with that instruction, gentlemen of the jury, I instruct you that if the defendant was at the time alleged in this information engaged in an unlawful act, to wit, the act of driving horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional; the defendant would be guilty.¹⁶

§ 2965. **Homicide—Previous Relations of Parties.** If in this you are in doubt as to the precise circumstances under which the homicide was committed—that is, are in doubt as to whether the de-

11—Stevens v. Commonwealth — Ky. —, 98 S. W. 284.

12—Commonwealth v. Carter, — Mass. —, 66 N. E. 716 (719).

13—Stevens v. State, 133 Ala. 28, 32 So. 270 (271).

14—Hunt v. State, 135 Ala. 1, 33 So. 329 (330).

15—State v. Hottman, 196 Mo. 110, 94 S. W. 237 (240).

16—State v. Stentz, 33 Wash. 444, 74 Pac. 588 (590).

ceased, at the very moment of the killing, was, in fact, about to inflict upon defendant great bodily harm—then the previous relations between the parties and their previous conduct towards each other and defendant's knowledge of the deceased become important for your consideration; and those previous relations and that previous conduct and knowledge embrace every word and act, in short, every fact and circumstance, bearing upon that point, of which evidence has been received. You are to place yourselves as nearly as possible in the situation of the parties, as respects each other, at the very scene and time of the homicide.¹⁷

§ 2966. Shooting At One Man, Killing Another. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, in Hardin county, and before the finding of the indictment, did unlawfully, willfully, and feloniously, not in his necessary or apparently necessary self-defense, shoot at D. with a pistol loaded with powder and leaden balls, but that the ball or balls so shot at said D. did miss him, and, instead, then and there strike and kill W., they should find defendant guilty. That is, guilty of murder, if they believe from the evidence, beyond a reasonable doubt, that the shooting was done with malice aforethought; or, of voluntary manslaughter if they believe from the evidence, beyond a reasonable doubt, that it was done in a sudden affray, or in sudden heat and passion, and without previous malice. If they find the defendant guilty of murder, the jury should fix the punishment at death, or confinement in the penitentiary for life, in their discretion. But if they find him guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary not less than — nor more than — years, in their discretion.¹⁸

§ 2967. Defendant Charged With Killing One, Evidence of Killing of Another Not to Be Considered. The defendant is on trial, charged with shooting Abe C. only, and if you do not believe the evidence sufficient to convict him under that charge you cannot convict him for shooting the Italian girl.¹⁹

§ 2968. Mutual Threats to Kill, Both Carrying Deadly Weapons. If the jury believe from the evidence established beyond a reasonable doubt that the defendant and the deceased bore malice to each other, and that there had been mutual threats to kill against the other,

17—People v. Gallanar, 3 Cal. App. 431, 86 Pac. 814 (815).

"Appellant contends that this instruction amounted to the advice of the court to the jury that it might discard the direct evidence in the case and arrive at a verdict on certain circumstantial evidence and probabilities. But such a theory cannot be maintained, for the jury was distinctly told that the previous relations, previous conduct and knowledge must be such as shown by the evidence in

the case, and no intimation was given that appearances might be determined from probabilities arising from circumstances not in evidence. Besides, this instruction must be read with other instructions which were given upon appearances."

18—Held that the trial court erred in refusing this instruction. Wheatley v. Commonwealth, 26 Ky. 'L. 436, 81 S. W. 687 (689).

19—Watson v. State, — Tex. Cr. App. —, 89 S. W. 270 (271).

known to each of them, and that each, with the knowledge of the other, had deliberately procured pistols for the purpose of fighting with them, and had thereupon deliberately fought with their pistols, and under these circumstances the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized to find the defendant guilty of the crime of murder.²⁰

§ 2969. Shooting With Gun or Pistol, Loaded With Powder and Lead Balls. The jury should find the defendant not guilty, unless the jury believe from the evidence, beyond a reasonable doubt, that the defendant did, in F. county, Ky., and prior to the 28th day of March, 1905, willfully shoot and kill L., by shooting said L., with a gun or pistol, or both, loaded with powder and leaden balls, or other hard substances.²¹

§ 2970. Homicide—Discharging of Gun Into the Air. I instruct you that the pointing of a gun in the air is not an unlawful act, and I charge you that the respondent would have the right to take a gun out into the field to the east of the house and to point the same in the air, as long as in doing so he did not take it there for the purpose of obstructing or resisting the officer, E. M., and did not use it for that purpose. I instruct you that the discharging of the gun, by respondent, in the air, is not an unlawful act, and I charge you that the respondent would have the right to take the gun out into the field east of the house and discharge the same into the air, as long as by doing so he did not take it there for the purpose of obstructing or resisting the officer, E. M., and did not use it for that purpose and did not use it in such manner as to amount to a reckless disregard of human life by so using it. The respondent, under the law, had a right to take the gun with him into the field where the shooting occurred, so long as by so doing he did not take it there for the purpose of obstructing and resisting the officer, E. M., and did not use it for that purpose, and to carry said gun in his hands and to point the same in the air, so long as he did not have the gun there for the purpose of obstructing the officer or resisting the officer, but he would not have the right to knowingly point said gun in the direction of any person.²²

§ 2971. Mere Peacemaker Should Be Acquitted. The court charges the jury that if the jury believe from all the evidence that E. B. and C. N. shot and killed S., and that defendant did no more than

20—*Roark v. State*, 105 Ga. 736, 32 S. E. 125 (126).

21—*Stout v. Commonwealth*, 29 Ky. L. 627, 94 S. W. 15.

22—*People v. Sauer*, 143 Mich. 308, 106 N. W. 866.

"We think this charge sufficiently recognized the defendant's theory in so far as it was entitled to consideration. The writ was still in the officer's hands, and, what-

ever may have occurred in the lower field, so long as the logs called for had not in fact been secured, the writ had not spent its force. If, however, the jury were satisfied that the officer was not, at the time he was shot down, acting under the writ, the charge fully protected the rights of the accused."

try to keep peace, the night of the shooting, then the defendant is not guilty, and the jury ought to acquit the defendant.²³

§ 2972. **Killing By Accident Excusable.** (a) If you believe from the evidence, beyond a reasonable doubt, that defendant J. S., about the time alleged in the indictment, did shoot and thereby kill the deceased, and you further believe from the evidence that such shooting was accidental, and not intentional, upon the part of defendant, then and in that event the homicide is excusable; and if you so believe from the evidence, or if you have a reasonable doubt thereof, then you will find the defendant not guilty.²⁴

(b) If, after reviewing all the evidence in the case, the jury entertains a reasonable doubt therefrom, as to whether or not, at the time the pistol was fired, the defendant and the deceased were scuffling for the possession of the pistol, and [believe] that it was fired accidentally during such scuffle, and without intent to take life, then the jury must acquit.²⁵

(c) If you fail to find that R.'s death was due to human agency, that will end the case in favor of the prisoner. But if you consider that the theory of accidental death cannot reasonably be entertained on this evidence, there remains the question whether the prisoner inflicted the injuries.²⁶

§ 2973. **Wound Not Necessarily Fatal—Death From Neglect.** (a) If you believe, from the evidence, beyond a reasonable doubt, that the gunshot wound was in itself mortal and reasonably calculated from its nature and extent to produce death without any medical or surgical treatment, then it would be no defense that the deceased, under better or different medical treatment, might or probably would have recovered, nor will the law justify a verdict of acquittal, merely upon the ground, if proved, that the medicine administered or the surgical treatment adopted to restore or relieve the deceased in point of fact, co-operated with the wound in producing death. It would be enough if you believe, from the evidence, beyond a reasonable doubt, that the gunshot wound of itself, would have resulted in death and that it did in fact contribute directly to the death, provided also, you further believe, from the evidence, beyond a reasonable

23—*Nicholson v. State*, 117 Ala. 32, 23 So. 792.

24—*Scott v. State*, 46 Tex. Cr. App. 536, 81 S. W. 294.

"We think the charge is correct, and not subject to the criticism urged by appellant. *Hull v. State*, — Tex. Cr. App. —, 80 S. W. 380.

25—*Johnson v. State*, — Miss. —, 30 So. 39 (40).

26—*State v. Bean*, 77 Vt. 384, 60 Atl. 807 (814).

In this case "the court had already instructed the jury as to the burden of proof resting on the state, and the necessity of estab-

lishing the offense beyond a reasonable doubt, and told them, that the evidence being entirely circumstantial, it must be such as to exclude every reasonable theory consistent with the prisoner's innocence; that that was but another statement of the rule that the offense must be established beyond a reasonable doubt, for, if there remained a reasonable ground on which the killing could be accounted for without the agency of the prisoner, it could not be said that his guilt was established beyond a reasonable doubt."

doubt, that the said wound was inflicted with malice aforethought.²⁷

(b) Upon the question, what was the cause of the death of the deceased, the court instructs you that in order to convict the defendant under this indictment, you must be able, from the evidence, to trace the death to the injury alleged to have been inflicted by the defendant and that, too, beyond any reasonable doubt.²⁸

(c) If one person inflicts wounds upon another, which are dangerous in themselves, though not necessarily fatal, but which do produce death through a chain of natural causes and effects, uninfluenced by human action, then the wounds are to be regarded as the cause of the death. And in this case if you believe, from the evidence, beyond a reasonable doubt, that the defendant did inflict wounds upon the deceased, in manner and form as charged in the indictment, and that these wounds were dangerous in themselves though not necessarily fatal, and that these wounds caused congestion of the brain, and that the deceased died of such congestion or that the congestion caused him to expose himself to the inclemency of the weather, and that such exposure was the immediate cause of his death, still, in law, it will be held that the defendant, by inflicting the wounds, caused the death of the deceased.²⁹

(d) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant cut the deceased, G. W., in the arm with a knife or other instrument capable of inflicting a similar wound, as charged in the indictment, it is no excuse to say that the deceased would not have died if he had taken proper care of himself, or that neglect or the want of proper applications to the wound had brought on blood poisoning, and of that he died, provided you believe, from the evidence, beyond a reasonable doubt, that the wound was the primary or true cause of his death.³⁰

(e) The law is, that if one unlawfully inflicts upon another a wound which is not in its nature necessarily mortal, but which might be cured by proper care and surgical treatment, and the person injured neglects to procure such care, or refuses to receive such surgical treatment, and he die of the wound owing to such want of care and treatment, this will not excuse the person inflicting the wound; and if, in such case, the jury further believe, from the evidence, beyond a reasonable doubt, that the injury was inflicted by accused with malice aforethought, as explained in these instructions, and that the deceased died from such wounds, then the jury should find the accused guilty of murder.³¹

§ 2974. Murder—No Defense that Life Might Have Been Saved.

(a) If the jury believe and find from the evidence that the death of X. resulted from the effects of a blow upon the head inflicted

27—*People v. Cook*, 39 Mich. 236;
Bowles v. State, 58 Ala. 335.

28—*People v. Cook*, 39 Mich. 236.

29—*Kelley v. State*, 53 Ind. 311.

30—*Duncan v. People*, 134 Ill. 110

(118), 24 N. E. 765, affirming conviction of manslaughter.

31—2 Bishop Crim. Law, § 638-639; *State v. Bantley*, 44 Conn. 537; *Williams v. State*, 2 Tex. App. 271.

by defendant with a pistol in D. county, Missouri, in November, —, said death occurring in said county and state in December, —, you cannot, in arriving at your verdict, take into consideration the fact, if fact it be, that said X.'s life might have been saved, after the infliction of said blow, by a proper medical or surgical treatment.³²

(b) If a man gives another a stroke or wound which it may be is not of itself mortal or fatal, but might with good treatment be cured, yet, if death was accelerated by the violence of the defendant, he may be guilty.³³

§ 2975. **Defense of Death From Other Causes.** If the jury should find from the evidence in this case that the accused died of the effects of alcoholism, extreme heat, or other causes than the alleged violence of the defendant, as I have defined it to you, he cannot be convicted of murder or manslaughter, but might be convicted of an assault with intent to murder.³⁴

§ 2976. **Turbulent Disposition of Deceased.** If the jury believe from the evidence that the deceased was of a rash, violent, and turbulent disposition, and that the defendant had knowledge of such disposition, then it is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself.³⁵

§ 2977. **Immaterial Whether Defendant Angry or Excited.** Whether or not the defendant was angry or excited at the time he killed the decedent is immaterial, provided that you find that the killing was unjustifiable, and with malice aforethought, as heretofore defined.³⁶

§ 2978. **Instruction to Jury to Consider Only Unlawful Homicide.** More precisely, gentlemen, you are concerned with that species of homicide which the law defines to be unlawful or criminal, for no possible aspect of the case presented upon the evidence makes it necessary or profitable for you to consider that class of homicide which the law regards as excusable or justifiable.³⁷

32—State v. Lane, 158 Mo. 572, 59 S. W. 965 (1907).

"No effort had been made to show any maltreatment of the wound, or any misconduct on the part of deceased with reference to his wound, and the evidence of all the physicians was to the effect that the wound caused the death of X. The court was right in telling the jury in plain language that the post mortem discovery that trephining at the proper time would have saved the life of the deceased was no defense whatever to the charge. State v. Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. 26; State v. Strong, 153 Mo. 548, 55 S. W. 78; Com. v. Hackett, 2 Allen 136, 1 Hale, P. C. 428."

33—Winter v. State, 123 Ala. 1, 26 So. 949 (1900).

34—Winter v. State, supra.

35—State v. Darling, 199 Mo. 163, 97 S. W. 592.

36—State v. Hunter, 118 Ia. 686, 92 N. W. 372 (1875). See also People v. Tuczkeewitz, 149 N. Y. 240, 43 N. E. 548 (1893).

37—State v. Marx, 78 Conn. 18, 60 Atl. 690 (1902).

The court said that "there is no error in this. It does not appear that any possible aspect of the case, as it was presented to the jury upon the evidence, required a consideration of the law which defines an excusable or justifiable homicide. No claim of this kind was made upon the trial. Under

§ 2979. Essential Elements to Convict—Must be Proved Beyond Reasonable Doubt. (a) It is incumbent upon the prosecution to establish all the material allegations of the information beyond a reasonable doubt. The material allegations of the information as here used are as follows: (1) That A. B. was killed by some criminal agency; (2) that he was killed within this county at or about the time stated; and (3) that the defendant had a criminal agency in that killing. If these allegations are established in your minds beyond a reasonable doubt, then the prosecution has established beyond a reasonable doubt all the material allegations of the information. It is not necessary that other facts or circumstances surrounding such testimony as has been given on behalf of the state should be established by a preponderance of evidence, or may not be established. It is not meant that it is incumbent upon the prosecution to establish every fact surrounding such testimony, as given, beyond a reasonable doubt. All that is incumbent on the prosecution is that all the facts and circumstances taken together should establish the defendant's guilt beyond a reasonable doubt. If you are satisfied beyond a reasonable doubt, from all the evidence in the case, of the defendant's guilt, you should find him guilty.³⁸

(b) If, after careful consideration of all the evidence, you entertain in your minds a reasonable doubt of the guilt of the defendants of murder in the first or second degree, and of manslaughter, then you should acquit the defendants by a general verdict of not guilty.³⁹

(c) This is a very grievous offense. It is easily charged, and the negative of it difficult to prove. The prosecution must satisfy you, beyond a reasonable doubt, of the defendant's guilt. The evidence should be plain and satisfactory in proportion as the crime is detestable. You must acquit the defendant unless you are satisfied that his guilt has been strictly and impartially proven—that it is true beyond a reasonable doubt.⁴⁰

§ 2980. Recommending a Person to Mercy. (a) Now, upon the question of recommendation for mercy, that is a matter the law leaves entirely with you, and I give you this in charge: You may recommend, if, in your judgment, you think you are justified in so doing. It is for you to say whether the facts—all the circumstances in the case—warrant you in making such a recommendation; but you are not limited or circumscribed in any respect, and the law prescribes no rule for the exercise of your discretion. It is a matter entirely with you.⁴¹

these circumstances, instructions upon the law defining excusable or justifiable homicide could serve no useful purpose, and the court properly so stated to the jury. *State v. Smith*, 49 Conn. 388."

38—*Horn v. State*, 12 Wyo. 80, 73

Pac. 705 (723), citing 1 Bish. New Cr. Proc. 1076.

39—*McCoy v. State*, 40 Fla. 494, 24 So. 485 (487).

40—*People v. Graney*, 91 Mich. 646, 52 N. W. 66 (67).

41—*Hackett v. State*, 108 Ga. 40, 33 S. E. 842 (843).

(b) Now, gentlemen, as to the form of your verdict. If you believe that defendant struck this blow in self-defense, write a verdict of not guilty. If you believe he struck this blow to keep J. H. from entering his house, write a verdict of not guilty. If you disbelieve both of these defenses and believe that he struck out of a malicious heart, write a verdict of guilty. If you believe he did not strike out of a hard heart, write a verdict of manslaughter. With reference to a general verdict of guilty, gentlemen, it is proper for me to say to you, in special cases, that it is proper for the jury to recommend a party to mercy. That practically, gives them the right to fix the penalty. No man can forfeit his life, under the laws of this country, except by consent of a jury. To recommend a party to mercy is to thereby save his life, and the law fixes the punishment at lifetime imprisonment. Now, gentlemen, this is a solemn business for you. I am going to put it where the law puts it—where the constitutional law puts it—upon your shoulders. This is your country. The defendant at the bar is your fellow citizen. The dead man was your fellow citizen. Whatever your verdict be, gentlemen, write it upon the back of this indictment, and sign your name as foreman.

§ 2981. **Furnishing Forms of Verdicts.** You will be furnished with five forms of verdicts, as follows: One finding the defendant guilty of murder in the first degree, and fixing the penalty of death; another finding him guilty of murder in the first degree, and fixing the penalty of imprisonment in the penitentiary during life; another finding him guilty of murder in the second degree; another finding him guilty of manslaughter; another finding him not guilty. From these you will select the one you desire to use, and sign and return the same.⁴²

§ 2982. **Homicide—General Summary.** The duty of counsel and the court has now been performed. The counsel engaged in this case have been untiring in their efforts to bring before you all possible evidence that may aid you in arriving at the truth. They have ably assisted you in applying the evidence to the facts in contention. The court has endeavored to rightly advise you in the law, and now there confronts you the final and important duty of pro-

In holding this instruction correct the court commented as follows:

"So far as I am concerned, if it were an original proposition, I should not hesitate to pronounce this charge error, and wholly unwarranted by the law. The quality of mercy is free. Whether it shall be exercised or not in a capital case is for the jury alone to determine, and the judge may not lawfully abridge this right by instructions which, even in the slightest degree, qualify its exercise. But I am bound by previous rulings of

this court. In the case of *Inman v. State*, 72 Ga. 269, where the judge, in the trial of a capital case, charged the jury that: 'If you find him guilty, and the case be one in which you think you are justified in doing so (the facts and circumstances justify you in doing so), you can say in your verdict that 'we recommend that he be imprisoned in the penitentiary for life;' and, upon that recommendation, it would be my duty to inflict that punishment upon him.'"

42—*Rhea v. State*, 63 Neb. 461, 88 N. W. 789 (799).

nouncing upon the guilt or innocence of the defendant. I submit this case to you with the confidence that you will faithfully discharge the grave duty resting upon you without, upon the one hand, being moved by any undue demand for conviction on the part of counsel for the state, or being swayed from its right performance by any undue appeal to your sympathies. You will bear in mind that neither the life nor the liberty of the accused may be trifled away, and neither taken by careless or inconsiderate judgment. But if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. Duty demands it and the law requires it. You must be just to the defendant and equally just to the state. As manly, upright men, charged with the responsible duty of assisting the court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and evidence in the case, and return into court such a verdict as is warranted thereby.⁴³

§ 2983. **Murder in First or Second Degree—Series.** (a) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, A. A., in Howard county, Missouri, on or about the 16th day of December, 1899, with a certain pistol, willfully, deliberately, premeditatedly and of his malice aforethought, shot and killed H. H., then the jury will find the defendant guilty of murder in the first degree, and will so state in their verdict.

(b) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, A. A., in Howard county, Missouri, on or about the 16th day of December, 1899, with a certain pistol, willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot and killed H. H., then the jury will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary for a term of not less than ten years.

(c) The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant intentionally killed H. H., by shooting him with a loaded pistol, in a vital part of the body, then the law presumes such killing was murder in the

43—*Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157 (173).

"An instruction involving the same sort of generalization was upheld by this court in *Lynch v. Bates*, 139 Ind. 206-08, 38 N. E. 806; and in *Stout v. State*, 90 Ind. 1-13. Indeed, the only proper test we know of, by which to determine whether the instruction amounts to error prejudicial to the rights of the appellant, is the answer to the question: Would the appellant's legal rights in any way be invaded,

impaired or infringed by the jury strictly following the instruction in the consideration of the case? The question admits of no other than a negative answer, if we confine ourselves to the language of the instruction. We need scarcely say that we are bound to presume, in the absence of a contrary showing in the record, that the jury would and did strictly obey and follow the instruction. Therefore there was no available error in giving it."

second degree, in the absence of proof to the contrary, and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless it is met or overcome by evidence introduced by the state.

(d) The court instructs the jury that “willfully” means intentionally, not accidentally, and, in the absence of qualifying facts and circumstances, the law presumes that a person intends the ordinary and probable results of his own acts and conduct.

(e) The court instructs the jury that “malice,” as used in the indictment and foregoing instructions, does not mean mere spite and ill will or dislike, as it is ordinarily understood, but means that condition of the mind which prompts one person to take the life of another without just cause or provocation, and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief.

(f) The court instructs the jury that “malice aforethought” means that the act was done with malice and premeditation. “Premeditation” means thought of beforehand for any length of time, however short.

(g) The court instructs the jury that “deliberately” means in a cool state of the blood. It does not mean brooded over or reflected upon for a week, a day or an hour; but it means an intent to kill, executed by defendant in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose, and not done under the influence of a violent passion suddenly aroused by some provocation.

(h) If the jury have a reasonable doubt as to defendant’s guilt, they should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant’s guilt, and not a mere possibility of his innocence.

(i) The jury are the sole judges of the weight of the evidence and credibility of the witnesses. In determining what weight they will give to the testimony of any witness, the jury should take into consideration the interest of the witness in the event of the case as a party or otherwise; the manner and conduct of the witness on the stand; any feeling or motive which may have influenced the witness in testifying; the probability or improbability of the testimony of such witness in view of all the evidence, facts and circumstances surrounding the case.

(j) If the jury believe that any witness has willfully sworn falsely to any material facts in the case, you are at liberty, in the exercise of their judgment, to disregard all or any part of such witness’s testimony.

(k) The court instructs the jury that the defendant is a competent witness in his own behalf, but, in determining the weight and credibility you will give to his testimony, the jury may take into

consideration that he is the defendant, testifying in his own behalf, and the interest he may have in the result of this trial.

(l) The court instructs the jury that, before you can acquit the defendant on the ground of self-defense, you must find and believe from the evidence that the defendant had reasonable cause to apprehend, and did apprehend, that H. H., the deceased, was about to inflict upon him some great bodily harm or take his life, and defendant believed, and had reasonable cause to believe, that such danger was imminent and impending; and, unless the jury so believe, you cannot acquit the defendant on the ground of self-defense.

(m) He who willfully (that is, intentionally) uses upon another, at some vital point, a deadly weapon, such as a pistol, must, in the absence of qualifying facts, be presumed to know that the result is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a bad heart. If, therefore, you believe and find from the evidence in this cause that the defendant killed H. H. by shooting him in a vital part with a pistol, with a manifest design to use such pistol upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, then such killing is murder in the first degree. And while it devolves upon the state to prove the willfulness, deliberation, premeditation and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proven by direct evidence, and may be deduced from all the facts and circumstances attending the killing; and, if you can satisfactorily and reasonably infer their existence from all the evidence, you will be warranted in finding the defendant guilty of murder in the first degree.

(n) The court instructs the jury that the previous good character of the defendant, if proved to your reasonable satisfaction, is a fact which the jury should consider in determining his guilt or innocence, for the law presumes that a man whose reputation is good is less likely to commit an offense than one whose reputation is bad; but if all the evidence proves the defendant to be guilty, to your satisfaction, beyond a reasonable doubt, then his previous reputation cannot palliate, mitigate, justify or excuse his offense.

(o) The jury are instructed that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment. And you are further instructed that the legal presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law binding upon the jury in this case; and, unless the state satisfies you of defendant's guilt beyond a reasonable doubt, it is your duty to act upon this presumption of innocence, and render a verdict of not guilty.

(p) The jury are instructed that, in law, a person accused of

crime is presumed to be innocent. This presumption entitles him to an acquittal unless it is overcome by evidence which establishes his guilt beyond a reasonable doubt. A juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty as charged. You should acquit the defendant if you entertain a reasonable doubt as to his guilt, and you should also acquit if it is as reasonable, considering all the facts and circumstances proven, to conclude that he is innocent as to conclude that he is guilty, or if all the facts and circumstances can be reasonably reconciled with any theory other than that of his guilt.

(q) The jury are instructed that the indictment in this case is of itself a mere accusation or charge against the defendant, and is not of itself any evidence of the defendant's guilt, and no juror should permit himself to be to any extent influenced against the defendant because or on account of the indictment in this case. And you are further instructed that in this case the law does not require the defendant to prove his innocence, but the law requires the prosecution to prove that the defendant is guilty in manner and form as charged in the indictment, beyond all reasonable doubt; and, unless the state has done this, the law makes it your duty to find the defendant not guilty.

(r) The jury are instructed that it is not sufficient in criminal cases, to justify a verdict of guilty, that there may be very strong probabilities or strong suspicions of guilt, nor, as in civil cases, a preponderance of the evidence in favor of the charge; but the jury must be satisfied, from all the evidence and circumstances in the case, beyond a reasonable doubt, before you can convict. If not so satisfied, you must acquit.

(s) The court instructs the jury that evidence of previous good character is competent evidence in favor of a party accused of crime, as tending to show he would not be likely to commit the offense alleged against him. And in this case, if the jury believe from the evidence that prior to the commission of the alleged crime the defendant had borne a good character for peace and order among his acquaintances, and in the neighborhood where he lived, this is a fact proper to be considered by the jury, with all the other evidence in the case; and if, after a careful consideration of all the evidence in the case, including that bearing upon defendant's character, the jury entertain a reasonable doubt of the defendant's guilt, then it is your sworn duty to acquit him.

(t) The court instructs the jury that a man may kill another, and not be guilty of any crime against the law. A killing is justifiable when committed in the lawful defense of one's self, or when committed by one who has reasonable cause to apprehend a design on the part of another to commit a felony upon him, or to do him some great personal injury, and there is reasonable cause to apprehend immediate danger of such design being accomplished. And in

this case, although you shall believe and find from the evidence that the defendant, and in the manner and by the means named in the indictment, shot and killed H. H., yet if you shall also find and believe that in so doing he, the defendant, was acting in the necessary self-defense of his person, either from death or from great personal injury, you should find him not guilty of any offense whatever. You will observe that, to acquit on the ground of self-defense, it must only appear that a party was apprehensive, in consequence of the acts of the deceased, that injury of a bodily nature to himself was impending and about to fall on him, and that the taking of the life of the deceased was, under the circumstances, apparently or actually necessary to prevent such injury. If, therefore, you shall believe from the evidence that, from the conduct, actions, manner and declarations of the deceased, H. H., at the time he was shot by the defendant, A. A., he, the defendant, had reasonable cause to apprehend, and did apprehend, that the deceased, H. H., was about to do him some great bodily harm or to take his life, and that he, the defendant, had reasonable cause to apprehend, and did apprehend, that there was danger of the deceased executing his purpose and accomplishing his design, and that defendant shot the deceased for the purpose of preventing such execution and such accomplishment, the verdict should be that the defendant is not guilty, because such killing, under such circumstances, is justifiable in the law, because done in self-defense. To acquit on the ground of self-defense, it is not necessary that the danger of death or injury to which the defendant apprehended himself to be exposed was real or actual, or that it was impending and about to fall on him. It is only necessary that it should appear to you that the defendant so apprehended himself to be exposed to such danger, and that his apprehension was reasonable, considering all the circumstances of the case as proven, and the situation of the parties at the time, and that the defendant acted in good faith upon the situation as it appeared to him, and under a real apprehension of danger to himself.

(u) The jury are instructed that if you believe from the evidence that the defendant, A. A., at the time he shot H. H., had reasonable cause to apprehend from him, and did apprehend, immediate danger of being killed or receiving some serious injury to his person, and to prevent such danger he shot the said H. H., then you must acquit the defendant on the ground of self-defense. And if the defendant acted in a moment of apparently impending peril from an assault by H. H., it was not for him to nicely gauge the proper quantity of force necessary to repel the assault, but he had the right to act upon appearances, and use such force as he had reasonable cause at the time to believe was necessary.

(v) The court instructs you that a person about to be attacked, or who believes he is about to be attacked, and has reasonable cause for so believing, is not bound to wait until his adversary gets close enough to him to strike him with some deadly weapon, but may act

on appearances, and take steps to prevent such striking, even unto the taking of life.

(w) The court instructs you that, although you may find and believe from the evidence that the defendant went to the house of E. R. and voluntarily entered into a difficulty with the deceased for some unlawful purpose, yet if you find and believe from the evidence that he abandoned the difficulty and left the place in good faith, and started uptown, and the deceased followed him, and acted in such a manner as to give the defendant good cause to believe, and he did believe, that the deceased was about to do him some great bodily harm, he had the right to shoot and kill the deceased, if necessary to protect his person from such apprehended danger, and you should find the defendant not guilty.

(x) The court instructs you that although you may find and believe from the evidence that the defendant was in the wrong in the first instance in going to the house of E. R. and quarreling with the deceased, yet if you find and believe from the evidence that he in good faith withdrew from the difficulty, and started uptown, intending to abandon the quarrel, and the said H. H. followed him, then, if the killing of the said H. H. became necessary to save himself from death or great bodily harm, he will be justified, and you should find him not guilty.

(y) The court instructs you that, to entitle a defendant charged with murder to an acquittal on the ground of self-defense, he need not establish his defense by a preponderance of evidence. It is sufficient if the evidence is such as to create in the minds of the jury a reasonable doubt of his guilt.

(z) The jury are instructed that the defendant is a competent witness in his own behalf, and they should not disregard his evidence because he is the defendant and stands charged with a crime, but they should fairly and impartially consider and weigh his testimony by the same rule as that of other witnesses in the case.⁴⁴

§ 2984. **Homicide—Various Elements—Series.** (a) If you believe, from the evidence, beyond a reasonable doubt, that at any time prior to the filing of the indictment herein, which was on the 1st day of March, 1901, the defendant, M., in Clay county, Missouri, willfully, deliberately, premeditatedly and with malice aforethought, shot and wounded C., at the county of Clay aforesaid, who died in consequence of such shooting and wounding, then it will be your duty to find the defendant guilty of murder in the first degree.

(b) If you believe, from the evidence, beyond a reasonable doubt, that the defendant, in Clay county, Missouri, at any time prior to the filing of the indictment herein, willfully, premeditatedly and of

⁴⁴—State v. Ashcraft, 170 Mo. 409, 70 S. W. 898 (903).

Of this series the court said:
"As to the instructions given by the court at the instance of either

party, they put this case very fairly to the jury, and if any error was committed in giving them the error was in defendant's favor."

his malice aforethought, but not deliberately, shot and wounded C., and that within a year and a day thereafter, and before the filing of the indictment aforesaid, the said C., at the county of Clay aforesaid, died in consequence of such shooting and wounding, then it will be your duty to find the defendant guilty of murder in the second degree.

(c) As used in these instructions, the term "willfully" means that the act must be done intentionally, and not accidentally. In the absence of qualifying facts or circumstances, the law presumes that a person intends the ordinary and probable results of his act and conduct. "Deliberately" means done in a cool state of the blood. It does not require that the act should be brooded over or reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by defendant in a cold state of blood, in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose, and not under the influence of a violent passion suddenly aroused by a lawful or some just cause of provocation. "Premeditatedly" means thought of beforehand for any length of time, however short. "Malice" does not mean spite, ill will, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another without just cause or provocation, and it signifies a state of disposition which shows a heart regardless of social duty, and fatally bent on mischief. "Malice aforethought" means malice and premeditation.

(d) The jury are instructed that while the law requires that the killing, in order to constitute murder in the first degree, shall be willful, premeditated and deliberate, still it does not require that the willful intent, premeditation or deliberation shall exist for any prescribed length of time before the crime is committed; it is sufficient that there was a determination and design to kill distinctly formed in the mind at any moment before or at the time the shot was fired; and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the deceased, as charged, and that at the time or before the shot was fired the defendant had formed in his mind a willful, premeditated and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree.

(e) You are instructed that he who willfully (that is, intentionally) uses upon another, at some vital part, a deadly weapon, must, in the absence of qualifying facts, be presumed to know that the effect is likely to produce death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a bad heart.

(f) Upon the question of self-defense, the court instructs you that if, at the time defendant shot C., he (the defendant) had reasonable

cause to apprehend a design on the part of C. to take his life or to do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that, to avert such apprehended danger, he shot, and that at the time he shot he had reasonable cause to believe and did believe that it was necessary for him to shoot and kill to protect himself from such apprehended danger, you will acquit on the ground of self-defense. It is not necessary that the danger should have been impending and about to fall. All that is necessary is that defendant should have so believed. He must have had reasonable cause to so believe. Whether or not he had reasonable cause is for you to determine, under all the facts and circumstances given in evidence. If you shall believe from the evidence that defendant did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defense, although you may believe that the defendant really thought he was in danger.

(g) If the jury find from the evidence that the defendant killed C. without deliberation, as defined in these instructions, but under a violent passion, suddenly aroused by abusive words alone spoken by said C. to him, and not under the circumstances as would make the killing justifiable upon the ground of self-defense, as defined in other instructions, then such killing would not be murder in the first degree, because done in the heat of passion aroused by just cause or provocation; but in such case the defendant would, if the killing was done intentionally and of malice aforethought, be guilty of murder in the second degree.

(h) Even though you may believe that said C. was assaulting or in the act of assaulting the defendant, and using offensive words or threats towards him, and that defendant, under the influence of violent passion suddenly aroused by words, acts and conduct of said C., drew his revolver, and without premeditation and malice, as defined in these instructions, shot deceased, from the effects of which he died within a year and a day thereafter, yet if the alleged shooting was not justified upon the ground of self-defense, as explained in other instructions, such fact, if any, will not warrant you in acquitting the defendant altogether, but in that event he should be convicted of manslaughter in the fourth degree.

(i) Even though you may find from the evidence that the deceased, prior to the shooting, made threats against the defendant, yet if you believe from the evidence that C., at the time of the shooting, was not attempting to carry the threats into execution, and was making no hostile demonstration towards the defendant, then such prior threats will not justify, excuse or palliate the shooting of deceased by defendant.

(j) Before the defendant can be convicted of any offense under the indictment, the jury must believe from the evidence that the defendant is guilty beyond a reasonable doubt. A reasonable doubt, however, must be a substantial doubt, arising out of a due consideration

of all the testimony, and not a mere possibility of defendant's innocence.

(k) The defendant is a competent witness in this case, and you should consider his testimony in arriving at your verdict, but, in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf.

(l) The jury are the sole judges of the weight of the evidence and the credibility of the witnesses. If the jury believe that any witness has willfully sworn falsely to any material matter in the case, they are at liberty to disregard all the testimony of such witness.

(m) The jury are instructed that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself any evidence of the guilt of defendant, and no juror should permit himself to be to any extent influenced against the defendant because or on account of the indictment in this case.

(n) The court instructs the jury that the defendant is presumed to be innocent, and this presumption attends and protects him at every stage of the case until it is overcome by testimony which proves his guilt beyond a reasonable doubt; and it is not enough, in a criminal case, to justify a verdict of guilty, that there may be strong suspicion or even strong probability of the guilt of defendant, but the law requires proof so clear and satisfactory as to leave no reasonable doubt of defendant's guilt.

(o) Upon the law of self-defense, the court instructs the jury that when a person has reasonable grounds to apprehend that some one is about to do him a great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary, to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done.

(p) Upon the law of self-defense, the court further instructs the jury that, in passing upon the question whether the defendant had reasonable grounds for believing that there was imminent danger that the deceased was about to kill him or do him some great bodily harm, the jury should determine the question from the standpoint of the defendant at the time he acted, and under his surroundings at the particular instant of time; and the jury may also, in passing upon that question, take into consideration the threats, if any, made by deceased against the defendant.

(q) The court instructs the jury that, under the law of this state, a person who has not himself wrongfully provoked the assault is under no obligation to retreat, but may, when wrongfully assailed, stand his ground, and if at the time it reasonably appears to be necessary to protect himself from death or great personal injury, may

lawfully kill the assailant. If C. made an assault and attack upon the defendant, and the defendant had reasonable grounds to believe that he was in danger of being killed, or of receiving great bodily harm from said C., he had a right to take such steps as to him, under the circumstances, reasonably seemed necessary, in order to save his own life or to save himself from great bodily harm, even to the taking of the life of the said C.

(r) Upon the law of self-defense, the jury are instructed that if the defendant, at the time he shot the deceased, had reasonable cause to apprehend, and did apprehend, that the deceased was about either to kill him or to do him some great bodily harm, and that the danger of his doing either was imminent, and that the defendant shot to avert such apprehended danger, then such shooting was justifiable, and you should acquit on the ground of self-defense. And in this connection, the jury are instructed that it is not necessary, in order to acquit on the ground of self-defense, that the danger should, as a matter of fact, have been real or actually impending; all that is necessary is that the defendant had reasonable cause to believe that the danger was real and about to fall upon him; and if the defendant acted in a moment of apparently impending danger from an assault by the deceased, it was not necessary for him to nicely measure the proper quantity of force necessary to repel the assault. And the question for you to determine is not what you think it was necessary for the defendant to have done or not done at the time he shot deceased, but the question is what the defendant might have reasonably believed was necessary for him to do under all the circumstances.

(s) The court instructs the jury that if they believe from the evidence that the deceased prior to the shooting, made threats against the defendant, they should take such threats into consideration in determining who was the aggressor at the time of the shooting, and whether, in connection with the conduct of the deceased at the time of the shooting, they afforded the defendant a reasonable apprehension of danger. Such prior threats, however, will not justify, palliate or excuse the shooting of the deceased by the defendant unless you believe from the evidence that C., at the time of the shooting, was attempting to carry the threats into execution by assaulting or attempting to assault the defendant, or by making some hostile or apparently hostile demonstration towards the defendant.

(t) The state has introduced in evidence a statement claimed to have been made by C. at a time when he was suffering from the wound inflicted by the defendant, and at a time when the said C. had given up all hope of living, and was then under the belief that death was imminent and near, and if you believe from the evidence that C. made said statement; that at the time of making the same his mind was clear, and that he knew at the time what he was doing, and with such knowledge made it, and that at the time he made it he was suffering from a fatal wound inflicted by defendant upon him, and which wound afterwards caused his death; and that at the time of

making such statement he had given up all hopes of life, and then believed that death was impending and near,—then it is your duty to consider it as the dying declaration of said C., and you are to give such dying declaration such weight as you may think it justly entitled to upon a consideration of it along with all other facts and circumstances disclosed by the evidence in the case. You should consider, however, that such statement was not made in the presence of defendant, that the declarant was not subject to the tests of cross-examination, that the jury had no opportunity to observe the manner of the declarant, and that he was not subject to prosecution for perjury if said statement, or any part of it, was untrue.

(u) The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses; and, if the jury believe that any witness has sworn falsely as to any material fact in the case, the jury may, in their discretion, reject all or any part of the testimony of such witness.⁴⁵

MURDER IN FIRST DEGREE.

§ 2985. **Murder in the First Degree—What Constitutes.** (a) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in the month of May, 1904, at V. county, Mo., with a pistol, shot and killed W., and that such shooting and killing were done willfully, deliberately, premeditatedly, and of malice aforethought, you should find the defendant guilty of murder in the first degree. Unless you do so believe, you should not find him guilty of murder in the first degree.⁴⁶

(b) The court instructs the jury that if you believe from the evidence in this case that the defendant, at the county of St. F., state of Missouri, at any time prior to the 16th day of November, 1903, willfully, deliberately, premeditatedly, and with malice aforethought, shot with a pistol and by such shooting wounded L., and that within a year and a day thereafter and before the 16th day of November, 1903, said L., at the county of St. F. aforesaid, died in consequence of such shooting and wounding, you will find the defendant guilty of murder in the first degree.⁴⁷

(c) The court instructs the jury that if they believe from all the evidence, beyond a reasonable doubt, that the accused, A., before the finding of the indictment in this case, did, in Simpson county, Kentucky, unlawfully, willfully and maliciously, feloniously and with malice aforethought, kill H. by shooting and wounding the said H. upon his body and person with a gun, a deadly weapon, loaded with a leaden ball or balls, or other hard substance, and of the effect of

⁴⁵—Above series of instructions approved in *State v. McMullin*, 170 Mo. 608, 71 S. W. 221 (224, 5, 6).

For another series see *State v. Bond*, 191 Mo. 555, 90 S. W. 830 (831).

⁴⁶—*State v. Todd*, 194 Mo. 377, 92

S. W. 674. For an almost similar instruction see *State v. May*, 172 Mo. 630, 72 S. W. 918 (920).

⁴⁷—*State v. McCarver*, 194 Mo. 717, 92 S. W. 684.

which shooting and wounding the said H. did die within one year thereafter, they shall find the accused guilty, and fix his punishment at death, or confinement in the state penitentiary for life, in the discretion of the jury.⁴⁸

(d) If the jury believe and find from the evidence in this cause that the defendant, P., in the county of S., and state of Mo., on or about the 26th day of November, 1901, did feloniously, willfully, deliberately, premeditatedly and of his malice aforethought make an assault upon W. with a certain loaded gun, and then and there with said gun feloniously, willfully, deliberately, premeditatedly and of his malice aforethought did kill said W. by shooting him upon the head and body, and thereby inflicting upon him a mortal wound, of which said wound he immediately died, at said county of S., during said month of November, 1901, and was thus killed by the shooting aforesaid, as charged in the information, then you will find the defendant guilty of murder in the first degree, and so state in your verdict.⁴⁹

(e) To justify you in finding a verdict of guilty of murder in the first degree, you shall be satisfied from the evidence, beyond a reasonable doubt, of the following material facts, among others: First, that L. G. is dead; second, that the prisoner at the bar caused the death of said L. G. at the time and place alleged in the indictment, and in some way and manner, and by some means, instruments, and deadly weapons unknown, unlawfully, and from a premeditated design to effect the death of her, the said L. G.⁵⁰

(f) In order to convict the defendant of murder in the first degree, you must believe and find from the evidence that defendant not only struck the deceased, A. K., with a deadly weapon upon a vital part, intentionally, but that he struck the blow intending to kill him. In this connection, however, you are instructed that, in the absence of qualifying facts and circumstances, a person is presumed to intend the natural, ordinary, and probable results of his acts. Wherefore, if you believe from the evidence that defendant intentionally struck deceased, A. K., on the head, a vital part, with a deadly weapon, from which death resulted, you will find that he intended to kill. And you will, in that event, also find that malice was the concomitant of the act.⁵¹

(g) In the case at bar, before the prisoner can be convicted of murder in the first degree, the jury must be satisfied beyond a rea-

48—Alderson v. Commonwealth, 25 Ky. Law 32, 74 S. W. 679 (681)

49—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (459).

50—Part of a charge which was held "entirely correct" as applied to second count of indictment charging murder by means unknown. *Gantling v. State*, 40 Fla. 237, 23 So. 857 (859), affirming conviction of murder in first degree for killing a woman at or after pro-

curing an abortion. The word "satisfied" might be found fault with as imposing too heavy a burden of proof on the state, and there is no express statement in this paragraph that the killing must have been done "with malice aforethought."

51—Approved as one of a series in *State v. Kinder*, 184 Mo. 276, 83 S. W. 964 (966).

sonable doubt from the evidence that the prisoner killed the deceased in pursuance of a fixed purpose, with premeditation, formed in a cool state of the blood.⁵²

§ 2986. Murder—First Degree—What Constitutes—Duration of Deliberation. (a) To constitute murder in the first degree, there must have been an unlawful killing done, purposely and with deliberate and premeditated malice. If the person has actually formed the purpose maliciously to kill, and had deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree. An unlawful killing with malice, deliberation, and premeditation constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind and weighed and deliberated upon it.⁵³

(b) If you find beyond a reasonable doubt, going outside of the matter of self-defense, that J. premeditatedly, deliberately, and willfully prepared for the use of the scissors blade, and used it in pursuance of that design, the degree of his criminality is murder in the first degree.⁵⁴

(c) The court charges the jury that if they find from the evidence in this case, beyond all reasonable doubt that the defendant in W. county, Ala., and before the finding of this indictment, purposed (purposely) killed the deceased M., after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, even a moment before the fatal shooting was done, then the defendant is guilty of murder in the first degree.

(d) The court charges the jury that if they believe beyond a

52—State v. Hunt, 34 N. C. 684, 47 S. E. 49 (50).

53—Reed v. State, — Neb. —, 106 N. W. 648.

"This instruction is vigorously assailed by counsel for the accused, who claims that it contains an incorrect definition of murder in the first degree. At first blush it would seem that the point was well taken; but after a careful reading of the whole thereof, in connection with the other parts of the court's charge to the jury, we are constrained to hold the instruction good. Counsel, in order to establish his contention, segregates a part of the paragraph complained of, and, reading it without reference to the rest of the instruction, claims that it is erroneous. It is not the correct method of constru-

ing instructions to select detached portions thereof and consider them as independent of the whole of the charge to the jury. The correct rule of construction, and the one universally followed by this court, is that all that is said in the entire charge upon any one question shall be construed together; and, if, when so construed, it is not inconsistent as a whole, and states the law correctly, no valid assignment of error can be predicated thereon. *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Parrish v. State*, 14 Neb. 60, 15 N. W. 357; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489; *Carleton v. State*, 43 Neb. 373, 61 N. W. 699."

54—State v. Jones, 71 N. J. L. 543, 60 Atl. 396 (398).

"The criticism upon this part of

reasonable doubt from the evidence in the case that the defendant in W. county, Ala., and before the finding of this indictment, purposely killed M. by shooting him with a pistol, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the shooting was done, is immaterial) then the defendant is guilty of murder in the first degree.⁵⁵

(e) The court charges the jury that if the defendant in T. county, and before the finding of this indictment, purposely killed the deceased, W. L., after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree.⁵⁶

the charge is that it requires the jury to convict of murder in the first degree, even though the intent to take the life was not present. An examination of this instruction shows the presence of an ellipsis. 'In pursuance of that design' plainly refers to something antecedent. An examination of the charge shows that this particular instruction is immediately preceded by a statement that, to constitute murder in the first degree, there must be a settled, deliberate, and premeditated intent to kill, followed by the execution of that intent. Reading the criticized excerpt in the light of what immediately preceded it, the instruction was that if the defendant premeditatedly, deliberately, and willfully prepared for the use of the scissors blade and used it in pursuance of that design (i. e. the design to kill the deceased), the degree of his criminality was murder in the first degree. That such is the legal rule prevailing in this jurisdiction is not controverted by the defense."

55—Stewart v. State, 137 Ala. 33, 34 So. 818 (820).

"Charge 1 requested by the state as it appears in the record, reads 'that if the jury find from the evidence in this case, beyond all reasonable doubt, that the defendant in W. county, Ala., and before the finding of this indictment, purposely killing the deceased,' etc. The word 'purposed' is plainly a self-corrective, clerical mistake, for the word 'purposely,' and we will so treat it, Lang v. State, 84 Ala. 4, 4 So. 193, 5 Am. St. 324. Thus construed, the charge, and the one following, numbered 2, were free from error, as we have

frequently held. Lang v. State, supra; Wilkins v. State, 98 Ala. 1, 13 So. 312."

56—Clark v. State, 105 Ala. 91, 17 So. 37 (38).

"This charge has been several times held by this court to be a proper one. Watkins v. State, 89 Ala. 82, 8 So. 134; Hammill v. State, 90 Ala. 577, 8 So. 380; Lang v. State, 84 Ala. 1, 4 So. 193, 5 Am. St. 324. It asserts a correct legal proposition and states facts on which guilt depends, hypothesized as absolutely true, and beyond all reasonable doubt. The defendant objected to it on the ground, among others, that it did not contain the instruction, that the jury must believe the facts hypothesized beyond reasonable doubt. But there was no necessity for instructing the jury that they must believe these facts beyond reasonable doubt, for the charge had already hypothesized them as absolute verities. This charge is distinguishable from the one in Pierson's Case, 99 Ala. 148, 13 So. 550, and other like charges, where we held that when the court charges 'if the jury believe from the evidence' certain facts hypothetically stated omitting the expression 'beyond reasonable doubt' or other equivalent words, it is reversible error. In the latter class of charges on the sufficiency of the evidence the trial courts giving them failed to caution the juries, after telling them if they believed certain facts, that they must believe them beyond reasonable doubt, whereas, in the charge we now review, the court predicated guilt, as we have before stated, upon the absolute truth of the hypothesized facts in the charge. As stated therein they

(f) "Deliberate" and "premeditated" as those words are used in the statute, mean only this: that slayer must intend before the blow is delivered, though it be only an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow, or in other words, if the slayer had any time to think, before the act, however short such time may have been, even a single moment, and did think, and he struck the blow as a result of an intention to kill, produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree.⁵⁷

(g) To constitute a murder in the first degree, the killing must have been willfully, deliberately, and with premeditation; that is, intentionally, sanely, and with prior deliberation, and without legal excuse or justification. "Willfully" as used in the information and these instructions, means "intentionally"; that is, not accidentally. "Deliberately" means an intent to kill, executed by the slayer in a cool state of the blood, in furtherance of a former design, to gratify a feeling of revenge or accomplish some other unlawful purpose, and not under the influence of a violent passion, aroused by real or supposed grievances, amounting to a temporary dethronement of reason. "Premeditated design to kill" means a previously formed intention to kill. But while the law requires, in order to constitute murder in the first degree, that the killing should be willful, deliberate and premeditated, still it does not require that the willful intent, premeditation or deliberation shall exist for any particular length of time before the crime is committed. It is not necessary that the killing should have been brooded over or reflected upon for a week, a day or an hour. It is sufficient if there was a design and a determination to kill, distinctly formed in the slayer's mind at any moment before or at the time the shot was fired which caused the death of the person killed. There may be no appreciable space

must have been true and believed to be true beyond all cavil or doubt, reasonable or otherwise, before defendant could have been found guilty. The charge was not therefore amenable to the objection interposed to it,—that it ignored the question of reasonable doubt."

57—*Kilgore v. State*, 124 Ala. 24, 27 So. 4 (5).

The court said that this instruction "given at the request of the state embraces every constituent element of murder in the first degree as defined by section 4854 of the Code. This charge is substantially the same as the charge passed on in the cases of *Miller v. State*, 107 Ala. 40, 19 So. 37, and *Wilkins v. State*, 98 Ala. 1, 13 So. 312. If the killing was purposely

done, it was willful; and, if done by shooting with a gun, with a wickedness or depravity of heart towards deceased, it was malicious; and, if determined on, no matter for what space of time, it must have been premeditated and deliberate. Premeditation and deliberation are necessarily involved where the thing done is predetermined."

See also *Robinson v. State*, 108 Ala. 14, 18 So. 732 (734), citing *Roberts v. State*, 68 Ala. 156; *Holley v. State*, 75 Ala. 15; *Cleveland v. State*, 86 Ala. 1, 5 So. 426; *Hunt v. State*, 135 Ala. 1, 33 So. 329 (330); *Stevens v. State*, 138 Ala. 71, 35 So. 122 (124); *Sherrill v. State*, 138 Ala. 3, 35 So. 129 (131); *Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1030).

of time between the intent to kill and the act of killing, and if sufficient deliberation was had to form a design or purpose to take life, and to put that design or purpose into execution by destroying life, then there was, in law, sufficient deliberation to constitute murder in the first degree, no matter whether the design to take life had been for a long time contemplated by the slayer or whether the design to kill was formed by him at the instant of the fatal shot. It is enough that the intent to kill preceded the fatal act, although the act followed instantly.⁵⁸

(h) The court charges the jury that if the defendant, in Fayette county, and before the finding of this indictment, purposely killed the deceased, W. F., by shooting him with a gun with a wickedness or depravity of heart towards the deceased, and the killing was determined even a moment before the shooting was done, the defendant is guilty of murder in the first degree.⁵⁹

58—*Perugi v. State*, 104 Wis. 230, 80 N. W. 593 (595), 76 Am. St. 865.

The court said: "We cannot resist the conclusion that every killing, not justifiable, done with that degree of deliberation and with an intent or design sufficiently fixed and settled in the mind as to come within the rule of 'premeditated design' laid down in the statute and interpreted by the decisions of this court, is murder in the first degree; and any expression in the *Terrill* case (*Terrill v. State*, 95 Wis. 276, 70 N. W. 356) or the *Sullivan* case (*Sullivan v. State*, 100 Wis. 283, 75 N. W. 956) to the contrary ought not to be adhered to. The intentional killing that may exist consistent with manslaughter in the second degree springs from momentary impulse, when the mind is unbalanced, and there is no opportunity for consideration or deliberation. Another difficulty with the *Terrill* case is that this court seems to have failed to appreciate the force, scope and effect of the language used by the trial judge. The instruction was: 'If you are convinced by the evidence, beyond a reasonable doubt, that when he shot and killed A. B. he did so pursuant to an intent, then distinctly formed in his mind, to kill A. B., you cannot lawfully find the defendant guilty of manslaughter in the second degree for the defendant in such case, if he killed A. B. from premeditated design to kill him, is guilty of murder in the first degree.' In the *Hogan* case it was said that, 'Previously formed intent to kill' and 'premeditated de-

sign to effect death' are synonymous terms'. And again: 'We take the premeditated design of murder in the first degree to be simply an intent to kill. 'Design' means 'intent' and both words essentially imply 'premeditation.' Very similar expressions have been used in other jurisdictions. Intent means 'that which is intended; purpose; aim; design; intention.' Cent. Dict. The word 'distinctly' is used as synonymous with 'clearly,' 'explicitly,' 'definitely,' 'precisely,' 'unmistakably.' So, when the trial judge used the words 'intent then distinctly formed in his mind,' and followed it with the words 'premeditated design', is there any possibility that the jury could have mistaken his meaning? 'Premeditate' is to think of in advance; to determine upon beforehand; to intend; to design. And. Law Dict. The jury are presumed to know the usual and ordinary meaning of words, and, in view of the definitions given, there seems no escape from the conclusion that they understood the words 'intent distinctly formed' to be the equivalent of 'premeditated design'. It is but proper to say that Mr. Justice Marshall filed dissenting opinion in both the *Terrill* and *Sullivan* cases, and that the views we have adopted are in harmony with the principles therein advocated by him."

See also *Cook v. State*, 46 Fla. 20, 35 So. 665 (670).

59—*Ragsdale v. State*, 134 Ala. 24, 32 So. 674 (675).

(i) The court charges the jury that if they find from the evidence in this case, beyond all reasonable doubt, that the defendant, in Dallas county, Alabama, and before the finding of this indictment, purposely killed the deceased, B. L., alias W. L., after reflection, with a wickedness or depravity of heart towards deceased, and the killing was determined on beforehand, even a moment before the fatal shooting was done, then the defendant is guilty of murder in the first degree.⁶⁰

§ 2987. **Murder in First and Second Degree Distinguished.** (a) So, when you come to measure it up, the question is whether the degree of guilt here rises above second degree, because it is clear that it is at least second degree. There is no presumption at the start that it is higher than that, unless, in this case, from the circumstances, the use of a deadly weapon at a vital part, with the presumption that the party using it knew the consequences of his act, that he acted willfully, deliberately, and premeditatedly. If the evidence all shows willful, deliberate, and premeditated killing under those circumstances, with the intent to take life, then your verdict should be murder of the first degree. Otherwise, if there is a reasonable doubt as to that grade, it should be murder in the second degree.⁶¹

(b) The court instructs the jury that murder in the second degree has all the elements of murder in the first degree, except that of deliberation. If you find from the evidence in this case that the defendant at the county of C. and state of Mo., on the — day of —, 1905, willfully, premeditatedly, and of his malice aforethought (but without deliberation, as defined in these instructions) struck and killed S. J. with a large stone, or a piece of iron, or any instrument or weapon likely to produce death or great bodily harm, as charged in the information, and that such stone, piece of iron, or other instrument or weapon was a dangerous and deadly weapon, then you should find the defendant guilty of murder in the second degree.⁶²

(c) To constitute murder in the first degree there must have been an unlawful killing done, purposely and with deliberate and premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree. An unlawful killing, with malice,

60—*Bondurant v. State*, 125 Ala. 31, 27 So. 775 (777).

The court said that this instruction given at the request of the state is a substantial copy of one approved in *Wilkins v. State*, 98 Ala. 1, 13 So. 312, and in *Miller*

v. State, 10 Ala. 40, 19 So. 37. Citing also *Martin v. State*, 77 Ala. 1.

61—*Commonwealth v. Combs*, 216 Pa. St. 81, 64 Atl. 873.

62—*State v. Darling*, 199 Mo. 168, 97 S. W. 592.

deliberation and premeditation, constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it.

(d) The jury are instructed that while the law requires, in order to constitute murder of the first degree, that the killing shall be willful, deliberate and premeditated, still it does not require that the willful intent, premeditation or deliberation shall exist for any length of time before the crime is committed. It is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the blow was struck, and in this case, if the jury believe, from the evidence, beyond a reasonable doubt that the defendant feloniously struck and killed the deceased as charged in the information, and that before or at the same time the blow was struck the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, the jury should find the defendant guilty of murder in the first degree.⁶³

(e) Malice denotes a state of mind from which acts are done regardless of the rights of others. This [the second] degree of murder is like murder in the first degree, except that to constitute murder in the second degree there must be no deliberation. If there

63—*Savary v. State*, 62 Neb. 166, 87 N. W. 34 (35).

Of these two the court said: "The instructions are substantially the same as those given in *Carlton v. State*, 43 Neb. 373, 61 N. W. 699, which were approved in an opinion of the court by Irvine, C. In the first it is said it is true that 'it is not time that constitutes the distinction between murder in the first and second degrees.' It is earnestly insisted that time is required for premeditation and deliberation. While this is true, the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed; and this is the substance of the instructions complained of. Whether the defendant had sufficient time to premeditate and deliberate, and whether in fact he did so, was a question for the jury, as triors of fact, under proper instructions from the court. From an examination of both instructions, it cannot be said that the purpose to kill could be formed, reflected upon,

and turned over in the mind, and the act committed, at one and the same time. To constitute the crime of murder in the first degree, there must be a reflection, a turning over in the mind, a weighing and consideration of the act, and the purpose formed to do it before its actual commission. . . . The correctness of the instruction as a legal proposition cannot be questioned. In the second the jury are told that if before or at the time the blow was struck the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design, without any justifiable cause or legal excuse, his guilt of the highest degree of the crime charged would be established. It can hardly be argued by any logical process of reasoning that under this instruction a verdict of guilty of murder in the first degree would be justified upon the theory that the premeditation and deliberation required to be shown and the act of killing may take place simultaneously."

be deliberation, it would be murder in the first degree. If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, G. D., killed the deceased, C. S., purposely and maliciously, but without premeditation, and you further find that he killed the deceased without such provocation as was apparently sufficient to create in him an irresistible passion, and such killing was not in lawful self-defense, you will find the defendant guilty of murder in the second degree. If the defendant intentionally killed the deceased with a deadly weapon and without such provocation as was apparently sufficient to excite in him an irresistible passion, and such killing was not in lawful defense, then such killing, if malicious, is murder; and, if such killing was deliberate and premeditated, it was murder in the first degree.⁶⁴

(f) If a person forms in his mind a purpose, design or intention to unlawfully kill a human being with malice but without premeditation, and he does so kill a human being, then the offense comes within our statute defining murder in the second degree; but if the element of premeditation is also present before the fatal blow is struck, then it is murder in the first degree.⁶⁵

(g) The court instructs the jury that the indictment in this case was filed on the 5th day of March, 1901, and charges the defendant with murder in the first degree. Under the evidence adduced, however, it will be necessary for you to determine, in the event you find the defendant guilty of any offense, whether he should be convicted of the specific offense charged in the indictment, or for murder in the second degree. Murder in the first degree is the killing of a human being willfully, deliberately, premeditatedly, and with malice aforethought. Murder in the second degree has all the elements of murder in the first degree except that of deliberation. "Willfully," as used in these instructions, means intentionally; that is, not accidentally. Therefore, if the defendant intended to kill, such killing is willful. In the absence of qualifying facts and circumstances, the law presumes that a person intends the ordinary and probable result of his acts. If you believe from the evidence beyond a reasonable doubt that the defendant with a pistol shot J. in a vital part and killed him, you will find that the defendant intended to kill, unless the facts and circumstances given in evidence show to the contrary. "Deliberately" means in a cool state of the blood; that is, not in a heated state of the blood, caused by a lawful provocation. It does not mean brooded over, considered, or reflected upon for a week, a day or an hour; but it means an intent to kill,

64—Downing v. State, 11 Wyo. 86, 70 Pac. 833 (835).

"The objections to this instruction are answered by the language used by this court in Ross v. State, 8 Wyo. 351, 57 Pac. 924. It is impossible to state in each instruction all the law applicable

to the case. . . . It is not only impossible to rehearse in each instruction every principle of law involved, but it would only create confusion and obscurity to attempt it."

65—Archie v. State, 64 Ind. 56.

executed by a party not under the influence of violent passion suddenly aroused by some lawful provocation, but in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose. "Premeditatedly" means thought of beforehand for any length of time, however short. "Malice" as used in these instructions, does not mean mere spite, ill will or dislike, as it is ordinarily understood; but it means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief. "Malice aforethought" means that the act was done with malice and premeditation.⁶⁶

§ 2988. **Whether Murder or Manslaughter.** If the jury believe from the evidence beyond a reasonable doubt, that the defendant, T. S., in F. county, Ky., and before the 28th day of March, 1905, willfully shot and killed L. with a gun or pistol, or both, loaded with powder and leaden balls, or other hard substances, and that said shooting was not necessary, and did not, at the time, reasonably appear to the defendant to be necessary to save the defendant from death, or from some serious bodily harm at the hands of said L., the jury should find the defendant guilty—guilty of murder if said shooting and killing, if there was such, was done by the defendant with malice aforethought; guilty of voluntary manslaughter if said shooting, if there was such, was done by the defendant in sudden affray, or in sudden heat and passion, and without previous malice.⁶⁷

66—Introduction to the charge in *State v. May*, 172 Mo. 630, 72 S. W. 918 (920).

67—*Stout v. Commonwealth*, 29 Ky. Law R. 627, 94 S. W. 15.

"In the case of *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 694, it was held that an indictment for murder was fatally defective if it omitted the word 'feloniously' from the description of the offense charged, and this case has been followed consistently since. But it has never been held that the word 'feloniously' is necessary in an instruction given in a case involving the trial of a felony charge. It may be conceded, however, that after the *Kalein* case the court proceeded very cautiously with reference to the necessity of the word 'feloniously' in instructions in felony cases, as is shown by these utterances: In *Omer v. Commonwealth*, 25 S. W. 594, 15 Ky. Law R. 694: 'We perceive no other serious objection to the instructions, although the failure to use the word "feloniously" in the first instruction should be cured upon another

trial. We are inclined to think that, owing to the peculiar nature of the facts set up by the way of defense, the failure to use the ordinarily necessary words was not prejudicial, but the omission should be supplied in the future.' In *Brooks v. Commonwealth*, 28 S. W. 148, 16 Ky. Law R. 356: 'It does not follow, necessarily from the omission of this word (feloniously) in the instruction complained of, that the error was prejudicial to the accused. * * * A homicide cannot legally be called a murder unless the act of killing be done feloniously and with malice aforethought; but if an assassin from ambush shoots his victim for purposes of robbery, it would be the height of legal folly to say that the substantial rights of the murderer are prejudiced by a defective definition of the words 'malice aforethought,' or the mere omission from an instruction to the jury of the 'words of art' (feloniously) technically required in law to designate a murder.' But in *Bunnell v. Commonwealth*, 30 S. W. 604, 17 Ky. Law R. 106, this

§ 2989. **Murder in First and Second Degree and Manslaughter Defined and Distinguished—Elements of—Michigan.** (a) The court instructs the jury that murder is defined as where a person of sound memory and discretion, willfully and unlawfully and unreasonably, kills any creature in being, against the peace of the state, with malice aforethought, express or implied. Under the statutes of this state, all murders which shall be perpetrated by means of poison or lying in wait, or any other means of unlawful, deliberate and premeditated killing, or which shall be committed in the perpetration of any arson, rape, robbery or burglary, shall be deemed murder in the first degree. All other murders shall be deemed murder in the second degree. If one, without cause, inflicts a wrong upon another, we call him "wicked and malicious." So, when one, without any legal provocation, justification or excuse, intentionally kills another, he is called a "murderer." The law implies from such unprovoked, unjustifiable or inexcusable killing the existence of that wicked disposition which the law terms "malice aforethought." Thus if the respondent intentionally killed D. without provocation, justification or excuse, your verdict should be "Guilty of murder." The intention may be inferred from the use of the deadly weapon in such a manner that the death of the person assaulted would be the inevitable consequence. If you come to the conclusion that the respondent is guilty of murder, it will be your duty to determine whether he is guilty of murder in the first or second degree. Our statute provides, as I have stated, that all murders which shall be perpetrated by means of poison or lying in wait, or any other kind of unlawful or premeditated murder, shall be murder in the first degree. To convict the respondent of murder in the first degree, you must be satisfied that he intended to kill D., and that the killing was willful, deliberate and premeditated. It is not necessary that any particular time should have elapsed between the forming of the purpose and the intention to kill, and the killing. If the respondent had, previous to the shooting of D., determined to kill him, and, to carry out his intention, willfully and deliberately killed him, he would be guilty of murder in the first degree. If the killing was done under a sudden impulse, then respondent would be guilty of murder in the second degree. If you are not satisfied beyond a reasonable doubt that the killing was murder in the first degree, your verdict should be "guilty of murder in the second degree," if you find him guilty of murder at all. If a man kill another suddenly and without provocation, the law implies malice, and it is murder. If the provocation was such as must have greatly provoked him, the killing would be manslaughter only. The instrument with which the

answer was made to the objection now under consideration: 'It is insisted, however, that the word "feloniously" should have been used in the instruction on the subject of murder and manslaughter.

The contrary has been announced in the recent case of *Brooks v. Commonwealth*, 28 S. W. 148, 16 Ky. Law R. 356, and the principles there laid down are conclusive of this question'."

killing was done must be taken into consideration. If inflicted with a deadly weapon, the provocation must be great, to make it manslaughter. The amount of resentment must bear a reasonable proportion to the provocation to reduce the offense to manslaughter. To make it manslaughter, it is also necessary that the killing be done immediately upon the happening of the provocation. If sufficient time elapses for passion to subside and reason to interpose, the killing is deliberate, and the crime murder, no matter how great the provocation. Under the information in this case, the respondent may be convicted of murder in the first degree, of murder in the second degree, or manslaughter, or acquitted upon the grounds that the killing was justifiable, depending upon your view of the testimony.⁶⁸

(b) In order for you to find murder in the first degree, you must find from all the evidence, beyond a reasonable doubt, a deliberate intention to take the life of the deceased, T. While the law requires, in order to constitute murder in the first degree, that the killing shall be willful, deliberate and premeditated, still it does not require that the willful intent, premeditation and deliberation shall exist for any particular length of time before the crime is committed. It is sufficient if there was a malicious design and determination to kill, distinctly and deliberately formed in the mind at any time before and continuing at the time the blow was struck. If a person has actually formed a purpose maliciously and willfully to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder of the first and second degree. An unlawful killing with malice aforethought, willfully, with premeditation and deliberation, constitute the crime of murder in the first degree; but the term "deliberate" is not applicable to any act done on a sudden impulse. You cannot find the respondent guilty of murder in the first degree unless you find from all the evidence beyond a reasonable doubt that he did on the 10th day of August, —, kill T., and that such killing was with malice prepense or aforethought, and also find beyond a reasonable doubt that such killing was willful, deliberate and with a design to take the life of said deceased. In order for you to convict the respondent of murder in the first degree, the specific intent, as well as all other elements of the offense which I have enumerated must be affirmatively proved beyond a reasonable doubt; that W. did shoot and kill the said T. at the time and place specified, and that such killing was not excusable or justifiable under the instructions which I have already given you, that such killing was with malice prepense or aforethought; and if you fail to find beyond a reasonable doubt that such crime was perpetrated

willfully, deliberately and premeditatedly—your verdict will be “murder in the second degree.” If you find from the evidence beyond a reasonable doubt that the respondent did kill the said T. at the time and place specified, and you further find that the act of killing, even if you find that it was intentional, was committed under the influence of passion, or in the heat of blood, produced by adequate or reasonable provocation, and before a reasonable time had elapsed for the blood to cool and reason to resume its habitual control, and was the result of temporary excitement, by which the control of the reason was disturbed, rather than any wickedness of heart or cruelty or recklessness of disposition, then your verdict will be “guilty of manslaughter.”⁶⁹

§ 2990. **Murder in First Degree—Idaho Statute—Nebraska.** (a) In this case it is not claimed by the prosecution that the homicide charge was committed in the perpetration or attempt to perpetrate any other felony, but it is claimed that it is murder in the first degree, as being unlawful, malicious, willful, deliberate and premeditated. In this class of cases the Legislature leaves the jury to determine from all the evidence before them the degree of the crime, but prescribes for the government of their deliberations the same test, which is, is the killing willful, deliberate and premeditated?⁷⁰

(b) You are instructed that under our statute, to constitute murder in the first degree, the jury must be satisfied beyond a reasonable doubt, from the evidence, that the defendant, without any justifiable cause or excuse, killed the deceased in manner and form as charged in the indictment; and they must also be satisfied beyond a reasonable doubt, from the evidence, that he killed the deceased purposely, and of deliberate and premeditated malice. And you are instructed that by premeditation and deliberation is meant to think of, to resolve in the mind beforehand, to contrive, to design previously, to weigh in the mind, to consider and examine the reasons for and against, to consider maturely, to reflect upon. The defendant, in order to be guilty of this degree of crime, must have first formed the purpose in his mind to kill the deceased, and having that purpose, he must have deliberated upon it. He must have considered the consequences of his act, and then, with full knowledge of the consequences of the act about to be done, he purposely, and maliciously executed that purpose by slaying the deceased. By malice is meant [a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act intentionally committed without lawful excuse.]⁷¹

69—*People v. Wright*, 89 Mich. 70, 50 N. W. 792 (797).

70—*State v. Shuff*, 9 Idaho 115, 72 Pac. 664 (667), 13 Am. Cr. Rep. 443.

71—*Carr v. State*, 23 Neb. 749, 37 N. W. 630 (632).

In the form given above the

objectionable sentence has been omitted and the definition of malice inserted as given by the Supreme Court, as shown in the following extract of the opinion:

“The definition of malice contained in the latter clause of this instruction is, we think, hardly

§ 2991. **Order in Which Jury May Consider the Issues—New York Code.** If the killing is not intentional, but done through carelessness, or in the heat of passion, or while engaged in the commission of a misdemeanor, when the killing was not intentional, then it is manslaughter. It is murder in the first degree if the killing is done intentionally with deliberation and premeditation. It is murder in the second degree if done intentionally, but without deliberation and premeditation. The charge in this case is that of murder in the first degree. And it becomes the duty of the jurymen to first consider and determine whether or not the prisoner is guilty of the greater crime; that is, murder in the first degree. For it is only after you become satisfied that he is not guilty of murder in the first degree that you have the right to consider the lesser degrees;

sufficient. It is a copy of the first paragraph of the definition of malice given by Bouvier in his dictionary. The paragraph referred to in the definition is as follows: 'The doing of a wrongful act intentionally, without just cause or excuse. 4 Barn. & C. 255; 9 Metc. 104.' 'The wicked, mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. 4 Barn. & C. 255; 9 Metc. 104.' The first case cited by the author is *Bromage v. Prosser*, an action of slander, decided in 1825, and which we need not here notice. The case cited in 9 Metc. is that of *Com. v. York*. Chief Justice Shaw, in writing the opinion, says: 'Malice in the definition of murder is imputed to an act done willfully, *malo animo*; an act wrong in itself and injurious to another, and for which there is no apparent justification or excuse. . . . The natural or necessary conclusion and inference from such an act willfully done without apparent excuse are that it was done *malo animo* in furtherance of the wrongful injurious purpose, previously, though perhaps suddenly formed, and is, therefore, a homicide with malice aforethought, which is the true definition of murder. In *Territory v. Egan*, 3 Dak. 119, 13 N. W. 568, malice is defined to be 'that state of mind or act where one willfully does that which he knows will injure another person or property.' In *Whart. Law Dict.*, malice is defined to be a 'formed design of doing mischief to another; technically, *malitia præcogita*, or malice prepense or aforethought.' . . . In *Harris v. State*, 8 Tex. App. 109, it is defined to be 'a con-

dition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.' By the foregoing and other citations which we might make, it is apparent that malice, as applied to the case at bar, should be defined as a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act intentionally committed without lawful excuse. It is a mental condition on the part of the actor, supposed to exist at the time of the commission of the offense, and is imputed to 'doing of an unlawful act, intentionally, without just cause or excuse.' The district court was perhaps fully justified in adopting the definition given, for the same language is used in defining malice in *Milton v. State*, 6 Neb. 143, and therefore what is here said can in no sense be said to be a criticism upon the action of the trial court. But, for the reasons given, we believe the rule stated in *Milton v. State* is imperfect, and should not be followed. It is not given with the usual care and precision of the writer of that opinion, for the reason, doubtless, that it was not an essential element in the case, the testimony failing to show deliberation and premeditation, and on account of which a new trial was given. The legal definition of malice given by Webster is 'any wicked or mischievous intention of the mind; a depraved inclination to mischief; intention to do an act which is wrongful, without just cause or excuse; a wanton disregard of the rights or safety of others; willfulness.' "

or rather, in case you are not satisfied beyond a reasonable doubt of the guilt in the greater degree, then you have the right to consider the lesser degrees. So that you are to determine, in the first place, as to whether the killing was intentional, and was it with deliberation and premeditation. In other words, did the accused premeditate, think over, resolve in his mind, form a conclusion to do the act, and did he deliberate upon that?⁷²

§ 2992. **Deceased Assaulting Defendant—Defendant Killing Deceased After Cooling Time.** You are instructed that, although you may believe from the evidence that some time prior to the killing, the deceased assaulted the defendant, and knocked him down with a rifle and punched him with a rifle and kicked him, yet if you further believe that after said assault the deceased and the defendant walked together for some distance, and sufficient time had elapsed for defendant's passion to subside, and that while they were so walking together the deceased passed the defendant, and the defendant deliberately drew a pistol and shot deceased and killed him, with malice aforethought, and with the intent in his mind, at the time, to take the life of the deceased, while deceased was riding from him and making no demonstrations, this would be murder in the first degree, and you should so find.⁷³

§ 2993. **Seeking Quarrel with Deceased with Expectation of Shooting Him.** If the jury believe, from the evidence, that the defendant sought a quarrel with the deceased and first struck him a violent blow with his fist, in the expectation that the deceased would resent the blow, and in his turn attack the defendant, so that he might have a chance to shoot or stab the deceased, and thereby take his life, and further, that in accordance with such expectation the said deceased did thereupon attack the defendant with his fists, and the defendant then shot the deceased, as charged in the indictment, such killing would be murder in the first degree.⁷⁴

72—*People v. Wilson*, 109 N. Y. 540, 16 N. E. 540 (544).

The court said: "The defendant was charged in the indictment with murder in the first degree, and to that charge he pleaded, and for that charge he was put on trial, and all the evidence was directed to the issue joined upon that charge. It was the duty of the jury first to determine whether he was guilty of that charge or not. That was the primary subject to be investigated, and it was only after they found him not guilty upon that charge that they were authorized, under section 444 of the Code of Criminal Procedure, to find him guilty of any inferior degree of homicide."

73—*Duckworth v. State*, 80 Ark. 360 (362), 97 S. W. 280 (281).

"To convict the defendant of murder in the first degree, under it, it was necessary for the jury to find that a sufficient length of time had elapsed for his passion to subside—cooling time—and that thereafter he deliberately drew a pistol and shot deceased and killed him—deliberation—with malice aforethought, and with the intent in his mind at the time—at the time of the deliberate shooting—to take the life of the deceased—premeditation—in other words, must find deliberation, malice aforethought, and premeditation. Construed in connection with the other instructions, the instruction objected to is substantially correct."

74—*State v. Christian*, 66 Mo. 138.

§ 2994. Deceased Making First Hostile Demonstration—Direct Evidence Not Necessary. (a) The court charges the jury that if they believe from the evidence in this case beyond a reasonable doubt, that the defendant lay in wait, with the formed design to take the life of deceased, then notwithstanding they may further believe that the deceased made the first hostile demonstration, defendant would be guilty of murder in the first degree.⁷⁵

(b) The court instructs you that while it devolves upon the state to prove willfulness, deliberation, premeditation and malice aforethought, all of which are necessary to constitute murder in the first degree, yet this need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if you can satisfactorily and reasonably infer their existence from all the evidence you will be warranted in finding the defendant guilty of murder in the first degree.⁷⁶

§ 2995. Murder by Poison—Essential Facts to Be Proven. (a) It is essential to the conviction of the defendant that the following facts must be proved beyond a reasonable doubt, to-wit: (1) The death of A. B., named in the indictment; (2) that his death was caused by, or was mediately or immediately accelerated by, poison by arsenic; (3) that the poison thus causing or accelerating the death of A. B. was feloniously administered by the defendant to him, or that the defendant feloniously participated in such administration thereof, or feloniously caused the same to be administered to him; (4) that the offense was committed in Huntington county in the state of Indiana.⁷⁷

(b) When murder—that is, killing a human being with malice aforethought is perpetrated by means of poison, the law implies, because of the nature of the act, that it was done intentionally, willfully, deliberately, premeditatedly and with malice aforethought, and therefore declares it to be murder in the first degree. Such being the law you are not called upon to consider as to murder in the second degree nor manslaughter. Your verdict must be guilty of murder in the first degree or not guilty.⁷⁸

(c) The court instructs the jury that whoever kills a human being with malice aforethought is guilty of murder; that all murder which is perpetrated by poison, lying in wait or any other kind of willful, deliberate and premeditated killing, is murder in the first degree.⁷⁹

⁷⁵—Gafford v. State, 125 Ala. 1, 28 So. 406 (407).

⁷⁶—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (458).

⁷⁷—Epps v. State, 102 Ind. 539, 1 N. E. 491 (499).

⁷⁸—It is objected that this instruction did not also tell the jury that death must have resulted within a year and a day after the poison was administered. In the first place, we see nothing in the instruction, so far as it purported

to go, which could have injured the appellant. In the next place, there is no evidence which required the additional definition insisted upon. The last sickness of A. B., immediately following his symptoms of arsenical poisoning, was of less than a week's duration."

⁷⁸—State v. Burns, 124 Ia. 207, 99 N. W. 721 (722).

⁷⁹—Longley v. Commonwealth, 99 Va. 307, 37 S. E. 339 (340).

(d) If you have a reasonable doubt as to whether defendant poisoned his wife with strychnine, with intent to kill her, as charged in the indictment, and if you have such doubt as to whether defendant, with intent to kill her, placed strychnine poison where he knew or believed deceased might take it, or if you have such doubt as to whether deceased committed suicide, or died from other causes than poison administered by defendant with intent to kill her, you will acquit defendant.⁸⁰

§ 2996. Deceased Having Had Illicit Intercourse with Defendant's Wife. (a) If the jury believe from the evidence beyond all reasonable doubt that the deceased, several months prior to the killing, did have sexual intercourse with the defendant's wife, with or without force, and that the defendant, in B. county, Alabama, and before the finding of this indictment, killed the deceased by decoying him to his (defendant's) house, and by lying in wait for him, on account of such illicit intercourse between deceased and defendant's wife, then defendant is guilty of murder in the first degree, and it is the sworn duty of the jury to so find their verdict.⁸¹

(b) The jury will observe, from all the instructions given them, those upon the part of the state as well as defendant, that under the law the defendant had no right to kill W. because of his knowledge or suspicion of deceased and defendant's wife having previously had illicit intercourse. And in this case, if the defendant, after having suspected or known for days, weeks, or even months of the intimacy of his wife and W., by reason thereof, and after having formed a conscious design and purpose to kill said W., did kill said W., the so killing of said W. was and is under the law murder in the first degree, and the jury should so find.⁸²

§ 2997. Murder in the First Degree—Definition of—Murder Committed in Perpetration of Robbery. (a) The court instructs you that every person with sound memory and discretion who shall unlawfully kill any reasonable creature in being in this state, with malice aforethought, either expressed or implied, shall be deemed guilty of murder. All murder committed in the perpetration of robbery is murder in the first degree. All murder of the first degree is of the second degree.⁸³

80—*Morrison v. State*, 40 Tex. Cr. App. 473, 51 S. W. 358 (365).

81—Approved in *Williams v. State*, 130 Ala. 107, 30 So. 484 (486).

82—*State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (460).

83—*Jones v. State*, — Tex. Cr. App. —, 96 S. W. 930 (931).

"This charge is objected to because, in the remainder of the charge, murder in the first degree is nowhere completely defined, nor is malice or malice aforethought anywhere defined. In connection with the charge there is no stated

definition of malice or malice aforethought. While ordinarily the court should define these terms, and in a case of this gravity the judge cannot be too careful, yet we believe in the court's charge applying the law to the facts, there was a sufficient definition of malice aforethought, which cured this defect. The charge in question required the homicide to have been committed 'unlawfully, and with a mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which

(b) If the jury believe, from the evidence, beyond a reasonable doubt, that at the time of the alleged killing the defendants had entered the house of the deceased, for the purpose of stealing and carrying away any article of personal property therein, and that, in the prosecution of that purpose, or in his efforts to escape from the house with such property, the defendant struck the deceased and thereby caused his death, then such killing would be murder and not manslaughter, and it would be wholly immaterial whether such killing was intentional or not.⁸⁴

(c) If the jury believe, from the evidence, beyond a reasonable doubt, that the said J. was killed by the defendant, and also, that at the time the defendant was engaged in an attempt to rob the deceased, then the defendant is guilty of murder in the first degree, although he may have had no intention to take the life of the said J.⁸⁵

(d) If you believe, from the evidence, beyond a reasonable doubt, that at the time of the alleged killing the defendant had entered the saloon of the said X. for the purpose of feloniously and violently taking the money or personal property of said X. from his person by force, intimidation or by putting said deceased, X., in fear, and that in the prosecution of that purpose the defendant shot the deceased, and thereby caused his death, then such killing under such circumstances would be murder in the first degree. In other words, if from the evidence the jury believe beyond a reasonable doubt that the defendant killed the said X., and also at the time of the killing that the defendant was engaged in an attempt to perpetrate a robbery upon the person of the said deceased, then the defendant would be guilty of murder in the first degree.⁸⁶

§ 2998. **Murder—Attempt to Escape.** The court instructs the jury that if they believe and find from the evidence, beyond a reasonable doubt, that on the — day of November, 1905, the defendants and another person named B. were confined as prisoners in the Missouri State Penitentiary, in C. county, Mo., and while so confined agreed with each other to make or attempt to make an escape from prison, and in so doing and while acting in concert with each other and in the furtherance of a common design to make such escape, either one of the four persons so attempting to escape did, in the presence of the other three, willfully, feloniously, deliberately, premeditatedly, and of malice aforethought kill J. in the county afore-

may be inferred from acts committed or words spoken and in the perpetration of robbery, and with malice aforethought, etc. This embraces one of the definitions of malice aforethought, and under the facts and circumstances of this case, we believe was sufficient. *Martinez v. State*, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. 895; *Hedrick v. State*, 40 Tex. Cr. App. 532, 51 S. W. 252; *Rupe v.*

State, 42 Tex. Cr. App. 477, 61 S. W. 929."

84—*Bissott v. State*, 53 Ind. 408.

85—*Monihan v. State*, 7 Ind. 126.

86—*Rhea v. State*, 63 Neb. 461, 88 N. W. 789 (798).

The court said: "The instruction complained of, we hold, states the law correctly, and that error cannot be successfully predicated on its being given to the jury."

said, while he was in the peace of the state and in the discharge of his duties as a guard at such penitentiary, by shooting him upon the neck or head with a pistol, and thereby inflicting upon him a mortal wound of which he then and there instantly died, then they will find all three of the defendants, H. V., G. R., and E. R. guilty of murder in the first degree, and so state in their verdict.⁸⁷

§ 2999. **Killing While Attempting to Commit Rape.** The crime charged in the second count is thus defined: "If any person in the perpetration or attempt to perpetrate any rape, kill another, every person so offending shall be deemed guilty of murder in the first degree." Under the law, to warrant a conviction of defendant of the crime charged in the second count of the information the state is not required to prove that the act of killing was done purposely, and of deliberate and premeditated malice. The facts necessary to be established by the state by evidence beyond a reasonable doubt, to warrant a conviction of the crime charged in the second count, are that the defendant, in perpetrating or attempting to perpetrate a rape upon the said G., did choke, suffocate, or strangle her, the said G., and of which choking, suffocation, or strangling by defendant, she, the said G., then and there died. . . .⁸⁸

§ 3000. **Fatally Wounded by Striking with Billiard Cues.** The court instructs the jury, if they shall find and believe from the evidence beyond a reasonable doubt that the defendant, R. S., on or about the 24th day of March, 1900, at the county of Lawrence and state of Missouri, did willfully, feloniously, deliberately, premeditatedly and with malice aforethought strike and wound W. with billiard cues, and if the jury further believe, from the evidence that within a year and a day thereafter, to wit, on or about the 26th day of March, 1900, the said W., at the county of Lawrence and state of Missouri, died in consequence of said wounding and striking with the

⁸⁷—State v. Vaughan, 200 Mo. 1, 98 S. W. 2.

⁸⁸—Morgan v. State, 51 Neb. 672, 71 N. W. 788 (793).

"Stephen, J. in Reg. v. Serne, 16 Cox Cr. Cas. 311, after holding death resulting from a known dangerous act, done in the commission of a felony, to be murder, makes use of the following illustration: 'Suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her; that would be murder. . . . That kind of a crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol or a knife. If a man once begins attacking the human body in such way, he must take the conse-

quences if he goes further than intended when he began.' See also State v. Gray, 19 Nev. 212, 8 Pac. 456; People v. Mooney, 2 Idaho 24, 2 Pac. 876; People v. Greenwall, 115 N. Y. 520, 22 N. E. 180; Moynihan v. State, 70 Ind. 126, 36 Am. Rep. 178; Robertson v. Com. (Va.), 20 S. E. 362; Reddick v. Com. (Ky.), 33 S. W. 416; Graves v. State, 45 N. J. Law 203; People v. Nichol, 34 Cal. 211. The authorities here cited serve to demonstrate the fallacy of the argument employed in Robbins v. State, 8 Ohio St. 131, as respects the grammatical construction of the statute, as well as the policy and purpose thereof, and our examination of the subject has suggested no sufficient reason for adhering to a construction alike exceptional and obviously unsound."

billiard cues aforesaid, the jury will find the defendant guilty of murder in the first degree, as charged in the indictment.⁸⁹

§ 3001. Deadly Weapon—Killing with a Large Stone or Piece of Iron. (a) The court instructs that if the jury find from the evidence in this case, beyond a reasonable doubt, that at the county of C. and state of Missouri, at any time prior to the filing of the information herein, the defendant E. D., with a large stone, or a piece of iron, or any weapon or instrument likely to produce death or great bodily harm, as charged in the information, and that such stone, piece of iron, or other instrument or weapon was a dangerous and deadly weapon, did willfully, deliberately, premeditatedly, and of his malice aforethought strike, beat, bruise, and wound S. J., thereby inflicting upon the head of him, the said S. J., one or more mortal wounds, from which the said S. J., on the —th day of —, 1905, at the county of C. and state of Missouri, died, then you will find the defendant guilty of murder in the first degree.⁹⁰

(b) The jury are instructed that he who willfully, that is, intentionally, uses upon another at some vital point a deadly weapon, must, in the absence of qualifying facts, be presumed to know that the effect is likely to produce death, and knowing this, must be presumed to intend death, which is the probable consequence of such an act, and if such deadly weapon is used without just cause or provocation he must be presumed to do it wickedly and from a bad heart, and if the jury believe from the evidence that the defendant shot and killed L., as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated, and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose and without any justifiable cause or legal excuse therefor as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree.⁹¹

⁸⁹—State v. Smith, 164 Mo. 587, 65 S. W. 270.

⁹⁰—State v. Darling, 199 Mo. 168, 97 S. W. 592.

⁹¹—State v. McCarver, 194 Mo. 217, 92 S. W. 684.

"We are unable to appreciate the criticism upon this instruction, to the effect that it instructs the jury that the intentional killing of a human being with a deadly weapon, without any lawful provocation, must be presumed to be murder in the first degree. The instruction does not so state; nor does the case of State v. Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959, or State v. Fairlamb, 121 Mo. 137, 25 S. W. 895, so hold. On the contrary, it is said in Silk's case that a homicide committed by the use of a deadly weapon, and with-

out deliberation, is murder in the second degree. The same rule was announced in the Fairlamb case. The instruction under consideration, in defining murder in the first degree, tells the jury that in order to convict defendant of that offense, they must first believe that the killing was with deliberation and premeditation. It says 'if the jury believe from the evidence that the defendant shot and killed H. L., as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated, and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as ex-

(c) He who willfully—that is, intentionally, uses upon another at some vital part a deadly weapon, as a loaded firearm, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and knowing this must be presumed to intend death, which is the probable and ordinary consequences of such an act; and if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly, or from a bad heart. If, therefore, the jury believe that defendant took the life of J. R. M. by shooting him in a vital part, with a revolver loaded with gunpowder and leaden bullets, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing is murder in the first degree; and while it devolves upon the state to prove willfulness, deliberation, premeditation and malice aforethought (all of which are necessary to constitute murder in the first degree) yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree.⁹²

§ 3002. Murder in First Degree—Metal Knucks or Means Unknown—Stabbing with Knife. (a) If the defendant in this county before the finding of this indictment, purposely killed deceased by striking him with metal knucks, by cutting him with a knife, or by throwing him overboard, or by means unknown to the grand jury, after reflection, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree.⁹³

(b) If you believe, beyond a reasonable doubt, from all the evidence in this case, that defendant in this county before the finding of this indictment, purposely killed the deceased, by stabbing or cutting him with a knife, after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, even a moment before the fatal blow was made, the defendant is guilty of murder in the first degree.⁹⁴

plained in these instructions, then the jury should find the defendant guilty of murder in the first degree.' The instruction is in line with all the authorities as to what it takes to constitute murder in the first degree, and is free from objection."

92—State v. May, 172 Mo. 630, 72 S. W. 918 (920).

93—Hunt v. State, 135 Ala. 1, 33 So. 329 (330).

94—Boulden v. State, 102 Ala. 78, 15 So. 341 (344).

Held that this "substantially hypothesizes the characteristics of murder in the first degree as defined by the statute. 2 Code §3725. It requires in order to constitute that degree of murder, that the homicide be purposely committed, after reflection with malice and that it was determined on beforehand. These are the equivalent of the willfulness, deliberation, malice and premeditation which the statute requires."

§ 3003. **Murder in the First Degree—Form of Verdict.** (a) The court instructs the jury that under the evidence in this case you will find the defendants guilty of murder in the first degree or acquit them; and you are further instructed that, if you find the defendants guilty of murder in the first degree, you will simply say so in your verdict, as you have nothing whatever to do with the punishment. If you find the defendants not guilty, you will return a verdict to that effect.⁹⁵

(b) If you find the defendant guilty of murder in the first degree, you will simply so state in your verdict, as you are charged with no responsibility with respect to the punishment for murder in the first degree. If you find the defendant guilty of murder in the second degree, you will state in your verdict and assess his punishment at imprisonment in the state penitentiary for any term not less than ten years.⁹⁶

(c) The defendant in this case stands charged by information with murder in the first degree; that is to say, the defendant, P., stands charged with having feloniously, willfully, premeditatedly, deliberately and of his malice aforethought shot and killed W., at the county of Sullivan, on the 26th day of November, 1901, and under the evidence in this case you will either convict the defendant of murder in the first degree, and so state in your verdict, or you will acquit him.⁹⁷

(d) A person on trial charged with murder in the first degree, if the evidence justifies it, may be convicted of murder in the first degree, or he may be acquitted of murder in the first degree; and, if the evidence justifies it, such person may be found guilty of murder in the second or third degree, or of manslaughter; or, in the absence of evidence to convict of either of said offenses, such person may be acquitted of all crime whatever by a general verdict of not guilty; and where such trial is had (that is, for murder), as in the case at bar, if the jury find the accused guilty, then, in their verdict, they should state the degree.⁹⁸

MURDER IN SECOND DEGREE.

§ 3004. **Murder in the Second Degree—Elements of.** (a) If you believe from the evidence that the defendant in the county of St. F., state of Missouri, at any time prior to the — of —, 19—, willfully, premeditatedly, and of his malice aforethought, but not deliberately, shot and wounded L., and that within a year and a day thereafter and before the — of —, 19—, the said L., at the county of St. F., aforesaid, died in consequence of said shooting and wounding, then it

95—State v. Vaughan, 200 Mo. 1, 98 S. W. 2; State v. Gatlin, 170 Mo. 354, 70 S. W. 885 (888).

96—State v. May, 172 Mo. 630, 77 S. W. 918 (920).

97—State v. Privitt, 175 Mo. 207, 75 S. W. 457 (458).

98—McCoy v. State, 40 Fla. 494, 24 So. 485 (487).

will be your duty to find the defendant guilty of murder in the second degree.⁹⁹

(b) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in the month of —, 19—, at V. county, Missouri, with a pistol, shot and killed W., and that such shooting and killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, you should find the defendant guilty of murder in the second degree. Unless you do so believe, you should not find him guilty of murder in the second degree.¹⁰⁰

§ 3005. Murder in Second Degree Defined—Shooting with Revolving Pistol Loaded with Gunpowder and Lead balls. (a) If you find from the evidence beyond a reasonable doubt that at the county of Carroll, in the state of Missouri, at any time before the finding of the indictment herein, the defendant did unlawfully, premeditatedly and of his malice aforethought, but without deliberation, as defined in these instructions, kill X., by shooting him with a revolving pistol, then and there loaded with gunpowder and leaden balls, you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary for a term

99—State v. McCarver, 194 Mo. 717, 92 S. W. 684; Smith v. State, — Tex. Cr. App. —, 89 S. W. 817; State v. Minor, 193 Mo. 597, 92 S. W. 466; State v. Smith, 164 Mo. 567, 65 S. W. 270; State v. May, 172 Mo. 630, 72 S. W. 918 (920).

State v. Kinder, 184 Mo. 276, 83 S. W. 964 (966). In this case the blow was "with a large club, the same being a dangerous weapon, inflicting upon him a mortal wound," etc.

100—State v. Todd, 194 Mo. 377, 92 S. W. 674.

"This instruction is claimed to be erroneous upon the ground that there was no testimony upon which to base it. . . . We think it clear from the evidence that the jury might have found the defendant guilty of murder in either degree, and under such circumstances said instruction was proper. State v. McMullin, 170 Mo. 608, 71 S. W. 221; State v. Frazier, 137 Mo. 317, 33 S. W. 913.

"Another objection urged against said instruction is that it does not indicate to the jury what facts were necessary for it to find in order to authorize a conviction of murder in the second degree, they must believe from the evidence beyond a reasonable doubt, that defendant, with a pistol, shot and killed W., and that such shooting and killing were done willfully, premeditatedly, and of malice afore-

thought, but without deliberation (these terms being defined in another instruction) and thus presented to the jury all the questions necessary for them to pass upon in order to a determination of the guilt or innocence of defendant of murder in the second degree. In speaking of a similar instruction in State v. Bauerle, 145 Mo. 1, 46 S. W. 609, Gantt, J., said: 'The court gave the following instruction: "The court instructs the jury that if you believe and find from the evidence in this cause, beyond a reasonable doubt, that the defendant, at the county of L. and state of Mo., on or about the 26th day of April, 1896, willfully, premeditatedly, and of his malice aforethought, shot and killed one B., but without deliberation, you will find the defendant guilty of murder in the second degree, and will assess his punishment at imprisonment in the penitentiary for a term of not less than 10 years." It had already defined the meaning of deliberation, premeditation, and malice aforethought. Defendant insists that this instruction is misleading and should not have been given. It is sufficient to say that this instruction has been approved a score of times by this court, and is the settled law of this state.' State v. Moxley, 115 Mo. 644, 22 S. W. 575, same as 102 Mo. 374, 14 S. W. 969, 15 S. W. 556."

of not less than ten (10) years. Murder in the second degree is the wrongful killing of a human being with malice aforethought, but without deliberation. It is when the intent to kill is, in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside. We do not use the phrase "heat of passion" in its technical sense, but as a condition of mind contradistinguished from a cool state of the blood.¹

(b) The court charges the jury that if the defendant, in Greene county, and before the finding of this indictment, purposely killed the deceased S. W. by shooting him with a gun, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand and after reflection (for however short a time before the fatal shooting was done is immaterial), the defendant is guilty of murder.²

§ 3006. Murder—Distinction between First and Second Degree.

(a) If the killing was unjustifiable, and with malice aforethought, and was also willful, deliberate and premeditated it would be murder in the first degree; but if it was with malice aforethought, and not willful and deliberate and premeditated, it would be murder in the second degree.³

(b) From these definitions the jury will see that any unlawful killing of a human being, with malice aforethought, is murder; but if nothing further characterizes the offense it is murder of the second degree. To constitute the higher offense there must be superadded, to the general definition above given, willfulness, deliberation and premeditation. By willfulness is meant that it was of purpose, with the intent that, by the given act, the life of the party should be taken. It must be deliberate and premeditated. By this it is not meant that the killing must have been conceived or intended for any particular length of time. It is sufficient if it was done with reflection and conceived beforehand. And in this view, as I have said before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough

1—State v. Marsh, 171 Mo. 523, 71 S. W. 1003 (1904).

Quoting from State v. Curtis, 70 Mo. 594, the court said: "Where there is a willful killing with malice aforethought—that is with malice and premeditation, but not with deliberation, or in a cool state of the blood,—the offense is murder in the second degree." Now, in the instruction under comment, both the terms 'premeditatedly' and of this malice aforethought' are used. 'Premeditatedly' was defined in instruction No. 1 given in behalf of the state as 'thought of beforehand for any length of time, however short,' and 'malice aforethought' as meaning that the killing was done with 'malice' and

'premeditation'; so that not only do the terms used in the challenged instruction bring it strictly within the foregoing quotation from State v. Curtis, *supra*, but the definition of those terms as given by the court does so also."

Citing also State v. Wieners, 66 Mo. 13.

2—Harkness v. State, 129 Ala. 71, 30 So. 73 (74).

Held a correct statement of "the effect of malice in making a homicide at least murder in the second degree, in which offense premeditation is not a necessary ingredient."

3—State v. Hunter, 118 Ia. 686, 92 N. W. 872 (875).

that the party deliberate before the act—premeditate—the purpose to slay before he gave the fatal blow. But while the purpose, the intent and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense. From what I have said you will see that the distinction between the two grades of offense is that, in murder of the first degree (unless it is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem), the killing must be deliberate and premeditated, whilst in murder of the second degree the killing is not deliberate or premeditated. In the one case there is deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal blow was given, to take life. In the other case there is no deliberation, premeditation or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice.⁴

§ 3007. Murder in Second Degree—Elements to Consider—California Statute. It will be proper therefore for you in determining the questions as to whether or not the defendant in this case is guilty of murder of the second degree to consider the following propositions: Is L. P., the person referred to by that name in the information in this case, dead? If she be dead, did she die as the result of an act committed by some other person? If so, did she die within a year and a day from the time of the commission of such act? If she did so die, was such act committed by the defendant in this case? If said defendant did commit such act, did she commit it willfully? If she did willfully commit such act, and it was unlawful, was it felonious?⁵

§ 3008. Murder in Second Degree—North Carolina. If the jury shall find that it was the intention of the prisoner to do serious bodily harm to the deceased, and death ensued in consequence of injuries inflicted with such intention, then the prisoner would be guilty of murder in the second degree.⁶

§ 3009. Murder in Second Degree—Killing Must Be Malicious—Reasonable Doubt—Alabama. (a) Unless from all the evidence in this case the jury can, each, say as a juror sworn and impaneled to try the case according to the evidence, beyond all reasonable doubt, that the defendant killed P. H. with malice towards him, then the jury cannot and should not find the defendant guilty of murder in the second degree.

(b) Unless the jury are satisfied from the evidence beyond all reasonable doubt that the defendant fired the fatal shot maliciously,

⁴—State v. Shuff, 9 Idaho 115, 72 Pac. 664 (668).

⁵—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017 (1019).

⁶—Approved, supplemented with other instructions. State v. Hunt, 34 N. C. 684, 47 S. E. 49 (50).

the jury cannot convict the defendant of murder in the second degree.⁷

(c) The court charges the jury that before they can convict the defendant of murder in the second degree, they must be satisfied from the evidence beyond all reasonable doubt that the defendant unlawfully cut or stabbed W. L. E., and that he did the cutting or stabbing willfully or maliciously.⁸

(d) Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder of the first degree.⁹

(e) Murder in the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation and premeditation.¹⁰

§ 3010. Malice Necessary in Murder in Second Degree, but Will Be Implied—Texas. The next lower grade of culpable homicide than murder in the first degree is murder of the second degree. Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that, in murder in the first degree, malice must be proved to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while, in murder in the second degree, malice will be implied from the fact of an unlawful killing.¹¹

§ 3011. Need Not Be Previously Planned or Deliberated Upon, but Must Be a Coldblooded and Malicious Act—Wyoming. Murder in the second degree is the committing of the act deliberately and in cold blood and not suddenly in the heat of passion, or upon provocation. In the case of murder in the second degree, while it is not necessary that the act should have been previously planned, or deliberated upon, still it must be a coldblooded and malicious act. If the circumstances do not show it to be such, or if there exists in the minds of the jury any reasonable doubt that such was the character of the killing, there cannot be any verdict of murder in any degree.¹²

§ 3012. Murder in the Second Degree—Killing Before Cooling Time Had Elapsed. (a) If you believe from the evidence that the mind of the defendant was not cool, calm, and sedate, and while in this condition he formed the determination to kill, and before cool-

7—Maugher v. State, 116 Ala. 463, 23 So. 26 (27).

8—Sullivan v. State, 102 Ala. 135, 15 So. 264 (265), 48 Am. St. 22.

9—Johnson v. State, 133 Ala. 38, 31 So. 951 (952).

10—McQueen v. State, 103 Ala. 12, 15 So. 824 (826).

Citing Ala. Code Sec. 3725, Ward v. State, 96 Ala. 100, 11 So. 217.

"No deliberation or premeditation is required to characterize murder in the second degree be-

yond that necessarily involved in the existence of malice. Such is the meaning of the instruction."

11—Smith v. State, 45 Tex. Cr. App. 552, 78 S. W. 694 (695).

"Then follows the definition of 'implied malice,' which is correct; the court having previously defined 'malice' in its general sense, as well as 'express malice.' We do not believe there is any error, and the criticism is hypercritical."

12—Downing v. State, 11 Wyo. 86, 70 Pac. 833 (835).

ing time had elapsed carried into execution that design, the offense would not be greater than murder in the second degree.¹³

(b) If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use in a sudden transport of passion, aroused without an adequate cause, or while his mind was not in a cool, deliberate, or sedate condition, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with intent to kill, did shoot and thereby kill R., as charged in the indictment, you will find him guilty of murder in the second degree, etc.

(c) If you believe from the evidence, or have a reasonable doubt of the same, that the deceased, R., on the day of the killing and prior thereto, caused and forced the defendant to get down on his bended knees and apologize to him (R.), and that the said R. cursed and abused the defendant and offered insults to defendant's mother, and insults to the negro race, and that this conduct on the part of said R. aroused in the mind of the defendant either anger, rage, or terror, and in that condition of mind the defendant formed the intent to kill deceased, and that sufficient time had not elapsed at the time of the killing (if any) to allow the mind of the defendant to become cool and capable of calm reflection, you cannot find the defendant guilty of any higher grade of homicide than murder in the second degree and you will so find.¹⁴

§ 3013. In Violent Passion from Offensive Language Used. If you believe from the evidence that at the time of the striking of J. the defendant was in a violent passion, suddenly aroused in consequence of opprobrious epithets applied to him or because of offensive, insulting, or degrading language addressed to him by the

13—*Manning v. State*, — Tex. Cr. App. —, 98 S. W. 251.

"It is contended, in connection with this charge, that the defense of adequate cause should have been given. Taking into consideration the subsequent charge of the court on manslaughter, the jury were not liable to confuse the defense of murder in the second degree with manslaughter. Moreover, not having found appellant guilty of murder in the second degree, we fail to see how it could have injuriously affected appellant; there being no contention that the mind of the jury might be confused between murder in the second degree and murder in the first degree, but merely between murder in the second degree and manslaughter. It might be that if the jury had found appellant guilty of murder in the second degree,

and it could be shown that the charge as between this offense and manslaughter was liable to confuse the jury, appellant might complain. Another objection urged to said charge is that the court told the jury that the offense under the circumstances was murder in the second degree in the latter portion of said charge. We do not understand the charge to convey this idea. The jury were informed that the offense under the circumstances stated could not be greater than murder in the second degree. They would not construe that this charge, in connection with the subsequent charges on manslaughter, which measured appellant's rights as to both of said offenses, relieved the case of any possible confusion between the two offenses."

14—*Manning v. State*, *supra*.

deceased, and that, while under said violent passion, he did strike and kill the said J., then such killing was done without deliberation, and the defendant is guilty of no higher offense than murder in the second degree, and you should so find, unless you further believe from the evidence that the defendant was justified in taking the life of said J. on the grounds of self-defense, as defined in other instructions.¹⁵

§ 3014. **Heat of Passion—Determined with Reference to Ordinary Men.** The heat of passion in this definition means something more than mere anger or irritation. It means that at the time of the act the reason is disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment.¹⁶

§ 3015. **Under Such Passion as to Deprive Defendant of the Power to Form Intent to Kill.** If you believe from the evidence beyond a reasonable doubt, that defendant did shoot and kill said S. W., not by mistake, but intentionally, but that at the time of doing so he was laboring under such a passion as deprived him of the power, at the time he formed that intent to kill her, to do so with a considerate and deliberate mind, then he would be guilty of murder in the second degree.¹⁷

§ 3016. **Sudden Transport of Passion—Without Adequate Cause—Deadly Weapon—Leather Belt Maybe.** If the jury believe beyond a reasonable doubt that defendant A. L., as charged in the indictment, with malice aforethought with a leather belt, being a deadly weapon, or weapon well calculated and likely to produce death by the manner in which it was used, in a sudden transport of passion, aroused without adequate cause, with intent to kill, did strike with the leather belt, and thereby kill M. L. as charged in the indictment, you will find him guilty of murder in the second degree.¹⁸

§ 3017. **Mutual Combat—Deadly Weapon Suddenly Snatched Up.** If it appears from the evidence in this case that the defendant and the deceased entered into a mutual combat, and at the commencement of the fight attacked each other on equal terms, and on a sudden, without previous intention to kill the deceased, the defendant, in the course of the fight, and in the heat of passion, snatched up a deadly weapon, and killed the deceased, it is only manslaughter; but if you believe from the testimony beyond all reasonable doubt that the defendant, in the course of the fight, snatched up the deadly

15—State v. Darling, 199 Mo. 168, 97 S. W. 592.

16—Ryan v. State, 115 Wis. 488, 92 N. W. 271 (275). Citing Reg v. Welsh, 11 Cox Cr. Cases 336; State v. Ellis, 74 Mo. 207, 41 Am. Dec. 321; 1 McClain Cr. Law, § 337.

The court said: "The precise objection to this portion of the charge is that it does not make the guilt of the accused turn upon

his own heat of passion, but upon the heat of passion of 'ordinary men of fair average disposition.' * * * We must hold there was no error in giving the instruction thus complained of."

17—"This charge is correct." White v. State, 44 Tex. 346, 72 S. W. 173 (174), 63 L. R. A. 660.

18—Lee v. State, 44 Tex. Cr. App. 460, 72 S. W. 195 (196), 61 L. R. A. 904.

weapons, and purposely, and of his deliberate and premeditated malice, killed the deceased, then he would be guilty of murder in the first degree; or if from the evidence you are satisfied beyond a reasonable doubt that in the course of the fight the defendant snatched up the deadly weapon, and purposely and maliciously, but without deliberation and premeditation, killed the deceased, then he would be guilty of murder in the second degree.¹⁹

§ 3018. Criminal Intimacy of Deceased With Defendant's Sister No Defense. Although the jury may believe from the evidence that the deceased and T. H. (defendant's sister) were criminally intimate, this would not, in law, justify or excuse the defendant in lying in wait to shoot and kill deceased, if you believe from the evidence that he did so lie in wait. So if the jury believe from the evidence that the defendant followed the deceased, and shot him from ambush, feloniously, premeditatedly and with malice aforethought, as the terms are in these instructions defined, then the criminal relation between said deceased and T. H., if it did exist, and if it were known to defendant, does not reduce the killing below murder in the second degree, and affords no justification or mitigation for the shooting, if done under such circumstances.²⁰

§ 3019. Killing Child by Beating Its Mother. (a) If a woman be quick with child, and, by a potion or otherwise, killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder; but if the child be born alive, and dieth of the potion or battery, this is murder. This is the doctrine of the common law, and would, under our statute, be murder in the second degree. No malice need be shown in a case of this character, beyond that inferred from the act stated; yet it is essential that the defendant should know that the woman was quick with child, and intentionally inflict the battery.

(b) If, from the evidence, you should believe, beyond a reasonable doubt, that the defendant, G. C., in Geneva county, Alabama, within the time covered by the indictment, intentionally beat his wife, B. C., while she was quick with child, knowing that she was quick with child, and that she afterwards gave birth to the child; that it was born alive, and afterwards died in consequence of the injuries received while in its mother's womb by the beating intentionally inflicted upon its mother by the defendant,—he, the defendant, would be guilty of murder in the second degree, and it would be your duty in that event to return a verdict accordingly.²¹

§ 3020. Murder in Second Degree Presumed—Burden of Proof.

(a) The court instructs you that where a homicide is proved be-

19—State v. Vance, 29 Wash. 435, 70 Pac. 34 (47).

20—State v. Hicks, 178 Mo. 433, 77 S. W. 539 (540).

The court saw "no substantial objection" to this instruction, which

was given by the court. "It was well warranted by the evidence, and very favorable to defendant."

21—Clarke v. State, 117 Ala. 1, 23 So. 671 (672), 67 Am. St. 157.

yond a reasonable doubt, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, it must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter the burden is on him.²²

(b) The court instructs you that all murders are presumed in law to be murder in the second degree, and in order to elevate the offense to murder in the first degree the burden of proof is on the commonwealth, and in order to reduce the offense below murder in the second degree the burden is on the prisoner.²³

(c) If the jury believe from the evidence that the defendant, intentionally killed J. by shooting him in the head with a pistol, and that such pistol was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of evidence to the contrary.²⁴

(d) The jury are instructed, that if the killing of the person mentioned in the indictment is satisfactorily shown by the evidence, beyond all reasonable doubt, to have been the act of the defendants, or either of them, then the law pronounces such killing murder, unless it appears, from the evidence, that circumstances existed excusing or justifying the act, or mitigating it, so as to make it manslaughter, as explained in these instructions.²⁵

(e) The jury are instructed, that the mere fact of an unlawful killing, if proved, raises no presumption that the killing was murder in the first degree, and unless the circumstances show, beyond a reasonable doubt, that some degree of deliberation took place before the killing (or in the attempt, etc), then the conviction can only be for murder in the second degree.²⁶

§ 3021. Murder in Second Degree—Presumed From Killing With Billiard Cues. If the jury believe from the evidence that the defendant intentionally struck and mortally wounded W. in a vital

22—State v. Melvern, 32 Wash. 7, 72 Pac. 489 (496).

"A substantially similar instruction was considered and sustained by this court in State v. Payne, 10 Wash. 545, 39 Pac. 157, on the authority of State v. Cain, 20 W. Va. 679 (709); Hill v. Com., 2 Grat. 595, and other cases cited in the opinion, and 2 Thompson on Trials, par. 2208. This instruction is an exact copy of the form of an instruction given by Thompson in the section of his work on trials above noted; and the learned author, in a footnote to said section, says that 'the principle embodied in the above instruction is believed to be universally acknowledged.'"

See also State v. Staley, 45 W. Va. 792, 32 S. E. 198 (199), and State v. Cain, 20 W. Va. 679 (709).

23—Longley v. Commonwealth, 99 Va. 807, 37 S. E. 339.

24—State v. May, 172 Mo. 630, 72 S. W. 918 (920).

25—Brown v. State, 4 Tex. App. 275.

26—Newton v. State, 6 Neb. 136.

But see People v. Ochoa, 142 Cal. 268, 75 Pac. 847 (850), where the following instruction was approved:

Presumptively, every killing is murder, but so far as the degree is concerned no presumption arises from the mere fact of killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact, to be determined by the jury from the evidence in the case, and it is not a matter of legal conclusion, as evidence of a want of premeditation is not within the rule which excludes it as an excuse.

part with billiard cues, and that said billiard cues were dangerous and deadly weapons, the law presumes that the killing was murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless the same has been met and overcome by evidence introduced by the state.²⁷

§ 3022. **Murder In Second Degree—Form of Verdict.** If you find the defendants guilty, you must state in your verdict the distinct degree of offense, whether of murder in the second degree or of manslaughter, of which you convict them, or you may convict one of them of one degree and the other of a lower degree, or you may convict one and acquit the other. Should you convict both defendants, the form of your verdict should be: "We, the jury, find the defendants, L. C. and S. C., guilty of (here state the offense). So say we all," and let one of your number sign as foreman. If you convict them of different degrees, or if you convict one and acquit the other, your verdict should so state.²⁸

MANSLAUGHTER.

§ 3023. **Manslaughter Defined.** (a) The court charges the jury for the state that manslaughter is the killing of another in the heat of passion, without malice, by the use of a dangerous weapon, without authority or law, and not in necessity self-defense; and the court further instructs the jury for the state that if the jury believe from the evidence beyond a reasonable doubt that E. cursed D. for a son of a bitch, and that D., while still under the heat of passion, aroused by such insult, secured a pistol, and shot and killed E., not in malice, but in the heat of passion, and not in his necessary self-defense, then he is guilty of manslaughter, and the jury should so find.²⁹

27—State v. Smith, 164 Mo. 567, 65 S. W. 270.

28—Clemons v. State, 48 Fla. 9, 37 So. 647 (649).

"It is contended that the judge nowhere charged the jury that they had the right to acquit both the defendants, and that the result of these two instructions could not fail to leave the impression on the mind of the jury that it was their duty to convict one of the defendants. It will be noted that these instructions were to guide the jury in making up their verdict if they found the defendants or either of them guilty. It does not seem to us that they could have been otherwise understood. Nor is the assertion correct that the judge nowhere charged the jury that they had the right to acquit both the defendants."

29—Moore v. State, 86 Miss. 160, 38 So. 504.

"It is contended that this instruction is erroneous, as being upon the weight of the evidence, and as assuming that D. was under heat of passion aroused by having been cursed by E. for a son of a bitch. We think the objection not well taken. The instruction, fairly construed, imports that the jury must believe from the evidence beyond a reasonable doubt not only that E. cursed D. for a son of a bitch, but also that D.'s passion was aroused by such insult, and that while still under the heat of that passion he secured the pistol and shot E. In one of the numerous briefs for the appellant it is insisted that, save for the objections noted, the instruction is free from objection, as being an in-

(b) You are instructed that manslaughter is the unlawful killing of a human being without malice either express or implied; that manslaughter must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; and, if you believe from the evidence in this case that the deceased assaulted him with a rifle, or kicked and cursed him in such a manner as would be apparently sufficient to arouse in the defendant such passion in him, and while in this condition and before a sufficient length of time had elapsed for his passion to cool, he shot and killed the deceased unlawfully and without justification, he is not guilty either of murder in the first or second degree, but is guilty of voluntary manslaughter only, and by your verdict you should so find.³⁰

(c) If the killing be purposely and unlawfully done, without premeditation, and without malice, express or implied, but voluntarily, upon a sudden heat and under a sufficient provocation, the crime is manslaughter.³¹

(d) Manslaughter is taking the life of a fellow being in sudden heat and passion superinduced upon a sufficient legal provocation.³²

struction strictly applicable by its terms to the crime of manslaughter. In another brief filed for appellant it is insisted that the instruction is incorrect, because, if appellant shot E. under circumstances stated in the instruction, he was guilty of murder. It is not necessary that we should say which of these conflicting views is correct. In either view, appellant was not prejudiced in his defense by this instruction. Self-defense was the sole defense relied upon by appellant. This defense was presented to the jury by numerous instructions which most liberally, exhaustively, and persuasively expounded the law applicable to that subject. The jury could by no possibility have acted in ignorance as to appellant's right to slay his antagonist, if apparently necessary so to do in order to save himself from impending danger to life or limb, actual or apparent. Their verdict of manslaughter can mean nothing less than that they were satisfied beyond a reasonable doubt that appellant did not act in justifiable self-defense. We cannot say that this finding of fact is not correct, and it shuts us up to the conclusion that appellant was guilty of either murder or manslaughter. A conviction of the lesser of these two crimes will not be set aside because had upon an instruction, which, if incorrect at

all, is incorrect only in this: that it directed a verdict of manslaughter upon facts which would have warranted a conviction of murder."

30—*Duckworth v. State*, 80 Ark. 360, 97 S. W. 280 (281).

31—*Henning v. State*, 106 Ind. 386, 6 N. E. 803 (812), 55 Am. Rep. 756.

The court said: "We understand the law to be perfectly well settled that an unlawful taking of human life, when done purposely, is murder, unless there is a sufficient provocation. It is the provocation that reduces the crime to the grade of manslaughter. The provocation must be a sufficient one to engender passion, for without provocation the crime is murder; and the provocation must be a sufficient one, otherwise the passion will not mitigate the offense. There are many cases declaring that passion alone is not enough, but that there must be an adequate provocation, arousing the passion. *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; *Murphy v. State*, 31 Ind. 511; *People v. Turley*, 50 Cal. 469; 2 Bish. Crim. Law, pars. 701-704."

32—*State v. Foster*, 66 S. C. 469, 45 S. E. 1.

The court said: "The definition of manslaughter given by the court was correct, and in accordance with numerous cases in this state, some of which are: *State v. Ferguson*, 2 Hill 619, 27 Am. Dec. 412;

(e) If, upon a consideration of the law and the evidence before you, you should conclude that the defendant is not guilty of murder, it is your duty next to consider whether or not, under the law and the evidence, he is guilty of the crime of manslaughter. Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation. The killer of a human being in the heat of passion by or with a dangerous weapon, except where the killing is shown by the evidence to be either justifiable or excusable, is manslaughter. If you believe beyond a reasonable doubt from the evidence that the defendant, within the Southern district of the Indian Territory, on the — of —, by means of firing a leaden bullet out of a Colt's 45 caliber revolving pistol into the head and brain of W., thereby killing the deceased; that said killing was not justified by law, or in necessary or apparently necessary self-defense, but was done in the heat of passion, and that said killing was done without malice on the part of the defendant,—the crime would be manslaughter, and you should so find the defendant guilty.³³

§ 3024. **Manslaughter Defined—U. S. Courts.** Manslaughter is the killing of a man unlawfully and willfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is, the doing of a wrongful act without just cause or excuse and in the absence of mitigating facts in such a way as to show a heart void of social duty and a mind fatally bent upon mischief must be out of the case. If that is driven out of the case, then if it is a crime at all, it must come under this statute; it must come under this definition of the crime of manslaughter. The common law, which I will read to you, defines it in the same way. It tells you in a little broader terms what kind of conditions it springs out of. Speaking of voluntary manslaughter, it says it is the willful

State v. Smith, 10 Rich. (S. C.) 341; State v. Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. 837. There was no dispute in this case that the defendant voluntarily killed the deceased. His plea was that he killed in self-defense. So the court was dealing with a case of voluntary homicide. The definition of manslaughter in the statute, as the 'unlawful killing of another without malice, express or implied,' covers not only voluntary but involuntary homicide, as for example, homicide by negligence. But the case in hand does not necessarily require the broader definition of the statute to be given, and was fully met by the approved definition of voluntary manslaughter, as based upon the common law. Under the theory of the law 'sudden heat and passion upon sufficient legal provocation' rebuts the implication of malice arising from an in-

tentional homicide, and mitigates the crime from murder to manslaughter, which latter is distinguished from murder by the absence of malice. The example stated by appellant's counsel in the exception, by way of illustrating his view, viz.: 'Where a man kills his assailant, honestly thinking his own life to be in danger, but the jury find from the evidence that the circumstances surrounding the transaction were not sufficient to justify a man of ordinary prudence, firmness and courage in coming to that conclusion'—merely states a case in which the plea of self-defense could not be sustained, and in which the jury would still have to decide whether the killing was murder, as done in malice, or manslaughter, as done in passion engendered by legal provocation.'

33—Williams v. U. S., 4 Ind. Ter. 269, 69 S. W. 871.

and unlawful killing of another on sudden quarrel or in the heat of passion. Let us see what is meant by this definition. The party who is killed, at the time of the killing, must offer some provocation to produce a certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must be doing some act—that is, the deceased, —, in this case, the party killed—which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion; in a heat of passion where he is incapable of deliberating.³⁴

§ 3025. Manslaughter Defined—Sudden Conflict Arising From Quarrel. The court instructs the jury that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man when assailed with violence of great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection. If, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood and violence of anger, and not through malice. The same rule applies to a homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant; and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and under our statute is manslaughter in the first degree.³⁵

34—Allen v. United States, 164 U. S. 492 (496), 17 S. Ct. 154.

"There is no error in this instruction. It is well settled by the authorities that words however aggravating are not sufficient to reduce the crime from murder to manslaughter." Affirming conviction of murder in U. S. C. C. W. Dist. Ark.

35—Robinson v. Territory, 16 Okla. 241, 85 Pac. 451 (456, 458).

"An instruction identical with this instruction was given in the case of Commonwealth v. Webster, 5 Cush. 58 Mass. 295, 52 Am. Dec. 711, and approved by the Supreme Court of Massachusetts.

Counsel for plaintiff in error admits that the above instruction properly states the law where applicable to the facts. If counsel desired an instruction describing the character of the violence of the blows, and defining what advantages would be unfair in the outset, if nothing but words were used, and the other matters of which they complain, they should have requested instructions covering those matters. The trial court could not be expected and is not required to instruct upon every possible question, and it is not error to omit to instruct upon some particular branch of the case

§ 3026. Manslaughter—Facts Amounting to. (a) The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt that the defendant killed the deceased in the heat of passion, without malice, by the use of a deadly weapon, without authority of law, and not in necessary self-defense such killing was manslaughter and the jury should so find.³⁶

(b) If the defendant killed W. J. as charged in the indictment, but at the time of the killing the defendant was not actuated by express malice, but was under the influence of a rash, sudden, and hasty impulse, or under the influence of sudden anger, rage, resentment, or terror, then unless such state of mind was produced by some adequate cause, as hereinbefore defined, the offense was murder of the second degree, unless the killing was done under circumstances which under the law justify or excuse it; but if such adequate cause did exist, and produced such sudden anger, rage, resentment, or terror such as rendered the mind of defendant incapable of cool reflection, then the offense is manslaughter, if not justified or excused by law.

(c) If you believe from the evidence that defendant, J. S., in T. County, Texas, on or about the — of —, —, did unlawfully kill W. J., as charged in the indictment, but at the time of the killing he (the said defendant) was by some adequate cause moved to such a degree of anger, rage, sudden resentment, or terror as to render him incapable of cool reflection, and that in such a state of mind, and not in his lawful self-defense, he killed the same W. J., then you will find defendant guilty of manslaughter, etc.³⁷

(d) If you should believe from the evidence that the defendant, H. B., entered into the difficulty with the deceased, W. C., voluntarily, or that he brought it on, but that he entered into the difficulty with no design to kill the deceased, or to do him great bodily injury, and at the time of entering into such difficulty he was under the influence of violent passion aroused by the conduct of the deceased, and that while in such passion he killed the deceased; but without a premeditated design, and that such killing was under such circumstances as did not justify him upon the grounds of self-defense, or if you have a reasonable doubt as to whether or not the defendant was acting from a premeditated design to effect the death of the deceased, or under the heat of violent passion, then, in such event, you should acquit the defendant, H. B., of the offense of murder and will find him guilty of manslaughter.³⁸

§ 3027. Voluntary Manslaughter—What Constitutes. (a) In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to ex-

deemed advisable by the defendant upon his theory of the case, when the defendant has not asked for such instruction."

36—Green v. State, — Miss. —, 37 So. 646 (647); Morgan v. State, 43

Tex. Cr. App. 543, 67 S. W. 420 (422).

37—Stell v. State, — Tex. Cr. App. —, 58 S. W. 75 (76).

38—Bassett v. State, 44 Fla. 2, 33 So. 262 (264).

cite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.³⁹

(b) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant unlawfully and feloniously struck the deceased a blow which caused his death, then to reduce the killing from murder to manslaughter, the jury must believe, from the evidence, that the provocation for the blow arose at the time the blow was given, and that the passion was not the result of a former provocation; that such passion was either anger, rage, sudden resentment or terror, which rendered the defendant incapable of cool reflection upon the character and results of his acts, and that the act was directly caused by passion arising out of such provocation.⁴⁰

(c) The court further instructs the jury that if you believe from the evidence, to the exclusion of a reasonable doubt, that in the county of Daviess, and before the finding of the indictment herein, the defendant did unlawfully, willfully and feloniously kill and slay one A. B. by shooting him to death with a pistol loaded with powder and ball, or other hard substance, of which shooting and wounding said A. B. did die within a year and a day thereafter, but you further believe from the evidence, to the exclusion of a reasonable doubt, that said shooting was not done maliciously and with malice aforethought, but do believe beyond a reasonable doubt, that same was not done in his necessary self-defense, or what appeared to him at the time to be his necessary self-defense, but was done in a sudden heat and passion, or sudden affray, and under such provocation as was reasonably calculated to excite an ungovernable passion, then you should acquit him of the charge in the indictment, and find him guilty of voluntary manslaughter.⁴¹

(d) If the jury believe that the evidence established beyond a reasonable doubt that the defendant and the deceased had a quarrel with each other about the woman —, and that the defendant and deceased had pistols in their hands at that time, and that, in consequence of the controversy about the woman, there arose at that time great heat of blood between the parties, and the mutual combat with intent to fight, and that both, being in a sudden heat of passion, then and there fought with their pistols, and the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized to find the defendant guilty of voluntary manslaughter.⁴²

39—Bruner v. State, 58 Ind. 159;
Nye v. People, 35 Mich. 16.

40—Bayett v. State, 2 Tex. App.
93; Seals v. State, 59 Tenn. 459.

41—Connor v. Commonwealth, 26
Ky. L. 398, 81 S. W. 259 (260).

42—Roark v. State, 105 Ga. 736, 32
S. E. 125 (127).

§ 3028. **Manslaughter in the First Degree—Definition of.** Manslaughter in the first degree is the unlawful and intentional killing of a human being without malice express or implied; and manslaughter committed under any other circumstances is manslaughter in the second degree.⁴³

§ 3029. **Manslaughter in Second Degree.** Every killing of one human being by the act, procurement or culpable negligence of another, which the statutes of this state has not declared to be murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree. Manslaughter in the first degree and manslaughter in the second degree are lesser degrees of the crime charged in the information, and should you find the defendant not guilty of murder, but find from the evidence that he is guilty of such lesser degree of crime as above described, you should determine the lesser degree of crime he has committed.⁴⁴

§ 3030. **Manslaughter in Third Degree—In a Heat of Passion and without a Design to Kill—Missouri.** (a) If the jury believe from the evidence that the defendant killed the deceased with a large club about four feet in length, and four inches in breadth, and two inches thick, and that the same was a dangerous weapon, in a heat of passion and without a design to kill him, you will find him guilty of manslaughter in the third degree, unless you further find from the evidence such killing was done in self-defense as explained in the instructions herein, in which event you will find him not guilty.⁴⁵

(b) The court further instructs the jury that if they find and believe from the evidence that at D. county, Missouri, on November 20, —, within three years prior to the filing of this indictment, defendant, S. L., intentionally and feloniously struck the deceased, J. M., on the head with a pistol, which said defendant then and there held in his hand, and that said M. died on December 3, —, and prior to the finding of this indictment, from the effect of such blow, and that such blow was struck by said defendant in a heat of pas-

43—*People v. Morine*, 138 Cal. 626, 72 Pac. 166 (167).

44—*State v. Hubbard*, — S. D. —, 104 N. W. 1120 (1121).

"As the mandate of the statute is, that the jury must find the degree and the court must instruct as to all matters of law essential to an intelligent consideration of the facts, as they may reasonably appear to the respective members of the jury, they might have been misled to the prejudice of the accused by refusing to give the requested instruction. Under our statute it is indispensable to the proper trial of a homicide case that the degree of crime be ascertained and designated by the jury. The records must show this essential element of the verdict, in order to enable the court to pronounce

a judgment within the penalty attached to a crime of that degree. From an Iowa case, *State v. Clemens*, 51 Ia. 274, 1 N. W. 550, we quote as follows: 'The court instructed the jury that under the indictment, the defendant may be found guilty of murder in the first degree, or murder in the second degree, or not guilty, as the evidence in your judgment demands at your hands.' The jury were fully instructed as to the necessary elements of the crime of murder in the first degree, and murder in the second degree, but no instruction was given as to what constituted the crime of manslaughter. This we think was erroneous."

45—Approved as one of a series, *State v. Kinder*, 184 Mo. 276, 83 S. W. 964.

sion, without a design to effect the death of said J. M., and that said pistol so used was then and there a dangerous weapon, you will find the defendant guilty of manslaughter in the third degree, unless you find that such killing, if done by defendant, was under such circumstances as to be justifiable under the law as given by the court. If you find the defendant guilty of manslaughter in the third degree, as above defined, you will assess his punishment at imprisonment in the penitentiary not exceeding three years, or imprisonment in the county jail not less than six months, or by a fine not less than five hundred dollars, or both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months.⁴⁶

§ 3031. Manslaughter in the Fourth Degree. Manslaughter is the intentional killing of a human being in a heat of passion on a reasonable provocation, without malice and without premeditating, as these terms are herein defined, and under circumstances that will not be justifiable or excusable homicide. And if the jury find and believe that the defendant in a sudden passion, on a reasonable provocation, intentionally struck and killed the deceased, without malice or premeditation, and not in the necessary defense of his person, then the jury should find him guilty of manslaughter in the fourth degree.⁴⁷

§ 3032. Murder and Voluntary Manslaughter Distinguished. (a) If the jury believe from the evidence beyond a reasonable doubt that the defendant, W., in B. county, Kentucky, and before finding of the indictment, did kill M. by shooting him with a pistol loaded with leaden ball, or other hard substances, when it was not necessary, and did not reasonably appear to defendant to be necessary to protect himself, C. W., S. W., or E. C. from danger, real or apparent, of death or great bodily harm at the hands of M., or those, if any, acting in concert with and aiding him, they should find the defendant guilty—that is, guilty of murder—if they believe from the evidence beyond a reasonable doubt that said killing was done unlawfully, willfully, feloniously, and with malice aforethought; but guilty of voluntary manslaughter if the jury believe from the evidence such killing was without previous malice, and should further believe from the evidence beyond a reasonable doubt that it was unlawfully, willfully, and feloniously done in a sudden affray, or in sudden heat and passion, upon provocation which was reasonably calculated to excite defendant's passion beyond the power of control. If the jury find the defendant guilty of murder they will fix his punishment at death or confinement in the penitentiary for life. But if they find him

46—State v. Lane, 158 Mo. 572, 59 S. W. 965 (1907).

The court said: "That the instruction correctly defined manslaughter in the third degree cannot be doubted. * * * This court has repeatedly ruled that where the killing is intentional or willful there can be no manslaughter in the third degree. State v. Edwards, 70 Mo. 480; State v. Curtis, 70 Mo.

600; State v. Dunn, 80 Mo. 689; State v. Watson, 95 Mo. 411, 8 S. W. 383. But the court was clearly justified in this case in submitting to the jury whether the defendant intended to kill deceased when he struck him."

47—Approved as one of a series in State v. Kinder, 184 Mo. 276, 33 S. W. 964.

guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary not less than two nor more than twenty-one years, in their discretion.⁴⁸

(b) Felonious homicide, at common law, is of two kinds, namely, murder and manslaughter, the difference between which consists principally in this: That in murder there is the ingredient of malice, whilst in manslaughter there is none, for manslaughter, when voluntary, arises from the sudden heat of the passions, but murder from the wickedness and malignity of the heart. Therefore manslaughter is defined to be the unlawful killing of another without malice, either express or implied, and without premeditation.⁴⁹

(c) If the accused unlawfully struck and killed McE. under circumstances that the killing was not justifiable or excusable in law, nor murder in any degree, he was guilty of manslaughter.⁵⁰

(d) The unlawful taking of human life is either murder or manslaughter and under an indictment charging a party with murder if the evidence is sufficient to justify either of such verdicts, you can find a verdict of guilty either of murder or manslaughter. "Murder" is the malicious taking of human life; it is nothing more or less than the evil, wicked intent to take human life. This evil, wicked intent to take human life, which is necessary to constitute the crime of murder, can be either expressed or implied. It may be expressed by the evil expression of the human lips, indicating this intent on the part of the human heart, or it may be implied where the killing takes place under such circumstances as indicate that it must have been prompted by a wicked, evil, depraved heart, devoid of social duty, and fatally bent on mischief. This evil intent must be a premeditated intent to take human life, but, whilst it is necessary for the state to show that the evil intent controlled the act of killing, it is not necessary for the state to show that that evil, malicious intent existed for any given time before the killing. But it must be there; it must prompt, actuate it, must spring from this wicked heart, and must prompt the action of killing, at the time of the killing. And as malice is a question of intent, it is of the utmost importance that the jurors should calmly and dispassionately consider all the testimony bearing upon the fatal act, in order to discover and determine what motive prompted the act of killing at the time. Was the motive this evil intent to take human life? If so, and you are so satisfied; if you are satisfied that the deceased came to his death at the hands of the prisoner at the bar by shooting with a pistol, and that the prisoner at the bar was at the time of the shooting actuated and prompted by this evil, malicious intent to take human life,—he is in law guilty of murder, and your verdict should so find. But if you conclude that the state has failed to establish his guilt of murder beyond a reasonable

48—*Watkins v. Commonwealth*, 29 Ky. Law 1273, 97 S. W. 740.

49—*State v. Brinte*, — Del. —, 58 Atl. 258 (262).

50—*Gray v. State*, 42 Fla. 174, 28 So. 53 (55).

See also *State v. Hicks*, 113 La. 779, 37 So. 753.

doubt, then you are to go a step further and under this indictment you are to consider and determine whether or not the state has failed to establish his guilt of manslaughter beyond a reasonable doubt. Now, what is manslaughter? Manslaughter is where the act of killing is not prompted by this evil, wicked intent to take human life, as in the case of murder, but it is distinguished from murder by the absence of malice. It is where the killing takes place under the impulse of sudden heat and passion, aroused by a lawful provocation, and under circumstances, that the law will not excuse the act of killing.⁵¹

(e) The jury are instructed, that if from motives of hatred, revenge, jealousy, or for any wrong or injury, real or imaginary, a sane person kills another, the killing will be referred to malice, and must be regarded as murder. If, however, the killing is the result of a sudden, violent impulse of passion, caused by a serious or highly provoking injury inflicted upon the person killing, and which is sufficient, in the minds of the jury, to excite an irresistible passion in a reasonable person, and the interval of time between the provocation and the killing is not sufficient for the passions to cool and the voice of reason and humanity to be heard, then the killing is manslaughter, and not murder.⁵²

(f) If a homicide is committed under the influence of passion, or in the heat of the blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool, and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, the offense is manslaughter and not murder.⁵³

(g) If you shall believe from the evidence, beyond a reasonable doubt, that defendant, A. W., in this county, and before the finding of the indictment herein, feloniously shot with a pistol, and killed, L. M., not in the necessary or apparently necessary self-defense of himself of A. M., you will find the defendant A. W. guilty, guilty of willful murder if same was done with malice aforethought; guilty of voluntary manslaughter if same was done in sudden heat and passion, and without previous malice.⁵⁴

§ 3033. **Manslaughter Distinguished From Self-Defense.** Now, gentlemen, these are the three conditions which I give you in the case. I have told you that if it is true that this defendant went up on one side of the fence and when there struck H. in the mouth and then shot him, that is murder. On the other hand, if it is true that H. and the other boys attacked him with sticks, and while that attack was going on and in the heat of that affray, and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed H., that would be manslaughter;

51—State v. Petsch, 43 S. C. 132, 20 S. E. 993 (1904).

52—Schnier v. People, 23 Ill. 1; Fisher v. People, 23 Ill. 283.

53—People v. Borgetto, 99 Mich. 336, 58 N. W. 328 (1902).

54—Of a series that included the above, the court said: This was a correct statement of the law. Wilson v. Commonwealth, 24 Ky. Law 185, 68 S. W. 121 (1902).

but if there was an absence of that condition, then there is no manslaughter in it, nor could there be any self-defense in it. There could be nothing else but this distinct grade of crime known as murder; because self-defense, as I have before defined to you, contemplates the doing of something upon the part of the one slain, or the ones acting with him, that was either actually and really so apparently of a deadly character, or which threatened great violence to the person, or that which seemed to do so. If they assaulted him with these sticks, and they were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot H., without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defense, because the injury received would not be of that deadly character or that dangerous nature that could give a man the right to slay another because of threatened deadly injury or actual great bodily injury received.⁵⁵

§ 3034. **Under Indictment For Murder Verdict May Be, For Manslaughter.** (a) The jury are instructed, that under an indictment for murder, a party accused may be found guilty of manslaughter. And in this case, if after a careful and dispassionate consideration of all the proof and circumstances in evidence before you, you have any reasonable doubt as to whether the defendant is guilty of murder, then you should consider whether he is guilty of manslaughter; and if from a full and careful consideration of all the evidence before you, you believe, beyond a reasonable doubt, that the defendant is guilty of manslaughter, you should so find by your verdict and in that event it will be your duty to fix, by your verdict, the term for which he shall be confined in the penitentiary, which may be for any length of time, not less than one year, and it may be for the term of his natural life.⁵⁶

(b) Under any indictment for murder of the first degree, the jury may find the accused guilty of either murder of the first or second degree, or of manslaughter, according as the law and the evidence may warrant; but, unless they shall find the accused guilty of one of these three grades of homicide, they must acquit and render a general verdict of not guilty.⁵⁷

(c) The charge of murder embraces or includes the charge of manslaughter; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased without malice and in the heat of passion, and not in necessary or apparently necessary self-defense the jury should find the defendant guilty of manslaughter.⁵⁸

55—Allen v. United States, 157 U. S. 675 (677), 15 S. Ct. 720.

56—Schnier v. People, 23 Ill. 1.

57—State v. Brinte, — Del. —, 58 Atl. 258 (262).

58—Green v. State, — Miss. —, 37 So. 646 (647).

(d) The indictment in this case charges the highest degree of felonious homicide known to the law, that is, murder in the first degree, and under this indictment, if the evidence requires it, as explained in these instructions, the jury may find the defendant guilty of either murder in the first or second degree, or of voluntary or involuntary manslaughter, or the jury may find the defendant not guilty.⁵⁹

(e) If the evidence, under the instruction of the court as to the law of the case, require it, you may find the defendant guilty of murder in the first or in the second degree, or you may find him guilty of manslaughter, or you may find him not guilty. If all the allegations in the indictment have been proved to your satisfaction, beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree. If all the allegations of the indictment have been proved beyond a reasonable doubt, except the allegation of deliberate or premeditated killing, you should find the defendant guilty of murder in the second degree; and if you find, from the evidence, beyond a reasonable doubt, that the defendant did unlawfully kill the deceased, upon a sudden quarrel, and without malice, or unintentionally, while the defendant was attempting to commit any unlawful act not amounting to felony, then the offense would be manslaughter; or if the jury have any reasonable doubt, arising upon all the evidence in the case, as to the defendant being guilty of one of these crimes, they should simply find the defendant not guilty.⁶⁰

(f) Under the laws of this state unlawful homicide may be either murder in the first, second or third degree, or manslaughter; and under an indictment of murder in the first degree, as in this case, the defendant may be convicted of any one of the offenses of which the evidence establishes his guilt beyond any reasonable doubt.⁶¹

§ 3035. Murder or Voluntary Manslaughter—Reasonable Doubt As to Which, to Be Resolved In Favor of Manslaughter—Where there Are Two Motives Ascribed, Any Doubt Should Be Resolved In Favor of Defendant. (a) If the jury believe from the evidence beyond a reasonable doubt that the defendant, G. W., has been proved guilty of murder or voluntary manslaughter, but have from the evidence a reasonable doubt as to which of said crimes, if either, he is guilty of, they should, in that event, find him guilty of voluntary manslaughter.⁶²

(b) I charge you that the burden is on the state to establish the guilt of the defendant beyond a reasonable doubt, and if you have a reasonable doubt as to what motive prompted the defendant to kill the deceased, that is, whether in so killing him, the mind of the defendant was aroused to such a degree of anger, rage, sudden resentment or terror sufficient to render it incapable of cool reflection

59—Archey v. State, 60 Ind. 56.

60—Binns v. State, 66 Ind. 428;
Adams v. State, 29 Ohio St. 462.

61—Gray v. State, 42 Fla. 174, 28
So. 53 (55).

62—Watkins v. Commonwealth, 29
Ky. Law 1273, 97 S. W. 740.

by reason of having been informed of insults to his wife, or that he so killed the deceased from some other motive or cause, then you will resolve this doubt in favor of this defendant, and find him guilty of manslaughter.⁶³

§ 3036. **Homicide—Degree of—Several Defendants.** If the jury believe from the evidence beyond a reasonable doubt that M. was unlawfully, willfully, feloniously, and with malice aforethought, or in sudden affray, or sudden heat and passion, shot and killed by C. W., S. W., or E. C., when it was not necessary, and did not reasonably appear to the one doing the killing to be necessary, to protect himself, G. W., or the other persons associated with him at the time, from danger, real or apparent, of death or great bodily harm at the hands of M., or those acting in concert with him, and shall further believe from the evidence beyond a reasonable doubt that the defendant, G. W., was present at the time, and did unlawfully, willfully and feloniously aid, abet, advise, counsel, or encourage the said C. W., S. W., or E. C., or the one of them who did the said killing, they should find the defendant, G. W., guilty, that is, guilty of murder, if they believe from the evidence beyond a reasonable doubt that said aiding, abetting, advising, consulting, or encouraging, if he did same, was done with malice aforethought, but guilty of voluntary manslaughter if they believe from the evidence such aiding, abetting, advising, consulting, or encouraging, if any was done, without previous malice, and shall further believe from the evidence beyond a reasonable doubt that it was done in sudden affray, or in sudden heat and passion, upon provocation which was reasonably calculated to excite his passion beyond the power of control.⁶⁴

§ 3037. **Under the Immediate Influence of Sudden Passion—Provocation Must Arise At the Time of the Killing—Passion and Adequate Cause Defined.** (a) Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. By the expression, "under the immediate influence of sudden passion," is meant that the provocation must arise at the time of the killing, and that the passion is not the result of former provocation, and the act must be directly caused by the passion arising out of the provocation, if any, at the time of the killing. It is not enough that the mind is merely agitated by passion arising from other provoca-

63—Ray v. State, — Tex. Cr. App. —, 85 S. W. 1151 (1152).

"We believe these charges sufficiently presented this issue to the jury. There were two motives ascribed to appellant—one by the state, on account of the former grudges and trouble; and the second claimed by himself, by reason of the insulting conduct toward his wife. There were no other motives or reasons for the killing, so far

as the record is concerned; and we are of the opinion that these charges sufficiently informed the jury that, where there are two causes or reasons for the killing, the jury should give the benefit of the doubt to the accused, and convict of the lesser offense. We believe there is no such error in this record as requires a reversal."

64—Watkins v. Commonwealth, 29 Ky. L. 1273, 97 S. W. 740.

tion, or a provocation given by some person other than the party killed.

(b) The passion intended is any of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection.

(c) By the expression "adequate cause" is meant such as commonly produces a degree of anger, rage, sudden resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. Any condition or circumstance which is capable of creating, and does create, sudden passion, as anger, rage, resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is adequate cause.

(d) In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the condition of mind known as anger, rage, sudden resentment, or terror, such as to render it incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense, and that it was produced by such adequate cause.⁶⁵

§ 3038. **In the Heat of Overwhelming Passion, Superinduced By Sudden and Sufficient Provocation—Sudden and Uncontrollable Passion.** (a) But should you not so find, and from the evidence, beyond a reasonable doubt, that the defendant, at the time and place and by the means and in the manner set forth in the indictment, slew the deceased unlawfully in the heat of overwhelming passion, superinduced by sudden and sufficient provocation on the part of the deceased, to throw a reasonable and cautious man into a sudden and uncontrollable passion, and that the defendant then and there instantly fired upon and slew the deceased, then you may find the defendant not guilty of manslaughter.⁶⁶

(b) If you believe from the evidence beyond a reasonable doubt that in the county of ———, with the weapon and before the date aforesaid, the defendant, in sudden heat and passion, created by such provocation as is ordinarily calculated to excite the passions beyond control, and which did then and there excite the passions of defendant beyond control, and without previous malice, willfully shot B. M., from which shooting said B. M. then and there presently died, you should find defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for not less than two (2) nor more than twenty-one (21) years.⁶⁷

65—*Stell v. State*, — Tex. Cr. App. —, 53 S. W. 75 (76).

66—*Kirby v. State*, 44 Fla. 81, 32 So. 837.

67—*Metcalfe v. Commonwealth*, 27 Ky. L. 704, 86 S. W. 534 (535).

"This instruction is criticised because it contains the expression 'without previous malice,' it being said that the absence of malice is necessarily included in the expres-

sion 'in sudden heat and passion,' and therefore the use of the former was supererogatory and prejudicial. Admitting, for the purposes of this case, that the two expressions 'in sudden heat and passion' and 'without previous malice' are so antagonistic that the existence of one excludes the other as motive for crime, the use of the one after the other was only surplus-

§ 3039. **Provocation and Passion Must Concur.** To extenuate an unlawful killing, and reduce it to manslaughter, two facts must concur: There must be at the time of the killing both passion and provocation. Provocation without passion will not extenuate, nor will passion merely without provocation reduce the unlawful killing from murder to manslaughter.⁶⁸

§ 3040. **Slight or Trivial Provocation Not Sufficient—Provocation Defined.** The court instructs the jury that the law does not permit the taking of human life in rage or passion occasioned by inadequate provocation—that is, by slight or trivial provocation—but it must be such as would, in the mind of an average man, be calculated naturally to arouse such rage and passion as would render the mind uncontrollable in its impulses to take life.⁶⁹

§ 3041. **Manslaughter—Malice and Intent Not Essential.** In determining whether a person is guilty of manslaughter, it is not necessary to show that he intended to kill the person or that he had any malice; it is sufficient if it is shown that he did some unlawful act to the person, such as striking him a blow, and death resulted from that blow, without regard to malice, and without regard to intent.⁷⁰

§ 3042. **Manslaughter—Sheriff Killing One Who Attempts to Release Prisoner.** If the jury believe from the evidence that defendant was a deputy sheriff, and while engaged in the lawful discharge of his duties, had arrested one J. W. for a violation of the law, and the said J. W. was resisting said arrest, and that thereupon deceased came up in a hostile manner and made an assault upon defendant, and struck him several blows on the head with a stick, not a deadly weapon, and defendant became excited and aroused by passion to such an extent that he was incapable of cool reflection, and under such state of mind he shot and killed deceased, he would be guilty of manslaughter.⁷¹

§ 3043. **Manslaughter—Killing In Attempt to Procure Abortion.** The killing of another in an act not of itself dangerous to life, but which results in death, contrary to the will and design of the doer,

age, and not prejudicial to the substantial rights of the accused. But we think the use of both was proper to make clear to the minds of the jury that, to reduce homicide from murder to manslaughter, there must not exist 'malice aforethought.' Frequently tautology is useful when clearness of meaning rather than logical refinement is desired."

68—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871. An instruction as to sudden passion must rest upon evidence.

In *Commonwealth v. McGowan*, 189 Pa. 641, 42 Atl. 365, 69 Am. St. 836, the defendant testified that he was perfectly cool at the time of

the killing. Held that, therefore, an instruction on the theory that he was enraged beyond the control of his reason could not be given.

69—*Hicklin v. Territory*, — Ariz. —, 80 Pac. 340 (343).

"In the abstract, that is a correct declaration of the law, and, while its incorporation in the definition of the provocation necessary to reduce homicide from murder to manslaughter might be criticised, the court did not stop here, but went further, and charged the jury fully on this subject."

70—*People v. McArron*, 121 Mich. 1, 79 N. W. 944 (958).

71—*Williams v. State*, 41 Tex. Cr. App. 365, 54 S. W. 759 (760).

when committed in procuring or attempting to procure an abortion, is voluntary manslaughter.⁷²

§ 3044. **Manslaughter—Knowledge of Intimacy of Deceased With Defendant's Wife.** (a) By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, sudden resentment or terror in a person of ordinary temper sufficient to render it incapable of cool reflection. The following are deemed adequate causes: (1) Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occurred as soon as the facts of an illicit connection is discovered; (2) insulting words or conduct of the person killed towards the wife of the party guilty of the homicide, provided the killing takes place immediately upon the happening of the insulting conduct; (3) any condition or circumstance which is capable of creating, and which does create, in the mind of the person guilty of the homicide such a degree of anger, rage, sudden resentment or terror as to render it incapable of cool reflection, is adequate cause.

(b) Now, if you believe from the evidence in this case that defendant had heard of the adultery of A. B. with his wife, and that as soon as the fact of the illicit connection was discovered he shot and killed the said A. B., in etc., about etc., and you further find that at the time of the killing there was aroused in the mind of defendant such a degree of anger, rage, sudden resentment or terror which rendered it incapable of cool reflection, then you will find defendant guilty of manslaughter. Or if you find from the evidence that defendant saw deceased use insulting conduct towards his wife, and that he immediately upon the happening of the insulting conduct shot with a gun and killed deceased at time and place mentioned in the indictment. Or if he had been informed of insulting conduct of deceased towards his (defendant's) wife, and that as soon thereafter as defendant met deceased he shot with a gun and killed said deceased at time and place in indictment charged; and if you further find that at the time of the killing his mind was aroused to such a degree of anger, rage, sudden resentment or terror as to render it incapable of cool reflection—then you will find defendant guilty of manslaughter. Or, if you believe from the evidence that from any condition or circumstance which was capable of creating in the mind of a person of ordinary temper such a degree of anger, rage, sudden resentment or terror as to render it incapable of cool reflection, and if you further believe that such condition or circumstance, whatever it may have been, did arouse in the mind of the defendant such a degree of anger, rage, sudden resentment or terror as to render it incapable of cool reflection, and that while in such state of mind he shot and killed A. B., at time and place

72—Clark v. Commonwealth, 23 Ky. L. 1029, 111 Ky. 443, 63 S. W. 740 (746). But see Gantling v. State, 40 Fla. 237, 23 So. 857 (859), where

such killing was held murder in the first degree, and conviction and death sentence affirmed.

in indictment alleged, then you will find him guilty of manslaughter. By the term "meet," as used in the foregoing charge, signifies that the parties were brought into such proximity as would enable defendant to act in the premises, whether armed or unarmed.⁷³

§ 3045. **Manslaughter—Negligence Causing Boiler Explosion.** The fact of the explosion, and even the possibility of guarding against it, do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care to prevent accidents, as would have been possible. The law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe. To require more would be to put every one under restraints in the management of his business and in his dealings with others, which would be more hurtful in the embarrassments they would cause than beneficial in the protection they would give against injuries. Whether the absence of the defendant from the boiler room at the time of the explosion was negligence depends upon circumstances. If we find that the defendant, from his past experience, from his knowledge of the boiler, and the flow of oil, and of the burner, had reason to believe, and in fact did believe, that it was consistent with safety to be absent from the boiler, as he was at the time of the explosion, then he was not, in law, guilty of criminal negligence by reason of such absence.⁷⁴

§ 3046. **Form of Verdict.** If you find the defendant guilty of willful murder, you will fix his punishment at death or confinement in the state penitentiary for life, in your discretion. If you find him guilty of voluntary manslaughter, you will fix his punishment at confinement in the state penitentiary for not less than two and not more than twenty-one years, in your discretion. If you find him not guilty, you will say so, and no more.⁷⁵

73—*Brown v. State*, 45 Tex. Cr. App. 139, 75 S. W. 33.

"We think, when these paragraphs are considered together, there is no such error apparent as would be calculated to injure the rights of appellant."

74—*People v. Thompson*, 122 Mich. 411, 81 N. W. 344 (352).

"The judge did not give these requests but gave a general charge as to what would be culpable negligence, which, in the main, was a correct statement of the law, but it did not instruct the jury upon

the particular questions raised in these requests. The requests should have been given. It cannot be that an act done in good faith, based upon what experience has shown to be safe, is criminally negligent. *Schroeder v. Car Co.*, 56 Mich. 132, 22 N. W. 220; *Cheboygan Lumber Co. v. Delta Transp. Co.*, 100 Mich. 16, 58 N. W. 661; *Whalen v. Railroad Co.*, 114 Mich. 512, 72 N. W. 232."

75—*Wilson v. Commonwealth*, 24 Ky. L. 185, 63 S. W. 121 (122).

CHAPTER XCVIII.

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| <p>characteristic of murder in the first degree.</p> <p>§ 3084. Meaning of "Sedate and deliberate mind" — Texas statute.</p> <p>§ 3085. No presumption of premeditated design.</p> <p style="text-align: center;">PROVOCATION.</p> <p>§ 3086. Provocation—Mere words not sufficient.</p> <p>§ 3087. Provocation—Insulting words to defendant's wife—Other relatives.</p> <p>§ 3088. Provocation — Mere threats not sufficient.</p> <p>§ 3089. Violent passion caused by insulting language may reduce grade of homicide.</p> <p>§ 3090. Provocation — If sufficient, Manslaughter.</p> <p>§ 3091. Slap with hand not sufficient provocation, when.</p> | <p>§ 3092. Provocation—Past conduct of deceased as evidence of.</p> <p>§ 3093. Provocation—Jury to determine adequacy.</p> <p>§ 3094. Provocation — Standard for determining sufficiency.</p> <p>§ 3095. Provocation—Heat of blood —Cooling time.</p> <p>§ 3096. Cooling time—Facts held to constitute — Question of law.</p> <p style="text-align: center;">DYING DECLARATIONS.</p> <p>§ 3097. Dying declaration—Why it is admissible—Weight of for jury.</p> <p>§ 3098. Dying declarations—Weight of for jury—What may be taken into consideration.</p> <p>§ 3099. Dying declarations, foundation for.</p> <p>§ 3100. Dying declaration to be received with caution.</p> |
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INTENT.

§ 3047. **Presumption that One Intends the Natural, Ordinary and Usual Consequences of His Voluntary Acts.** (a) The law presumes that every sane person contemplates and intends the natural, ordinary and usual consequences of his own voluntary acts, unless the contrary appears, from the evidence; and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by any act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that the death of the deceased was designed by the slayer, unless the facts and circumstances of the killing or the evidence creates a reasonable doubt whether the killing was done purposely.¹

(b) The court instructs the jury that it is a well-settled rule of law that a sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own act. If, therefore, one voluntarily or willfully and deliberately does an act which has a direct tendency to destroy another's life or destroy and injure his property, the natural and necessary conclusion from the act is that he intends so to destroy such life or destroy or injure such property.²

§ 3048. **Unlawful Act—Presumed that the Act Was Done Advisedly—Deliberate Intent to Kill—Malice Aforethought.** (a) When a man commits an unlawful act, unaccompanied by circumstances justifying its commission, it is a presumption of law that he is acting advisedly, and with the intention to produce the consequences which have ensued.³

(b) How can you find a deliberate intent to kill? Do you have to see whether or not the man had that intent or not in his mind a

1—Archer v. State, 64 Ind. 56.

3—Hayne v. State, 99 Ga. 212, 25

2—Approved as one of a series in S. E. 307 (311).
Keady v. People, 32 Colo. 57, 74
Pac. 892 (894).

year or month or day or an hour? Not at all, for in this age of improved weapons, when a man can discharge a gun in the twinkling of an eye, if you see a man draw one of these weapons, and fire it, and the man toward whom he presents it falls dead, you have a deliberate intent to kill, as manifested by the way he did that act. You have the existence of a deliberate intent, though it may spring up on the spur of the moment, as it were, spring up contemporaneous with the doing of it—evidence by shooting of the man, if the act was one he could not do under the law and then claim it was manslaughter, or an act that he could not do in self-defense from the fact that it was done without just cause or excuse, or in the absence of mitigating facts, and that is precisely this characteristic of murder, known as malice aforethought. It does not, as I have already told you, necessarily import any special malevolence towards the individual slain, but also includes the case of a generally depraved, wicked and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Malice, says the law, is an intent of the mind and heart.⁴

§ 3049. The Question of Intent Is for the Jury—Weapons Used.

In all cases of homicide, the law requires as an element of guilt an intent to kill; and if, in this case you find that defendant did not, when he struck H. (if you find he did strike him) intend to kill him, then you should acquit him of all grades of homicide, and inquire only as to whether he is guilty of an aggravated assault.⁵

§ 3050. Right of Jury to Infer Intent from the Defendant's Acts.

4—Allen v. United States, 164 U. S. 492 (495), 17 S. Ct. 154.

5—In Danforth v. State, 44 Tex. Cr. App. 105, 69 S. W. 159 (162), it was held error to refuse this instruction. The court said: "The question here presented was before us in Honeywell v. State, 40 Texas Cr. App. 199, 49 S. W. 586. We there held that under article 717, Pen. Code, which provides: 'The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears,' it becomes a question of fact for the jury to determine as to whether or not said intent exists. In other words, where the instrument is one not likely to produce death, then it becomes a controverted question of criminal intent that should be submitted by a proper charge to the jury; and it must appear from

the evidence that the manner in which it was used made it evident that defendant intended to kill, before the jury would be warranted in finding defendant guilty of homicide. In passing upon a similar question, Judge Hurt, in Fitch v. State, 37 Tex. Cr. App. 500, 36 S. W. 584, said: 'Where the homicide was not committed in the perpetration of a felony, and the circumstances do not show a cruel or evil disposition on the part of defendant, the intent to kill cannot, as a matter of law, be inferred from a killing with a stick four feet long and two inches in diameter.' And for other authorities on the same question see Shaw v. State, 34 Tex. Cr. App. 435, 31 S. W. 361; Griffin v. State, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. 718; Johnson v. State, 42 Tex. Cr. App. 377, 60 S. W. 48; Martinez v. State, 35 Tex. Cr. App. 386, 33 S. W. 970; Bell v. State, 17 Tex. App. 552; Dones v. State, 8 Tex. App. 112; Nichols v. State, 24 Tex. App. 137, 5 S. W. 661; Boyd v. State, 23 Tex. App. 137, 12 S. W. 737."

The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is, from our common experience, presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design that it is not necessary to prove that such design existed for any definite period before the fatal blow was struck. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time appreciably distant.⁶

§ 3051. Facts Showing Killing to Have Been Willful and Malicious.

(a) If you believe the story as narrated by the two Erne boys, who testified as witnesses, is true—that is, that the defendant went up to the fence with his pistol; that he went through the wire fence, and went into the wheat field where H. was, and met him, first halloed at him, placed his pistol upon the fence, and stopped the boys, and then went through the wire fence and went out to where he was, and struck him first in the mouth with his left fist, and at the same time undertook to fire upon him; and that that firing was prevented by the action of H. in taking hold of the pistol, and it went off into the ground, and then he fired at him and struck him in the side, and then he fired at him and struck him in the back, you have a state of facts which would authorize you to say that the killing was done willfully; and, not only that, because that state of case, if that be true, would show the doing of a wrongful act, an illegal act, without just cause or excuse, and in the absence of mitigating facts to reduce the grade of the crime.⁷

(b) If you find from the evidence beyond a reasonable doubt that the defendant, H., had inflicted upon X., the deceased, a mortal wound by shooting said X. with a pistol, and the said X., immediately after the infliction of the injury, staggered, retreated, or traveled away from the defendant, and ceased to make any demonstration towards defendant, or to make any effort to inflict injury upon the defendant, and immediately thereafter, but after defendant had become separated from said X. a distance of from twenty to forty feet, the said defendant arose in his buggy, and deliberately discharged a second shot at or in the direction of said X., whether the second shot did or did not strike the person of said X., you may consider the circumstances of the firing of said second shot, along with all the other circumstances of the case so proven, as tending to show malice in the mind of the defendant.⁸

6—Allen v. United States, 164 U. S. 492 (496), 17 S. Ct. 154.

7—Allen v. United States, 164 U. S. 492 (494), 17 S. Ct. 154.

8—Harris v. State, 155 Ind. 265, 58 N. E. 75 (77).

The court said: "The evidence, it is true, discloses that the first

§ 3052. Instrument Used to Be Taken into Consideration in Judging the Intent. (a) The instruments or means by which the homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner it was used such intention evidently appears.⁹

(b) You are charged that, unless you believe beyond a reasonable doubt that the instrument used in inflicting wounds upon deceased was a deadly weapon, you cannot convict defendant of any degree of homicide, unless you further believe from the evidence beyond a reasonable doubt that, from the manner and mode of its use, if any, an intention to kill evidently appears; and, unless you so believe beyond a reasonable doubt, you will acquit the defendant of any grade of homicide.¹⁰

§ 3053. Blow with the Fist—Presumption as to Intent. A mere blow with the fist may produce death, but very rarely, and would scarcely fix the intent of such consequence. It may however be given with such violence, and under such circumstances that the necessary intent may be inferred.¹¹

§ 3054. Time When the Intent to Take Life Was Formed Is Not Material. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant, in connection with W. T., and A. T., willfully, deliberately, and maliciously, and after premeditation and deliberation, killed J. F., the defendant would be guilty of murder, and the time when the intent to take life was formed was not material. All that is necessary in order to sustain a conviction of murder in the first degree is that it be shown from the facts and circumstances, beyond a reasonable doubt, the design and intent to take the life of the deceased was formed in their minds as the result of premeditation by defendant before the act of killing.¹²

shot was the fatal one. It is also shown that after appellant had fired it, and after the deceased, in the very agony of death, had staggered away from appellant to a distance of some 20 or 40 feet, and was apparently in the act of falling, appellant stood up in his buggy and deliberately fired the second shot at him. The charge presented against appellant, and which was in issue upon the trial, was that of malicious murder. The burden of proving malice was upon the state, and it had the right to have the jury consider all of the circumstances bearing upon this feature of the case, regardless of the fact as to whether such circumstances happened before or after the homicide."

9—*Barbee v. State*, — Tex. Cr. App. —, 97 S. W. 1058; *Perrin v.*

State, 45 Tex. Cr. App. 560, 78 S. W. 930 (932); *Spivey v. State*, 45 Tex. Cr. App. 496, 77 S. W. 444 (445).

10—*Early v. State*, — Tex. Cr. App. —, 97 S. W. 82.

In comment the court said: "As we view the evidence, it shows that the knife was a very large spring-back affair, the blade of which was something over three inches long. If this be true, then the charge was highly beneficial to appellant. But if the knife was smaller than the one suggested, then the issue would be in the case, and the charge would be highly proper. In no event could it have injured appellant."

11—*Winter v. State*, 123 Ala. 1, 26 So. 949 (950).

12—*Vasser v. State*, 75 Ark. 373, 87 S. W. 635 (636).

§ 3055. Concealment of the Body Not Conclusive Proof of Intent. The court instructs you that concealment of the body after the act, where there was no previous preparation, is not conclusive proof of intent.¹³

§ 3056. Distinction Between Intent and Premeditated Design. There may, in contemplation of law, be an intention to kill a human being which may not amount to a premeditated design to kill. Shooting a man intentionally and killing him is not necessarily the same as doing so with a premeditated design to kill him. There may be an intention to kill without its having been premeditated. In order to convict the defendant, M. C. C., of murder in the first degree, you must be satisfied from the evidence beyond a reasonable doubt, that the defendant M. C. C. not only had an intention to kill the deceased, but that he actually had a premeditated design to kill him.¹⁴

§ 3057. Administering Poison—Necessary Intent to Constitute Murder. But if you find that the defendant, unlawfully with bad intention, caused poison to be taken by M., you should find the defendant guilty of murder in the first degree; but, if you fail to so find, your verdict should be not guilty.¹⁵

13—State v. Thomas, 50 La. Ann. 148, 23 So. 250 (251).

The instruction requested by the defendant was as follows:

Concealment after the act, where there was no previous preparation, is not necessary evidence of intent.

Held error to refuse this or an equivalent instruction. The court said that the word evidence is often used as equivalent to proof. "Evidence of concealment is admissible, as it goes to show criminal intent, and as such it should be weighed, but it is proper on request, to instruct the jury that it does not necessarily constitute proof. It admits of no question that concealment after the fact is not proof conclusive of intent to commit murder. For instance, in a case of manslaughter, the slayer may seek to conceal the body of his victim without its being an evidence of the previous intent to murder. We are of the opinion, under the circumstances, the jury should have been instructed, in view of the terms of the original charge, that concealment after the deed was not conclusive proof of intent."

14—Cook v. State, 46 Fla. 20, 35 So. 665 (669).

This instruction is "substantially the law as laid down in Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. 232, and should have been given."

15—State v. Thomas, — Ia. —, 109 N. W. 900 (902).

"An objection made to this charge is that a homicide committed by the unlawful administration of poison with bad intention is not necessarily murder, but that it may be manslaughter, depending upon the nature of the intent with which the poison was administered. The question is not as to the degree of murder, for it is provided in Code 4728, that: 'All murder which is perpetrated by means of poison * * * is murder in the first degree.' But the question is whether the crime might not be manslaughter. The abstract inquiry to which our attention is thus directed is this: May there be a homicide committed by the unlawful administration of poison under such circumstances as to render the perpetrator thereof guilty of a crime which does not constitute the crime of murder? Or, in other words, does the fact of the unlawful and wrongful administration of poison, causing death, in itself show that malice aforethought which characterizes murder as distinct from manslaughter? There can be but one answer to this question under the decisions of this court, and it is not necessary to go further in discussing the question for the present case. In State v. Robinson, 126 Ia. 70, 101 N. W. 634, it was held that

§ 3058. "Willfully," "Deliberately," "Premeditatedly" and "Malice Aforethought" Defined. The court instructs the jury that the term "willfully," as used in the instructions, means intentionally; that is, not accidentally. "Deliberately" means in a cool state of the blood, not in a sudden passion engendered by a lawful or some just cause or provocation. "Premeditatedly" means thought of beforehand for any length of time, however short. "Malice," in common acceptance, means ill will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. "Malice aforethought" means that the act was done with malice and premeditation.¹⁶

MALICE.

§ 3059. **Malice Defined.** (a) By malice is meant not only anger, hate and revenge, but any other unlawful and unjustifiable motive.¹⁷

an indictment for murder by means of a felonious administration of poison need not specifically allege an intent to kill. In *State v. Wells*, 61 Ia. 629, 17 N. W. 90, 47 Am. Rep. 822, it was held that it was sufficient to charge that the poison was unlawfully administered, and not given with a good intention, and the court says: "The administration of the poison unlawfully with a bad motive or intent, under the statute constitutes murder, if death ensues. * * * It is immaterial whether or not there is a specific intent to kill. It is fundamental that every one is presumed to intend the necessary consequences of an act deliberately done by him." The result of our cases as we understand them, is to hold that the administration of poison unlawfully and with bad intent constitutes malice aforethought without specific intent to kill, just as a felonious act of inflicting a grievous bodily injury supplies the malice aforethought necessary to constitute murder, although there is no specific intent to kill proven in connection with the infliction of such injury. Malice aforethought does not necessarily require for its existence an intent to take life. Death resulting from the attempt to commit any felony, even though its tendency in itself is not to cause death, will supply the malice aforethought necessary to constitute murder. 1 *McLain's Criminal Law*, 322, 325, 326. Thus, in *State v. Moore*, 25 Ia. 128, 95 Am. Dec. 776, it was held that death caused in the unlawful attempt to procure an abortion necessarily constituted murder irrespective of

whether there was any intent to take life, or whether the crime of abortion was a felony. And it is said 'that malice may be implied from unlawful acts dangerous to life committed without lawful justification.' Certainly the unlawful administration of poison is an act also dangerous to life, and we do not see why it does not necessarily amount in law to the malice aforethought which will characterize death resulting therefrom as murder. The general conclusion that any criminal homicide caused by the wrongful administration of poison is murder in the first degree is supported by numerous cases decided by this court. See *State v. Bertoch*, 112 Iowa 195, 83 N. W. 967; *State v. Burns*, 124 Ia. 207, 99 N. W. 721; *State v. Van Tassel*, 103 Ia. 6, 72 N. W. 497. There was no error in the instruction given."

16—Approved as one of a series in *State v. Kinder*, 184 Mo. 276, 83 S. W. 964.

Nearly similar instructions were approved in *State v. Gatlin*, 170 Mo. 354, 70 S. W. 885 (888) and *State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (458).

17—*State v. Hunter*, 118 Ia. 686, 92 N. W. 872 (874).

"The use of the word 'anger' is criticised. Such use was approved in the famous case of *Com. v. Webster*, 5 Cush. (Mass.) 304, 52 Am. Dec. 711, and we are not disposed to quarrel with the definition there given, although there may be cases where it would be improper to use the word. Not so here, however."

(b) Malice, in its legal sense, differs from the meaning which it bears in common speech. In common acceptation it signifies ill will, hatred or revenge towards a particular individual. Such a condition of mind would, of course, constitute malice in the eye of the law, but such is not necessarily its legal sense. Malice, in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.¹⁸

(c) "Malice" in the law and as used in the statutes defining murder has a technical meaning, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is used and intended to denote an action growing from any wicked or corrupt motive,—a thing done with bad or malicious intent; where the fact has been attended by such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent on mischief; and therefore malice is implied from any deliberate and cruel act against another, however sudden.¹⁹

(d) Malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive; that the term "malice" has in law a twofold significance. There is what is known as "malice in fact" and "malice in law," or "implied malice," in the legal sense. Malice signifies a wrongful act intentionally done without justification or legal excuse.

18—Housh v. State, 43 Neb. 163, 61 N. W. 571 (572).

"The above definition of malice, it is argued, is incomplete, but we regard it as substantially within the definition in Harris v. State, 8 Tex. App. 90, and which was approved in Carr v. State, 23 Neb. 749, 37 N. W. 630. It is certainly not in conflict with the authorities cited by Reese, J., in the last named case, and possesses merits which cannot, unfortunately, be claimed for every instruction which we have had occasion to examine, viz., brevity and perspicuity."

19—Harris v. State, 155 Ind. 265, 58 N. E. 75 (77).

"Substantially the same as an instruction given upon that question in the celebrated trial of John W. Webster upon the charge of the murder of Dr. Parkman. See Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711. The definition of 'malice' as therein given was referred to with approval and adopted by this court in Coghill v. State, 37 Ind. 111; and was again approved in McDermott v. State, 89 Ind. 187. The instruction in question, considered as an entirety, in our opinion states the

law correctly. The part more especially criticised by counsel for appellant is the latter part, wherein it is stated that 'malice is implied from the deliberate and cruel act against another, however sudden.' It is contended that this part of the charge invades the province of the jury. This error, in our judgment, cannot be successfully imputed to the instruction. The court thereby merely advises the jury that malice, as a legal inference, may be deduced from the perpetration of any deliberate and cruel act by one person against another. It is certainly evident that such an inference may be drawn from an act or deed so committed, and this statement to the jury by the court, in regard to such a legal proposition, cannot be said to be an invasion upon any of their rights. Of course, the inference arising from such an established fact or facts is not conclusive, but may be rebutted by countervailing evidence, and in this light, in the absence of anything to the contrary, we must presume the charge was understood by the jury."

Express malice is that deliberate intention of taking away unlawfully the life of a fellow creature which is manifested by external circumstances capable of proof. Malice may be found when no considerable provocation appears, and when all the circumstances of the assault show an abandoned and malignant heart. Malice is not confined to ill will toward an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty, and fully bent on mischief, indicates malice within the meaning of the law; hence malice may be found from any deliberate and cool act against another, however sudden, which shows an abandoned and malignant heart.²⁰

§ 3060. Malice Presumed from Fact of Killing—Death by Violence. (a) In every charge of murder, the fact of killing being first proven, all the circumstances of action, necessity, or infirmity, are to be satisfactorily proven by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appear. The matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them.²¹

(b) When the state proves a homicide by violence, and nothing more appears, the law calls that murder. It fixes the crime as murder, with malice attached to it, and it then becomes incumbent upon the person killing to show that the homicide is either manslaughter or justifiable.²²

§ 3061. May be Implied from the Facts—Express Malice Embraces Implied Malice and May be Proved even if not Charged. (a) Implied malice is constructive malice, and not a fact to be proved specifically. It is inference or conclusion founded upon the facts and circumstances of the case as they are ascertained to exist, thus: When the proof shows an unlawful killing, and no evidence has been adduced establishing the existence of express malice on the one hand, or which tends to establish any justification, excuse, or mitigation on the other, the law implies malice, and the murder is of the second degree. But in this connection you are charged that where an indictment charges murder or implied malice alone, and the evidence establishes or tends to establish express malice as a fact, it is not to be understood that such proof would, on the one hand, be incompetent, nor, on the other, that it would create a variance from the allegation in the indictment; but such evidence, notwithstanding it shows express malice, would in such case be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree embraces murder of the second degree.²³

20—Downing v. State, 11 Wyo. 86, 70 Pac. 833 (834); Blume v. State, 154 Ind. 343, 56 N. E. 771 (774).

22—Hinkle v. State, 94 Ga. 595, 21 S. E. 595 (601).

23—Wilson v. State, — Tex. Cr. App. —, 90 S. W. 312 (315).
21—Brown v. State, 62 N. J. L. 666, 42 Atl. 811 (823).

(b) Murder is defined by the law to be the unlawful killing of a human being then and there in the peace of the United States, with malice aforethought either express or implied. Express malice is that deliberate intention of the mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof. Malice, in general terms, may be defined to be the doing of a wrongful act intentionally, without just cause or excuse. As employed in the foregoing definition of murder, the term "malice" includes in its meaning all those states of the mind under which the killing of a human being takes place without any cause which will in law justify, excuse or extenuate the homicide. "Malice," as used in this incident, does not mean mere spite, ill will, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another without just cause or legal justification. There need be no appreciable space of time between the formation of the intention to kill and the killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of the will, deliberation and premeditation on the part of the slayer. Malice includes not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to ill will towards an individual, but is intended to denote an action arising from any wicked and corrupt motive. Malice may be inferred when any unlawful act is done with a wicked mind, when the fact is attended by such circumstances as evince a plain indication of a heart, regardless of social duty and fatally bent on mischief. Hence malice may be implied from any deliberate and unlawful act of one person against another, however sudden, if the unlawful act be of such a character as to show an abandoned and malignant disposition. Malice, in connection with the crime of killing, is but another name for a condition of a man's heart and mind; and, as no one can look into the heart of another, and thus learn its condition, the only way to decide upon this condition at the time of the killing is to infer it from the surrounding facts. The presence or absence of this mental condition marks a boundary which separates the two crimes of murder and manslaughter. Malice shall be implied when no considerable provocation appears, and where all the circumstances manifest an abandoned and wicked disposition.²⁴

(c) Every person, with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either expressed or implied, shall be deemed guilty of murder. All murder committed with express malice is murder of the first degree. "Malice aforethought" is a term used in law to designate the wicked and mischievous intent with which a man willfully does a wrongful act, and it is to be inferred from acts committed or words spoken. Express malice exists where a murder

is committed with sedate, deliberate mind on the part of the murderer, and in pursuance of a formed design to kill the person killed. The mind of the murderer need not be entirely free from excitement in order to bring it within the meaning of the term "sedate and deliberate"; for, if it be in such condition as to admit of reflection upon the character of the act, then it is sedate and deliberate, within the meaning of the law.²⁵

§ 3062. Malice—Includes Every Unlawful and Unjustifiable Motive. The court instructs the jury that malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind—where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, which shows an abandoned or malignant heart.²⁶

§ 3063. Malice—Without Justification or Excuse. (a) In this case, if defendant intentionally and wrongfully killed the deceased, without any justification or excuse, then he killed him with malice, and that would constitute murder.²⁷

25—*Cain v. State*, 42 Tex. Cr. App. 210, 59 S. W. 275 (276).

Approving this and quoting from *Harris v. State*, 8 Tex. App. 90, 109, the court said:

"About as clear, comprehensive and correct definition as the authorities afford is that 'malice is the condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.'" This has been recognized as a correct definition by courts of last resort, and one which announces a true rule by which to measure malice under our statute of murder. Another equally correct rule is thus stated: 'Malice, in its legal sense, means the intentional doing of a wrongful act towards another without legal justification or excuse.' Each form has been employed in charges, and sometimes both have been embodied. It is wholly immaterial which is used, as they have been held to convey substantially the same idea. For a discussion of this matter see *Martinez v. State*, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. 895, and authorities there collated."

26—*McCoy v. People*, 175 Ill. 224 (229), 51 N. E. 777.

"The objection is made that the

words 'every other unlawful and unjustifiable motive' broadened the instruction to include every motive, whether growing out of the evidence of the case on trial or not. We do not think the instruction is subject to the criticism. It is a literal copy of one given in *Jackson v. People*, 18 Ill. 269."

27—*State v. McDaniel*, 68 S. C. 304, 47 S. E. (387), 102 Am. St. 661.

The court said: "In the sentence just preceding the one excepted to, the court said: 'In its general signification, 'malice' means the doing of a wrongful act intentionally, without justification or excuse.' This is substantially the famous definition of 'malice' by Bayley, J., in *Bromage v. Proser*, 10 E. C. L. 321: 'Malice,' in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' In *State v. Doig*, 2 Rich. Law. 182, our court said: 'In law 'malice' is a term of art, importing wickedness, and excluding a just cause or excuse.'" There can be no doubt, under the decisions in this state, that malice is presumed from an intentional killing, in the absence of facts and circumstances in evidence tending to show want of malice. *State v. Hopkins*, 15 S. C. 153; *State v. Ariel*, 38 S. C.

(b) The phrase "malice aforethought" means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed.²⁸

(c) "Malice," as the word is used in courts of law, signifies a wrongful act done intentionally, without legal justification or excuse. The word, as commonly used in everyday affairs of life, has, I believe, the meaning of personal hatred or ill will. This is something more than its meaning here. In this case it signifies the formed design on the part of the defendant to take the life of the deceased unlawfully, not in self-defense, and without such provocation allowed by the law to be such as would repel the imputation of malice. In other words, malice is criminal intention.²⁹

§ 5064. Malice—An Essential Ingredient of Murder—Absence of, Reduces Crime to Manslaughter. (a) The distinguishing feature between murder and manslaughter is the ingredient of malice. Malice aforethought is as essential an ingredient of murder as the act of killing. In the absence of malice, such killing is manslaughter, unless you should find from the evidence that such killing was done in necessary self-defense.³⁰

(b) Malice, as the word is used in defining criminal offenses, denotes a criminal act done intentionally and without just cause or excuse. The intention is an inference of law resulting from the

221, 16 S. E. 779; *State v. Jones*, 29 S. C. 201, 7 S. E. 296; *State v. Alexander*, 30 S. C. 74, 8 S. E. 440, 14 Am. St. 879. But the court in this case left it to the jury to decide whether the killing was intentional, and whether malice was any justification or excuse, and in that event malice existed, and the killing would be murder. An intentional homicide, without any excuse, is certainly murder. The language 'without any justification or excuse' not only excludes justifiable and excusable homicide, but homicide extenuated to manslaughter because done in sudden heat and passion upon sufficient legal provocation. It must not be supposed that the word 'excuse' is only applicable to excusable homicide, as homicide in self-defense. In the early stages of the common law there was ground for distinction between justifiable and excusable homicide, when the accused was not entitled to an acquittal in case of excusable homicide, but upon special verdict was entitled to pardon; but now the distinction is of no practical importance, as in both cases the accused is entitled to an acquittal, and there is no penalty

whatever attaching. It would therefore be wrong to hold that the word 'excuse' was intended by the court or understood by the jury to be used in the absence of something which renders one wholly excusable or justifiable, but, on the contrary, it should be held to include also any legal extenuation of the offense charged. The dictionaries give as one definition of 'excuse,' 'a plea offered in extenuation of a fault or neglect.' *Bouvier's Law Dictionary* says: "This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that, though guilty, he is less so than he appears to be." In the case of *State v. Mason*, 54 S. C. 240, 32 S. E. 357, the court sustained a charge to the effect that malice is implicated from an intentional killing, without justification or excuse."

28—*Clark v. Commonwealth*, 23 Ky. L. 1029, 111 Ky. 443, 63 S. W. 740 (742).

29—*Stoball v. State*, 116 Ala. 454, 23 So. 162.

30—*Harris v. People*, 32 Colo. 211, 75 Pac. 427 (429).

doing of the act, except in rare instances, where the intention is expressly declared by the wrongdoer, and except where the circumstances rebut the presumption of its existence. Malice is presumed where one person deliberately injures another. It is the deliberation with which the act is performed that gives it a malicious character. It is the opposite of an act performed under sudden or uncontrollable passion, which prevents the deliberation of cool reflection in forming a purpose. Hence, if in this case you should find that the act charged is not, when committed, accompanied by wrong intent and cool reflection, but was, on the contrary, the result of sudden and uncontrollable passion, produced by adequate cause or provocation, then the defendant would be guilty of no higher degree than manslaughter.³¹

§ 3065. Malice—How Proven. Malice may be established by proof of cool, calm, and circumspect deportment and bearing of the party when the act of killing is done, immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passion.³²

§ 3066. Malice May be Proved by Prior Threats or Seeking an Opportunity to Perpetrate the Act. (a) Malice may be proved by direct evidence, such as prior threats, or seeking an opportunity to perpetrate the act. This is called express malice, and proof of such malice in this case would be evidence of premeditation, and would make the case murder in the first degree, if otherwise made out beyond a reasonable doubt. Malice may also be implied from the act of killing; as if the killing is done purposely, and without justification, legal excuse, or reasonable provocation. And if the act is perpetrated with a deadly weapon so used as to be likely to produce death, the purpose to kill may be inferred from the act.³³

(b) Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof, such as previous difficulties,

31—State v. Vance, 29 Wash. 435, 70 Pac. 34 (45).

32—Howard v. State, — Tex. Cr. App. —, 58 S. W. 77 (78).

33—Boyle v. State, 105 Ind. 469, 5 N. E. 203 (207), 55 Am. Rep. 218.

"The express malice of which the instruction speaks is that evidenced by threats, and the efforts to secure opportunities to slay the deceased, and it is certainly not error to charge the jury that the uttering of threats, and the effort to secure an opportunity to kill the deceased, may be regarded as evidence of premeditation. The only point wherein the instruction is justly subject to criticism is in that it tells the jury that such express malice 'would make the case murder in the first degree, if other-

wise made out beyond a reasonable doubt;' but, considered in connection with the other parts of the instruction, it is clear that the statement quoted could not have misled the jury. The meaning conveyed is that, if all the other elements of murder in the first degree were proved beyond a reasonable doubt, then proof of previous threats, and efforts to kill, would make out a case of murder in the first degree. This is correct as an abstract proposition of law; for, if all the other ingredients of the crime were proved, as purpose, malice, and the like, then premeditation would be established by such express malice as the court referred to; namely previous threats and efforts to secure an opportunity to kill."

preparation to commit the offense, threats. Such things as these indicate what the law calls "express malice."³⁴

(c) Express malice exists when a murder is committed with sedate, deliberate mind, and in pursuance of a previously formed design to kill the person killed.³⁵

DEADLY WEAPON.

§ 3067. Deadly Weapon Defined. (a) A weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon.³⁶

(b) The jury are informed that a deadly weapon is one likely to produce death or great bodily injury, as a knife, an ax, or a club.³⁷

§ 3068. Whether Certain Instruments Are Deadly Weapons, Question of Fact—Metallic Knucks—Gas Pipe. (a) The court instructs the jury that metallic knucks are not deadly weapons as a matter of law, but whether they are deadly weapons or not must be determined by the jury from all the facts in the case. The mere fact that death in a particular case has resulted from the use of a certain weapon does not in itself prove that the weapon was deadly, and only such weapons are deadly as are likely to produce death, or great bodily harm.³⁸

(b) Whether or not the piece of gas pipe was a deadly weapon, within the meaning of the law, is a question of fact for the jury to decide, in determining which they will take into consideration the character and nature of the instrument, the manner in which it was used, if they believe it was used, and the probable effect of such use.³⁹

§ 3069. Deadly Weapon—Presumption from Killing With—Provocation. (a) The court further instructs the jury that a mortal

34—Henderson v. State, 120 Ga. 504, 48 S. E. 167 (1903), citing Mitchum v. State, 11 Ga. 628; Wilson v. State, 33 Ga. 217; Brown v. State, 51 Ga. 502.

The court said:

"The previous difficulty between the defendant and the deceased, and the threat against the deceased inspired thereby, were indicia of express malice; and the court did not err in illustrating what is meant by the term 'express malice' by stating that it might be shown by proof of previous difficulties, threats, and things of that character."

35—Stevens v. State, 42 Tex. Cr. App. 154, 59 S. W. 545 (549).

36—Acers v. United States, 164 U. S. 388 (391), 17 S. Ct. 91.

37—Clarey v. State, 61 Neb. 688, 85 N. W. 897 (898).

The court said:

"It is urged that this instruction was prejudicial, in that by naming a knife it emphasized that instrument as a deadly weapon. It did no such thing. The court designated a knife, an ax, and a club as deadly weapons, and emphasized one of them no more than the others."

38—Clemons v. State, 48 Fla. 9, 37 So. 647 (650), citing Young v. State, 24 Fla. 147, 3 So. 881; Bacon v. Green, 36 Fla. 325, 18 So. 870.

39—State v. Drumm, 156 Mo. 216, 56 S. W. 1086 (1087).

wound given with a deadly weapon in the previous possession of the slayer, without any provocation, or even with slight provocation is *prima facie* willful, deliberate and premeditated killing and throws upon the prisoner the necessity of showing extenuating circumstances.⁴⁰

(b) The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act. And if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances; and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree.⁴¹

(c) When a man assaults another with, or uses upon another, a deadly weapon, in such a manner that the natural, ordinary and probable result of the use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life.⁴²

(d) When the killing is done with a deadly weapon, or a weapon calculated to produce death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause; and the presumption in such case will be that the act was voluntarily committed with malice aforethought.⁴³

40—Langley v. Commonwealth, 99 Va. 807, 37 S. E. 339 (340).

41—State v. Staley, 45 W. Va. 792, 32 S. E. 198 (199).

42—State v. Sullivan, — Ia. —, 50 N. W. 572.

"Counsel thinks the instruction is not applicable to the case for the reason that defendant used the deadly weapon. This is the very reason the instruction is applicable. It was important for the jury to determine the intent with which defendant used the weapon to aid them in this inquiry. The instruction was properly given. The facts are unlike those in State v. Benham, 23 Ia. 154 (163), 92 Am. Dec. 416, cited by counsel."

43—State v. Dull, 67 Kas. 793, 74 Pac. 235 (236).

"Was the giving of this instruction error? Mr. Bishop, in his work on Criminal Law, vol. 2, par. 680, says: 'As a general doctrine, subject, we shall see, to some qualifications, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death.' In the case of Commonwealth v. York, 9 Metc.

(Mass.) 93, 43 Am. Dec. 373, it is held: 'The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused; and this may appear either from evidence adduced by the prosecution or evidence offered by the defendant.' In the case of State v. Earnest, 56 Kan. 31, 42 Pac. 359, this court held: 'On the trial of a person charged with murder the jury ought not to be instructed that, the killing with a deadly weapon being admitted, the presumption, therefore is that such killing was with malice, and that this presumption stands until it is rebutted by evidence. It would be better to instruct them that malice may be inferred from the fact of killing by a deadly weapon, and that they should consider this circumstance, in connection with all the other evidence in the case, for the purpose of determining wheth-

§ 3070. Using Deadly Weapon—Presumed to Intend Death. (a) He who willfully—that is, intentionally—uses upon another at some vital part a deadly weapon, such as a loaded gun, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act. He who so uses such deadly weapon without just cause or provocation must be presumed to do it wickedly and from a bad heart. If, therefore, you find and believe from the evidence in this cause that the defendant took the life of W. by shooting him in a vital part with a gun, with the manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill him, and without sufficient or just cause or provocation, then such killing is murder in the first degree.⁴⁴

(b) If an act be perpetrated with a deadly weapon so used as to be likely to produce death, the purpose to kill may be inferred from the act.⁴⁵

(c) The court charges you that it is a presumption of law that every sane person intends the natural and reasonable consequences of his own free voluntary acts, and if a sane person unlawfully, willfully and intentionally strikes another person with a deadly weapon it is an inference of law that he intends to cause great bodily harm or death.⁴⁶

§ 3071. Previously Formed Design to Use Deadly Weapon. If a party enters into a contest dangerously armed and fights under an undue advantage, even though mutual blows pass, if he slays his adversary pursuant to a previously formed design, either special or general, to use such weapon in case of an emergency in which his life would not be endangered, or he would not be in danger of suffering great bodily harm, it is not manslaughter, but it is murder.⁴⁷

§ 3072. Deadly Weapon—Malice Presumed from Use of—May Be Rebutted. (a) The court charges the jury that in a case of homicide the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption of malice,

er the act was malicious or not.' From the whole charge the jury are advised if the one disputed fact, the act of killing, is first found against the accused beyond a reasonable doubt, the proof of motive for the commission of the deed may be dispensed with, and the essential ingredient in the crime of murder, malice, may be inferred from the use of a deadly weapon as the instrument employed to accomplish the deed. This we think proper, and the claim of error is disallowed."

44—*State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (459); *State v. Darling*, 199 Mo. 168, 97 S. W. 592.

45—"There was no error in giving this instruction." *Deilkes v. State*, 141 Ind. 23, 40 N. E. 120, citing *Newport v. State*, 140 Ind. 299, 39 N. E. 926; *Boyle v. State*, 105 Ind. 476, 5 N. E. 203, 55 Am. Rep. 218; *Murphy v. State*, 31 Ind. 511.

46—*Clemons v. State*, 48 Fla. 9, 37 So. 647 (649).

"As this charge is taken from *Adams v. State*, 23 Fla. 511, 552, 553, 10 So. 106, where it is approved and is applicable to the evidence, we cannot perceive that it was erroneous."

47—*Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1030); *State v. Mills*, 116 N. C. 992, 21 S. E. 106 (107).

unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown and is un rebutted by circumstances of the killing, or by other facts and evidence, there can be no conviction for any degree of homicide less than murder.⁴⁸

(b) The jury are further instructed that when the killing is done with a deadly weapon, or a weapon calculated to produce, and actually producing, death, malice may legitimately be inferred, in the absence of proof that the act was done in necessary self-defense, or upon sufficient provocation and cause; and the presumption in such case will be that the act was voluntary, and committed with malice aforethought.⁴⁹

(c) The court charges the jury that the law implies malice from the use of a deadly weapon.

(d) The court charges the jury that the law presumes that a man intends the natural or probable results of his act.⁵⁰

(e) Whenever one man intentionally kills another with a deadly weapon, the law presumes that it was maliciously done,—that it was done with formed design to take life,—unless the evidence which proves the killing shows the excuse or extenuation.⁵¹

(f) In a case of homicide arising from the intentional use of a deadly weapon, the law presumes malice from the use of such weapon, unless the evidence in the case rebuts such presumption; and, if such

48—*Stevens v. State*, 138 Ala. 71, 35 So. 122 (124); *Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1030); *Kilgore v. State*, 124 Ala. 24, 27 So. 4 (5); *Bondurant v. State*, 125 Ala. 31, 27 So. 775 (777); *Wilkins v. State*, 98 Ala. 1, 13 So. 312; *Miller v. State*, 107 Ala. 40, 19 So. 37; *Martin v. State*, 77 Ala. 1; *State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (994); *Harkness v. State*, 129 Ala. 71, 30 So. 73 (74); *Clark v. State*, 105 Ala. 91, 17 So. 37 (38); *Robinson v. State*, 108 Ala. 14, 18 So. 732 (734); *Cleveland v. State*, 86 Ala. 1, 5 So. 426; *Holley v. State*, 75 Ala. 15; *Roberts v. State*, 68 Ala. 156.

49—*Harris v. People*, 32 Colo. 211, 75 Pac. 427 (429).

50—*Stillwell v. State*, 107 Ala. 16, 19 So. 322 (323), citing *Hornsby v. State*, 94 Ala. 66, 10 So. 552; *Hadley v. State*, 55 Ala. 37, as to malice; and as to cooling time, *Felix v. State*, 18 Ala. 724; *Keiser v. Smith*, 71 Ala. 482, 46 Am. Rep. 342; *McNeill v. State*, 102 Ala. 121, 15 So. 352, 48 Am. St. 17; 2 Bish. Cr. Law, § 713.

The court in comment said: "The facts of this case show that defendant struck deceased the blow that killed him, after deceased had

assaulted him with a piece of plank. As soon as assaulted, defendant picked up an iron poker with which to return the blow, but he was arrested in that intention, by a bystander, and made to put the weapon down. After this, deceased started away and got to the front door, when defendant picked up the poker and following, struck deceased over the head with it, causing his death. We must hold, that the use of the deadly weapon under these circumstances was not simply the result of passion but also revenge or malice. It was therefore unnecessary for the court in giving charge 1, to add, the qualifying words, 'unless the evidence which proves the killing rebuts the presumption of malice,' as defendant's counsel insists ought to have been done."

51—The court said:

"There was no error in the oral charge of the court of which the defendant can complain."

Bankhead v. State, 124 Ala. 14, 26 So. 979 (981), citing *Miller v. State*, 107 Ala. 45, 19 So. 37; *Sylvester v. State*, 72 Ala. 201; *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. 96.

presumption is not rebutted by the evidence in the case, then you are authorized to find that the killing was with malice.⁵²

(g) If you should find from all the evidence in the case beyond a reasonable doubt that the defendant did shoot and kill H., using a deadly weapon in such manner as was likely to and did produce death, the purpose on the part of the defendant to kill may be inferred from the act itself. And if you further find from all the evidence, beyond a reasonable doubt, that the killing was done purposely, without sufficient justification, legal excuse or reasonable provocation, then malice may also be inferred from such act.⁵³

(h) Malice may be presumed when life is taken with a deadly weapon, unless the proof or the circumstances of the killing rebuts the idea of malice.⁵⁴

§ 3073. Malice not a Necessary Inference from Killing with Deadly Weapon. The court instructs you that unless you find that the weapon had been prepared for the purpose, its use was not necessarily evidence of malice.⁵⁵

§ 3074. Circumstances from Which to Determine Whether or Not Blow Caused the Death. And if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant struck the deceased on the head with such a stick, that the violence of the blow knocked him down and produced insensibility, speechlessness and other symptoms of a fatal character, and that, suffering great agony, he died within the space of — or thereabouts, after the blow was given, then these are circumstances which the jury should take into consideration, together with all the other evidence in the case, in determining whether or not the blow was what occasioned the death of the deceased.⁵⁶

§ 3075. Mere Possession of Deadly Weapon by Deceased no Defense. Although you may believe from the evidence that at the time of the killing deceased had a loaded pistol in his pocket, still, unless he made an assault upon defendant by either drawing or attempting to draw said pistol with the manifest or apparent intention of shooting him, such fact did not justify or excuse the shooting and killing of L. by defendant, and such fact cannot avail defendant by way of self-defense.⁵⁷

MOTIVE.

§ 3076. Failure to Prove Motive. (a) You are further instructed that it is not indispensable that a motive be shown for the commis-

52—*Mitchell v. State*, 129 Ala. 23, 30 So. 348 (353), citing *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. 96; *Miller v. State*, 107 Ala. 40, 19 So. 37.

The court said this "was correct, as applied to the evidence in the case."

53—*Coolman v. State*, 163 Ind. 503, 72 N. E. 568 (570).

54—*Winter v. State*, 123 Ala. 1, 26 So. 949 (950).

55—*State v. McCourry*, 128 N. C. 594, 38 S. E. 883 (885).

56—*Davis v. People*, 19 Ill. 74; *Keenan v. Com.* 44 Penn. St. 55.

57—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871.

sion of a crime, but the existence or nonexistence of such motive is a question of fact, which must be determined by the jury from a consideration of all the evidence in the case, and as a circumstance tending to show the guilt or innocence of the accused.⁵⁸

(b) The court instructs the jury that, when the evidence fails to show any motive to make an assault or commit a crime, this is a circumstance in favor of the innocence of the party accused. And in this case, if the jury find, upon a careful examination of all the evidence, that it fails to show any motive, cause, or reason on the part of S. to assault and murder the defendant, then you should consider this fact in determining the truth or falsity of the claim made by the defendant that his wife first shot him and then killed herself.⁵⁹

(c) The court instructs the jury that, when evidence fails to show any motive to commit the crime charged on the part of the defendant, this is a circumstance in favor of his innocence; and in this case, if the jury finds, upon a careful examination of all the evidence, that it fails to show any motive on the part of the defendants to commit the crime charged against them, then this is a circumstance which the jury ought to consider, in connection with all the evidence in the case, in making up their verdict. And, in order to ascertain a motive, the jury will take into consideration all the evidence in relation with the association, relations and deportment toward each other and the deceased, together with all the other evidence in the case.⁶⁰

(d) The court instructs the jury that the absence of all evidence of an inducing cause or motive to commit the offense charged, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence.⁶¹

(e) In case of homicide, motive may be important, and the absence of motive is a fact and circumstance that the jury may con-

58—*Lillie v. State*, 72 Neb. 228, 100 N. W. 316 (322).

59—*Smith v. State*, 61 Neb. 296, 85 N. W. 49 (51).

"It is admitted by counsel for defendant that, as an abstract proposition of law, the instruction is without error, and that the subject dealt with therein may be properly argued by counsel, and has probative force worthy of consideration by the jury; but it is contended that it is an argument from the bench, giving a negative phase undue prominence by singling out the one feature of the case, and imputing to it special significance and force, and that the instruction practically casts upon the defendant the burden of proving a motive in his wife to commit the crime. That part of the instruction relative to the want of motive being favorable to the innocence of a party accused of crime

is a correct expression of the law when applied to the case at bar, either as an abstract or concrete proposition, and is as favorable to the defendant as to the state. The principle contained in the instruction is approved in *Clough v. State*, 7 Neb. 320. Under the circumstances of the case at bar the defendant was accused of the crime of killing the deceased, his wife. His defense was that the deceased first shot him, and then took her own life. That the shooting was done by the one or the other with felonious intent is established by the evidence, not only to a moral certainty, but to a degree amounting almost to the certainty of a mathematical demonstration."

60—*State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (197).

61—*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (341).

sider in determining the guilt or innocence of the accused. It is a circumstance that you may consider; and if you believe in the case that any motive has been shown, you may consider that fact and circumstance in determining the guilt or innocence of the accused.⁶²

(f) The court charges the jury that if the state has failed to show any motive for the defendant to have murdered J. E., and if the state has failed to so convince each and every juror by the evidence that defendant was present at the scene of the homicide and not at his home, and to do this to that degree of certainty, that they would, each of them, venture to act upon that conviction in matters of the highest concern and importance to his own interest, then the jury must find the defendant not guilty.

(g) If the state has failed to show any motive for defendant to have murdered deceased, and if the defendant has shown that he was at home when the deceased was shot, then the jury must find the defendant not guilty.⁶³

§ 3077. Motive of Defendant—How Determined by Jury. In judging as to what motive prompted or actuated the prisoner at the bar, the law says you must go in the light of the testimony as best you can back to the scene where this thing occurred, and you are to judge of the motive which prompted him, and his conduct on that occasion, and in that light it is for you to say whether or not he fired and took the life of the deceased in the exercise of the right of self-defense. If he did, and you are satisfied that he has made out his plea, then it is a good plea, and should avail him; if he has failed to make it out, then it would not avail him.⁶⁴

§ 3078. Motive—State Not Required to Prove, to Convict. Proof of a motive to commit the crime is not indispensable nor essential to conviction. While a motive may be shown as a circumstance to aid in fixing the crime on the defendant, yet the state is not required to prove a motive on the part of the defendant in order to convict; and the jury would be justified in inferring a motive from the commission of the crime itself, if the commission of the crime by the defendant is proved beyond every reasonable doubt, as required by law, and you find that the defendant at the time of the commission of said act was sane, and there were no extenuating circumstances.⁶⁵

§ 3079. Reconciliation in Good Faith Lived up to—Previous Troubles Not Considered as Affording a Motive. If you find from the evidence that on the day after Thanksgiving, 1899, a reconciliation and adjustment of all matters of differences and trouble was effected between the defendant and her husband, X.; and you further find from the evidence that such reconciliation was in good faith en-

62—*Smith v. State*, 94 Ga. 591, 22 S. E. 214 (216).

63—*Burton v. State*, 107 Ala. 108, 18 So. 284 (286).

64—*State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (997).

65—"The instruction was sanc-

tioned by the decisions of the court and in no way invaded the province of the jury." *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975 (980), citing *Hinshaw v. State*, 147 Ind. 334-364, 47 N. E. 57; *Blume v. State*, 154 Ind. 343, 56 N. E. 771.

tered into on behalf of the parties thereto, and was thereafter, including the night on which X. was assaulted, if he was assaulted, in like good faith lived up to and observed by the parties, and that after such reconciliation and adjustment there was no further trouble or quarrels between them, including the night on which X. is alleged to have been assaulted, then whatever trouble, differences or quarrels you may find from the evidence, if any, had existed or occurred prior to such good-faith reconciliation and adjustment, if any, would not, alone, be sufficient to show malice.⁶⁶

PREMEDITATION.

§ 3080. **Meaning of "Premeditate."** (a) If an intention to kill exists, it is willful. If this intention be accomplished by such circumstances as evidence a mind fully conscious of its purpose and design, it is deliberate. "Premeditate" means "to think of in advance, to determine upon beforehand." It means that there was a design to kill before the act of killing took place.⁶⁷

(b) An act is done willfully when done intentionally and on purpose. By premeditation is meant thinking out beforehand; and when one thinks over doing an act, and then determines or concludes to do it, he has premeditated the act. Malice, in the ordinary sense, means ill will or hatred toward another; but in its legal sense it signifies a wrong act done without just cause or excuse. Before you can convict the prisoner of murder in the first degree, it is necessary for the state to show from the evidence beyond a reasonable doubt, that the prisoner, prior to the time of the killing, formed the purpose or

66—State v. Hossack, 116 Ia. 194, 89 N. W. 1077 (1080).

Held error to refuse this instruction. The court said:

"It is said in the way of criticism of this instruction that if there was in fact a good-faith reconciliation, lived up to by the parties thereafter, then previous troubles could not be considered as affording a motive. This seems true. It was not a reconciliation in good faith, lived up to in sincerity, if old animosities were still harbored. If in November, 1899, all previous differences had in fact been forgiven and forgotten, and this state of affairs continued down to X.'s death, it is difficult to see why the law should resurrect troubles the parties had buried, and allow them any weight whatever. McClain Cr. Law, par. 419; People v. Hyndman, 99 Cal. 1, 33 Pac. 782; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391."

67—Carleton v. State, 43 Neb. 373, 61 N. W. 699 (712). The court said:

"This was a clear and explicit statement that, in order to constitute the act one of premeditated and deliberate malice, the intent to perform it must have preceded the performance, and that the mind must have beforehand considered it and determined upon it. The language complained of, therefore, could only mean that there had been formed in the mind an intent to kill, and that that intent existed, so formed, at the time the blow was struck. It is no doubt true that the terms 'deliberation' and 'premeditation' require some time for reflection, and that it is not sufficient that the intent to kill be formed simultaneously with the striking of the blow. Simmerman v. State, 14 Neb. 568, 17 N. W. 115; Milton v. State, 6 Neb. 136. * * * The instruction of the court was, therefore, correct." The court cited State v. Turner, Wright (Ohio) 20, from which state the Nebraska statute was taken.

design to kill the deceased, and that this design to kill was formed with deliberation and premeditation, and that in pursuance of said design the prisoner killed the deceased. It would not be necessary for such fixed design to be formed any definite time before the killing. If it was formed but a moment before the killing, it would be sufficient; but, if formed at the time of the killing, it would not be sufficient to make murder in the first degree, for it is essential, to constitute murder in the first degree, that the fixed purpose or design to kill should have been formed at some time before the killing.⁶⁸

(c) The word "purposely" defines itself. It simply means an act done with the purpose or intent of doing that act. The word "deliberate" means the mental state or condition of the mind in considering, weighing and deliberating upon the motive which prompts or induces a certain act or line of action. "Premeditation" is the mental operation of thinking over an act or line of action already decided in the mind, before carrying the act or line of action into execution. "Malice" is not confined to ill-will towards an individual, but it is also intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duties and fully bent on mischief, indicates malice, within the meaning of the law. Malice may be either expressed or implied. Express malice may appear from all the evidence and circumstances of the alleged killing. Implied malice may appear where there is no just cause or excuse of the alleged killing.⁶⁹

§ 3081. **Same Subject—Need Not Take Any Particular Time.** (a) "Deliberate" and "premeditated" as those words are used in the statute, mean only this: that the slayer must intend, before the blow is delivered, though it be only for an instant of time before, that he will strike at the time he does strike, and death will be the result of the blow; or, in other words, if the slayer had any time to think before the act—however short such time must have been—even a single moment—and did think, and he struck the blow as the result of the intention to kill produced by this even momentary operation of the mind, and death ensued, it would be a deliberate and premeditated killing within the meaning of the statute defining murder in the first degree.⁷⁰

(b) To constitute murder in the first degree there must have been an unlawful killing done, purposely and with premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first and in the second degree; an unlawful

68—State v. Spivey, 132 N. C. 989, 43 S. E. 476.

69—State v. Lindgrind, 33 Wash. 440, 74 Pac. 565 (566).

70—Stevens v. State, 138 Ala. 71, 35 So. 122 (124).

killing, with malice, deliberation and premeditation constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it.⁷¹

(c) The law does not and cannot define any precise time for the formation of any such design. It may take place in the shortest interval,—even the moment before the act, as well as the month before. The difference in the degrees of murder does not result from the length of time taken to form the design or the speed with which it was executed.⁷²

(d) It is not essential that the willful intent, premeditation and deliberation shall exist in the mind of the slayer for any considerable length of time before the actual perpetration of the crime. It is sufficient if there was a fixed design or determination to maliciously kill distinctly framed in the mind of such slayer, at any time before the fatal injury inflicted. And in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant assaulted and shot the deceased at the time and place and in the manner charged in the indictment, and that either at some time before, or in the moment or instant of time immediately before, the fatal shot was fired, the defendant had framed in his mind a willful, deliberate, and premeditated design or purpose, of his malice aforethought, to take the life of the said deceased, and that the said fatal shot was fired by the said defendant in furtherance of that design or purpose, without any justifiable cause or lawful excuse therefor, then it may be said that the defendant acted with deliberation and premeditation, and you should find him guilty of murder in the first degree. But if you fail to find from the evidence, beyond a reasonable doubt, that the said fatal act of the defendant was accompanied with some degree of deliberation and premeditation, or that it was the result of a fixed determination on the part of the defendant to kill the deceased, you must then acquit the defendant of the crime of murder in the first degree.⁷³

(e) The court instructs the jury that the law does not require that the premeditation and deliberation, or the willful intent and purpose shall exist for any length of time before the crime is committed.⁷⁴

71—*Fahnestock v. State*, 23 Ind. 231; *Miller v. State*, 54 Ala. 155; *State v. Weiners*, 66 Mo. 13; *State v. Ahmook*, 12 Nev. 369.

72—"This is the generally accepted doctrine on the subject." *Howard v. State*, — Tex. Cr. App. —, 58 S. W. 77 (78).

73—*State v. McPherson*, 114 Ia. 492, 87 N. W. 421 (422). "It is well settled," said the court, "that, if the intent to take life is executed after deliberation and premeditation, though but for a moment or

an instant, the crime may be murder in the first degree." *State v. Johnson*, 8 Ia. 525, 530, 74 Am. Dec. 321; *State v. Brown*, 41 Minn. 319, 43 N. W. 69; *Donnelly v. State*, 26 N. J. L. 463, 509; *Koerner v. State*, 98 Ind. 7; *State v. Dunn*, 18 Mo. 419, 424; *State v. Jennings*, Id. 435, 443; *Herrin v. State*, 33 Tex. 639, 645."

74—*Robinson v. State*, 71 Neb. 142, 98 N. W. 694.

"If the words above quoted were to be considered alone, it would

§ 3082. **Premeditated Design—Mutual Combat.** (a) If the jury believe, from the evidence, that at the time of the alleged killing the defendant and the deceased met together, and mutually agreed to engage in a personal combat, and did engage in such combat, then, if the jury further believe, from the evidence, beyond a reasonable doubt, that the deceased was unarmed, and that the defendant, in anticipation of having a difficulty with deceased, had armed himself with a deadly weapon without the knowledge of the deceased, with the intention of using the same some time during the contest, and did so use it, and thereby killed the deceased, then such killing would be murder in the first degree.

(b) If the jury believe, from the evidence, that at the time of the alleged killing, the defendant and the deceased met, and upon a sudden cause of quarrel arising between them, mutually agreed to engage in a personal combat, and did so engage in such combat, and if the jury further believe, from the evidence, beyond a reasonable doubt, that during such quarrel the defendant, without the knowledge of the deceased, made use of a deadly weapon, in such a manner as would be likely to cause the death of the deceased, and did so cause it, then the defendant was guilty of murder; and if the jury further believe, from the evidence, that the defendant so used the said deadly weapon, deliberately, and with malice aforethought, and with intent to take the life of deceased, or to do him great bodily harm, then such killing would be murder in the first degree.⁷⁵

(c) If the intention upon committing a homicide was to take life, the killing was done purposely. If the killing was accompanied by circumstances showing a mind fully conscious of its purposes, and if before the killing sufficient time had elapsed to enable the mind to have considered the matter, and to have formed a design to kill, and said design had been formed, the killing was designed and premeditated.⁷⁶

§ 3083. **Premeditation Distinguishing Characteristic of Murder in the First Degree.** (a) The killing in this case was neither justifiable nor excusable within the meaning of our law. To warrant a verdict of "Guilty as charged in the indictment," you must, therefore, be satisfied by the evidence beyond a reasonable doubt that the defend-

seem that the exception thereto was well taken, but when they are considered in connection with the other parts of the paragraph complained of, it appears they are not at all misleading. The substance of the instruction is that it is not necessary for the state to prove that the premeditation and deliberation or the willful intent and purpose to kill existed for any particular length of time before the homicide, and the language of the instruction is so plain that there can be no doubt about this. That

this is a correct statement of the law there can be no doubt. The principle contained therein is also approved in the case of *Clough v. State*, 7 Neb. 320. We therefore hold that the court did not err in giving the instruction complained of."

The same instructions had previously been given in *Carleton v. State*, 43 Neb. 373, 61 N. W. 699, and in *Savary v. State*, 62 Neb. 171, 87 N. W. 34.

⁷⁵—*State v. Christian*, 66 Mo. 138.

⁷⁶—*State v. Vance*, 29 Wash. 435, 70 Pac. 34 (45).

ant killed J. A., and that such act was perpetrated with a premeditated design to effect the death of the deceased. It is the premeditated design which is the distinguishing characteristic of murder in the first degree.⁷⁷

(b) The court instructs the jury, that under our statute, to constitute murder in the first degree, the jury must be satisfied, beyond a reasonable doubt, from the evidence, not only that the defendant, without any justifiable cause or legal excuse, as explained in these instructions, killed the deceased in manner and form as charged in the indictment, but they must further believe, from the evidence, beyond any reasonable doubt, that at the time the defendant struck the fatal blow he had formed in his mind a deliberate, willful and premeditated purpose to kill the deceased, and that he struck the blow with the intention of effecting that purpose (or that he killed the deceased while attempting to perpetrate the crime, etc.).⁷⁸

(c) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant shot the deceased, and thereby caused his death, in manner and form as charged in the indictment, then no matter what the provocation, and no matter what the other surrounding circumstances may have been, unless the act of shooting was justifiable, as explained in these instructions, then the defendant is guilty of murder in the first degree; provided, you further believe, from the evidence, beyond a reasonable doubt, that the defendant did the shooting with a premeditated design to kill the deceased.⁷⁹

§ 3084. **Meaning of "Sedate and Deliberate Mind"**—**Texas Statute.** (a) If you believe defendant, S. P., did, with express malice aforethought, with a sedate and deliberate mind, and formed design to kill, and as these expressions have been explained to you, did, with a razor, cut the throat of E. S., not in defense of himself, and thereby killed her, . . . you will find him guilty of murder in the first degree. The expression "sedate and deliberate mind" means simply that the mind is sufficiently composed to admit of reflection and consideration upon the design, and in a condition to comprehend the nature of the act designed and its probable consequences. It does not mean that the mind must be absolutely unruffled. It means that the killing must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement however unjustified or unwarranted it may be.⁸⁰

77—State v. Corrivau, 93 Minn. 38, 100 N. W. 638 (639).

78—Prinues v. State, 2 Tex. App. 369; State v. Melton, 67 Mo. 594; Cox v. State, 5 Tex. App. 493.

79—State v. Christian, 66 Mo. 138.

80—Spears v. State, 41 Tex. Cr. App. 527, 56 S. W. 347 (350).

"And it was held in the Gaines Case (Gaines v. State, — Tex. Cr. App. —, 53 S. W. 623) it was error

for the court to give this charge. I do not believe in this respect the Gaines Case is correct. The law has been held otherwise in Texas (see Farrer's Case, 42 Tex. 271; and see also, Hall v. State, 33 Tex. Cr. R. 191, 26 S. W. 72, and Duebbe v. State, 1 Tex. App. 159), and, under my view, is unquestionably the law. But, if it be conceded that the question is not sufficiently

(b) But if the design is formed with a sedate, deliberate mind, the fact of the design being executed while the slayer is under the influence of rage, passion, or other character of excitement will not prevent the killing being attributable to the preconceived, express malice of the slayer.⁸¹

§ 3085. **No Presumption of Premeditated Design.** The law presumes a sober man to intend what he does, but the law does not presume a killing with a premeditated design. This, like every other element of murder in the first degree, is to be inferred, by the jury from the facts proved beyond a reasonable doubt.⁸²

PROVOCATION.

§ 3086. **Provocation—Mere Words Not Sufficient.** (a) The jury are instructed that no provocation, by words only, addressed to the person killing, or to another in his presence, however opprobrious, will mitigate an intentional killing so as to reduce the killing to manslaughter; and although the jury may believe, from the evidence, that opprobrious epithets were used by the deceased to the defendant, W. M., in defendant B. M.'s presence, yet, if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendants immediately or soon thereafter revenged themselves by the use of a dangerous and deadly weapon in a manner likely to cause the death of the deceased, and did thereby cause his death as charged, then the defendants are guilty of murder, and the jury ought to so find, unless they shall further believe, from the evidence, that said killing was reduced to manslaughter, or was justifiable, upon other grounds, or by other than the use by deceased of such opprobrious language.⁸³

(b) You are instructed that mere words, however irritating, are no excuse for a felonious assault; and although you may believe from the evidence that insulting and opprobrious epithets were used by the deceased, B., to the defendant, W., yet, if said defendant, W., immediately revenged himself by using a revolver and shooting and

raised by the motion for new trial, then I desire to say, in any event, that the charge is correct, and to leave the Gaines Case in the condition it is, without correcting the error, would lead to unnecessary complications hereafter in the trial courts. The Gaines Case on this question should be overruled, and the law made to harmonize with that line of decisions above cited, which has always been considered the law in this state."

81—Howard v. State, — Tex. Cr. App. —, 58 S. W. 77 (78). "This doctrine is announced in Farrer's Case, 42 Tex. 265."

82—Cook v. State, 46 Fla. 20, 35 So. 665 (669).

"We think this is a correct proposition of law and should have been given. Garner v. State, 28 Fla. 113, text 157, 9 So. 835, 29 Am. St. 232."

83—McCoy v. People, 175 Ill. 224 (231), 51 N. E. 777, affirming conviction of murder.

"The instruction is almost a literal copy of the instruction given in the series in the case of Jackson v. People, 18 Ill. 269, which was approved by this court without the qualification contained in the foregoing instruction."

killing the said B., then the defendant is guilty, and you should so find from your verdict.⁸⁴

(c) The court charges the jury that in a case of homicide no mere words used by the deceased towards the defendant, however abusing or insulting, will reduce the degree of homicide to less than murder.⁸⁵

(d) Mere words, no matter how insulting or abusive, would not be sufficient provocation, unconnected with any acts or other circumstances, calculated to excite anger or passion of a reasonable man.⁸⁶

(e) The court further instructs the jury, that where a person strikes another with a deadly weapon, in a manner calculated or likely to produce death, no words of reproach, or abuse, or gestures, however irritating or provoking, amount to considerable provocation in law, so as to reduce the crime of killing from murder to manslaughter, in case such blow results in death.⁸⁷

(f) The court instructs the jury that words spoken, no matter how vile or opprobrious, unaccompanied by other demonstrations which would cause a reasonable belief in the mind of the defendant that the deceased was about to do him some great personal injury, would not justify the defendant in shooting the deceased, or in inflicting on the deceased any personal injury.⁸⁸

§ 3087. Provocation—Insulting Words to Defendant's Wife—Other Relatives. (a) If you believe from the evidence before you that defendant shot and killed M. at the time and place alleged in the indictment, yet if you should further believe that prior to the time of the killing, the said M. had used insulting words or conduct towards defendant's daughter or wife, or either of them, and that defendant had been informed or knew of such insulting words or conduct, and that such insulting words or conduct created in the mind of defendant such a degree of anger, rage, sudden resentment, or terror as to render his mind incapable of cool reflection, and that defendant immediately, or upon the first meeting between him and said M., after learning or being informed of such insulting words or conduct, shot and killed the said M., then, if you do not find defendant justified under the evidence before you and instrue-

84—Willis v. State, 43 Neb. 102, 61 N. W. 254 (259).

85—Wilson v. State, 140 Ala. 43, 37 So. 93 (94).

"The court committed no error in giving the charge requested by the state. Compton v. State, 110 Ala. 24, 37, 20 So. 119." A similar instruction was approved in Bon-durant v. State, 125 Ala. 31, 27 So. 775 (777), citing Ex. parte Sloane, 95 Ala. 22, 11 So. 14; Jones v. State, 96 Ala. 102, 11 So. 399; Reese v. State, 90 Ala. 624, 8 So. 818.

See also Ray v. State, 15 Ga. 223; Rapp v. State, 14 B. Mon. (Ky.)

494; State v. Starr, 38 Mo. 270; Martin v. People, 30 Wis. 216.

86—Olds v. State, 44 Fla. 452, 33 So. 296 (298).

87—People v. Turley, 50 Cal. 469; Bird v. State, 50 Ga. 585.

88—Robinson v. Territory, 16 Okla. 241, 35 Pac. 451 (456, 458).

"Exception was taken to the above instruction; but counsel for plaintiff in error assign no reason why such instruction should be held to be erroneous, and we know of no reason that could be successfully urged to that end."

tions given, he would not be guilty of any higher grade of offense than manslaughter.⁸⁹

(b) If you believe from the evidence that the defendant had heard that deceased had used insulting words toward or concerning defendant's female relations, and that upon meeting deceased defendant asked him about it, and he replied as above mentioned, but believe that neither such information as to insulting words, nor the reply of the deceased, nor any other fact or circumstance, produced at that time the degree of passion herein defined as being necessary to reduce a homicide to the degree of manslaughter, but that in the absence of and without any such passions, and not in his self-defense, defendant kicked the deceased, with the intention of bringing on a difficulty, for the purpose of killing the deceased in such a difficulty, or inflicting serious bodily harm upon him, and that during such difficulty defendant, in pursuance of such intention, if any, did shoot and kill deceased, then the homicide would not be manslaughter, but would be murder; and, if you find such was the case,—that is, that such was the state of facts, and such was the state or condition of defendant's mind, and such was the intention of defendant at the time he kicked deceased,—then the killing would not be manslaughter, but would be murder, no odds to what extremity defendant may have been reduced during the progress of the difficulty, and no odds what passion may have been aroused during the difficulty.⁹⁰

§ 3088. **Provocation—Mere Threats Not Sufficient.** (a) The court instructs the jury that the fact of one person having threatened to take the life of another or to inflict upon him a great bodily injury will not excuse the person threatened in becoming the aggressor, and with deadly weapon assaulting the person making such threats, and that although the jury may believe from the evidence that A., in his lifetime, had made threats to take the life of the prisoner or to so inflict upon him great bodily harm, the fact of making such threats towards the prisoner will not justify a verdict of acquittal, unless the jury further find that, at the time the said A. was shot, he was making overt acts towards the prisoner, indicative of an intention to carry such threats into immediate execution, and that by reason of such threats and overt acts, he (the prisoner) believed that it was necessary then and there to shoot with a deadly weapon the said A., in order to save his (the prisoner's) life, or to protect him from great bodily harm.⁹¹

(b) A person charged with murder, who seeks to justify himself on the ground of threats against his own life, is permitted to introduce evidence of such threats so made, but the same should not be regarded as affording a justification for the killing or offense, unless

89—*McComas v. State*, — Tex. Cr. App. —, 81 S. W. 1212, affirming conviction of murder in second degree.

90—*Fossett v. State*, 41 Tex. Cr. App. 400, 55 S. W. 497 (500).

91—*State v. Staley*, 45 W. Va. 792, 32 S. E. 198 (199).

it is shown that at the time of the killing, the person killed by some act then done manifested an intention to execute the threats so made or reasonably appeared to defendant to be doing so.⁹²

(c) Mere words or menaces, no matter how aggravating or abusive, or profane or insulting, do not of themselves constitute a provocation for the commission of the crime of murder in any degree.⁹³

§ 3089. Violent Passion Caused by Insulting Language May Reduce Grade of Homicide. (a) The court instructs the jury that if you believe and find from the evidence that in the county of Cape Girardeau and state of Missouri, at any time before the filing of the indictment herein, defendant struck A. K. with a large club, the same being a dangerous weapon, inflicting upon him a mortal wound, from which said mortal wound the said A. K. within a year thereafter, at the county of Cape Girardeau and state of Missouri, died, and that the defendant inflicted said blow while he was in a violent passion suddenly aroused by insulting or by abusive language spoken by deceased to him, then such killing was not done with deliberation; but although the defendant may have struck the blow while in a violent passion suddenly aroused by insulting or abusive words spoken to him by the deceased, yet if such killing was done willfully, premeditatedly, and of his malice aforethought, as explained in these instructions, defendant is guilty of murder in the second degree.⁹⁴

(b) The court instructs the jury that if they believe from the evidence that the defendant struck and killed A. while he (the defendant) was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken by A. to defendant, then such striking and killing was not done with deliberation, and was not murder in the first degree; but, if not done in self-defense, such a killing of A. by defendant in a passion aroused by such opprobrious epithets, willfully, premeditatedly and of his malice aforethought, was murder in the second degree.⁹⁵

92—Karr v. State, 106 Ala. 1, 7 So. 328 (329).

93—Lynch v. People, 33 Colo. 128, 79 Pac. 1015.

"The lexicographers and law-writers regard 'menace' as synonymous with 'threat'. Webster; Bouvier p. 397; Black, 767, 1 McClain on Criminal Law § 730; Kerr on Homicide § 171. It doubtless has other meanings. We are of opinion that it was used in this instruction as synonymous with 'threat by word of mouth.' This is apparent from the use of the preceding word 'mere' and the immediately following phrase 'no matter how aggravating or abusive or profane or insulting.' 'Aggravating' might characterize an overt act, but it is not so usual to speak of an overt act as 'abusive, profane or insulting.'

They more naturally and properly refer to words and verbal threats." But menaces along with threats have often justified killing as in self-defense.

94—Approved as one of a series. State v. Kinder, 184 Mo. 276, 83 S. W. 964.

95—State v. Gartrell, 171 Mo. 489, 71 S. W. 1045 (1052).

"In a word, the circuit court held that mere words, however opprobrious and insulting, would not be such a lawful or reasonable provocation as would reduce the homicide to manslaughter in the fourth degree, but only reduces the grade of the offense to murder in the second degree. Unquestionably this has been the general rule in this state for many years."

§ 3090. **Provocation—If Insufficient, Manslaughter.** If a man takes the life of his fellow man under sudden heat and passion, upon insufficient legal provocation, no matter how terrible the provocation, a jury is not acting within the law, but is acting in defiance of and against the law if it acquits that man. It must convict such a man at least of manslaughter and not of murder.⁹⁶

§ 3091. **Slap with Hand Not Sufficient Provocation, When.** If you believe from the evidence that the defendant used opprobrious words to the deceased, and that the deceased resented them by slapping or striking the defendant with his hand, I charge you that such blow would not be considered as such considerable provocation as would rebut the presumption of malice on the part of the defendant in killing the deceased, provided you shall believe that the striking was not disproportioned to the insult offered, if any. As to whether the words were opprobrious as used, if used, and as to whether, under the circumstances as testified to by the witnesses, the striking, if any, was disproportioned to the insult offered, if any, are questions for your consideration solely. If without adequate provocation a person strikes another with a deadly weapon,—one likely to produce death,—and kills, although he has no previous malice against the party, he is to be presumed to have had such malice at the moment, from the circumstances, and is guilty of murder.⁹⁷

§ 3092. **Provocation—Past Conduct of Deceased as Evidence of.** While it is true, the provocation must arise at the time of the commission of the offense, and the passion must not be the result of a former provocation, yet in passing upon the sufficiency of a provocation, and on the effect of the passion upon the mind of the defendant, the past conduct of the deceased towards the defendant, his threats, if any, and bearing,—in fact, all the facts and circumstances of the case—should be considered by the jury. An act standing alone may not be sufficient provocation, but may be ample when it is one of a series of similar acts.⁹⁸

§ 3093. **Provocation—Jury to Determine Adequacy of.** It is your duty, in determining the adequacy of the provocation, if any, to consider in connection therewith all the facts and circumstances in evidence in this case; and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law. And so, in this case, you will consider all the facts and circumstances in evidence, in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition.⁹⁹

96—State v. Byrd, 52 S. C. 480, 30 S. E. 482 (483).

97—Hayne v. State, 99 Ga. 212, 25 S. E. 307 (308).

98—State v. Scossoni, 48 La. 1464, 21 So. 32 (34).

99—Swanner v. State, — Tex. Cr. App. —, 58 S. W. 72 (74); Chism v. State, — Tex. Cr. App. —, 78 S. W. 949 (950).

§ 3094. **Provocation—Standard for Determining Sufficiency.** In determining whether the provocation is sufficient to reduce homicide to manslaughter, ordinary human nature, or the average of men recognized as men of fair average mind and disposition should be taken as the standard, unless the person whose guilt is in question be shown to have some particular weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.¹⁰⁰

§ 3095. **Provocation—Heat of Blood—Cooling Time.** (a) The object of the law is to have passion controlled and subdued, and not permit it to become the excuse or palliation of crime. To mitigate the offense to manslaughter, the facts must show that the act was done in the excitement of passion; it must appear that the killing resulted from passion or heat of blood produced by a reasonable provocation. It is not every provocation that will reduce a killing from murder to manslaughter. The provocation must be of such a character, and so close upon the act of killing, that for the moment the prisoner could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the offense is not mitigated to manslaughter. I have said the provocation must be reasonable, and must be recent, and the act of killing must be done in a sudden transport of passion. Whether the provocation was reasonable, and whether sufficient time elapsed between the provocation given and the act of killing for the accused to subdue or control his passion, are questions of fact, to be determined by the jury on a consideration of the circumstances of the particular case before them.¹

(b) The provocation sufficient to reduce an intentional killing from murder to that of manslaughter must arise at the time of the commission of the offense, or before the passion of the slayer had time to cool. The provocation by deceased must be the direct and controlling cause of the passion, and it must be such as naturally and instantly to produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection. The law requires two things: First, there should be provocation; and, second, the blow must be clearly traced to the passion arising therefrom,—and that the provocation must be such as would stir the resentment of a reasonable man [ordinary man].²

100—*People v. Borgetto*, 99 Mich. 336, 58 N. W. 328 (329).

1—*Brown v. State*, 62 N. J. Law 666, 42 Atl. 811 (827).

2—*State v. Walker*, 50 La. 420, 23 So. 967 (969).

The court said:

"These two propositions were given by the district court to the jury, the only deviation therefrom

being in the substitution of the words an 'ordinary man' for the words a 'reasonable man.' Here, again, we think that the departure was not prejudicial to the accused. If there be any substantial difference between a 'reasonable man' and an 'ordinary man,' or a man of ordinary reason, influenced and governed in his conduct by such

§ 3096. Cooling Time—Facts Held to Constitute—Question of Law.

(a) The court charges you that the act must be the result of passion, and if you believe from the evidence that the deceased had connection with (I might say as near as I can express it, the relationship) the niece-in-law of the defendant, and he was informed of that fact, and he had time to think, and did think, and that his mind was in a cool state, then, gentlemen of the jury, the court will charge you as a matter of law that there would be cooling time absolutely, and it would constitute murder, and not manslaughter.³

(b) Applying these principles to the case at bar, the court charges you as a matter of law, as applied to the facts of this case, that the defendant did have cooling time, and that if he was sane at the time of the homicide, the offense, if any was committed, would not be manslaughter but murder.⁴

DYING DECLARATIONS.

§ 3097. Dying Declaration—Why it is Admissible—Weight of, for Jury.

(a) You are instructed that in prosecutions for murder or homicide the dying statements or declarations of the person with whose murder the accused stands charged, when material, and made

passions and resentments as are found in the 'average' man, we think the standard adopted more liberal than the one contended for. The term used conveys to the everyday juror a much clearer and better idea of the standard of man called for by law than the one which it is desired to replace it by."

3—Jarvis v. State, 138 Ala. 17, 34 So. 1025 (1030), citing Stillwell v. State, 107 Ala. 23, 19 So. 322; McNeill v. State, 102 Ala. 121, 15 So. 352, 48 Am. St. 312; Felix v. State, 18 Ala. 720, and declining to follow dictum that cooling time is a question of fact for the jury in Hooks v. State, 99 Ala. 166, 13 So. 767.

4—Ragland v. State, 125 Ala. 12, 27 So. 983 (987).

"What constitutes a sufficiency of cooling time, or of provocation, is necessarily a question of law, and not of fact, the court being required to decide it preliminarily to the admission or exclusion of evidence offered in mitigation, analogous to the rule governing in cases of homicide. 2 Bish. Cr. Law, pars. 712, 713, and authorities cited; Felix v. State, 18 Ala. 720; Stillwell v. State, 107 Ala. 16, 19 So. 322. If the defendant had shot the deceased immediately upon hearing of the wrong to his daughter, and in the heat of passion en-

gendered by the fact coming to his knowledge, all the facts would have been admissible to eliminate the element of malice from the act, by referring it to passion which had not had time to cool, thus reducing the homicide (under the plea of not guilty) to manslaughter. Rogers v. State, 117 Ala. 14, 22 So. 666; Robinson v. State, 108 Ala. 16, 18 So. 732; McNeill v. State, 102 Ala. 126, 15 So. 352, 48 Am. St. Rep. 17; Hooks v. State, 99 Ala. 166, 13 So. 767. In the last cited case, appears the expression to the effect, that cooling time is a question of fact for the determination of the jury. This is contrary to the generally received doctrine on the subject, and to that extent that decision must be disapproved."

In Olds v. State, 44 Fla. 452, 33 So. 296 (298-300), the supreme court said that the giving of the following charge was not error, in fact, that it was too favorable to defendant:

The fact that the defendant may have been at the time of the killing under the influence of anger or resentment would not of itself be sufficient to preclude the idea of premeditation unless the degree of feeling was such as to cloud his senses or to impair his reason. And not even then would it be sufficient if, subsequently to forming

under the sense of impending death, are admissible in evidence. Such declarations are made when the party making them is at the point of death, and when every hope of the world is gone, and when every motive for falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. The situation, in law, is considered as creating an obligation equal to that which is imposed by an oath administered in a court of justice.

(b) You are instructed that the declarations of X. offered in evidence in this case through certain witnesses were admitted under such rule of law. But the truth or falsity of such declarations of X., and the degree of accuracy or inaccuracy in the recital thereof by the witnesses, are matters for you to weigh under the same tests as apply to other witnesses, considering all of the circumstances in evidence surrounding each case and each witness.⁵

the design, and before executing it, sufficient time elapsed for an ordinarily reasonable man to have regained his self possession. Nor would such anger be sufficient to exclude the idea of premeditation if there was not such provocation for it as would be calculated to excite such anger or passion as might obscure the reason of an ordinarily reasonable man in the same situation and under the same circumstances.

The court said:

"What design is meant? If it be the premeditated design to kill, referred to in the first part of the charge, then time to regain self-possession would play no part. A killing from a premeditated design—that is with the formed intention to kill—with full consciousness of the mind's purpose—would be murder in the first degree without reference to time to regain self-possession, for the reason that the party would be already sufficiently self-possessed to form the intention to kill. If the jury took this view of the charge, it could not have been detrimental to the accused, because it gave him the benefit of the additional fact to be found against him, entirely immaterial, that sufficient time had to elapse after forming the premeditated design for an ordinarily reasonable man to have regained self-possession. If the design mentioned had reference to a purpose to kill under the impulse of anger or passion produced by a sufficient provocation, then the rule as stated as to cooling time would apply."

The following instruction is an extract from the charge in State

v. Timberlake, 50 La. An. 308, 23 So. 276 (278):

It is essential that the excited and angry condition of the party committing the act, entitling him to a milder consideration of the law, should be superinduced by some insult, provocation or injury which would instantly produce in the minds of ordinary men, situated as the prisoner was, the highest degree of exasperation. * * * The law assigns no limits within which cooling time may be said to take place; every case must depend upon its circumstances; but a time within which an ordinary man in like circumstances would have cooled may be said to be a reasonable time.

The court in comment said:

"Considering the charge as to manslaughter as a whole, it must be held a correct exposition of the law. The selection of passages here and there for criticism and animadversion is not favored, and a verdict will not be disturbed on a merely inaccurate or incomplete instruction, as embodied in the sentences excepted to, when, from the entire charge on that branch of the law, a correct view and explanation of the subject is given. To justify relief, the isolated passages brought to our attention must amount to a positive misstatement of the law. State v. Ardion, 49 La. An. 1145, 22 So. 620, 62 Am. St. Rep. 678; State v. Ferguson, 37 La. An. 51; State v. Porter, 35 La. An. 1159."

5—Kastner v. State, 58 Neb. 767, 79 N. W. 713, (715).

"It is admitted, in the brief of counsel for defendant, that the first

(c) The court instructs the jury that the statement read to you as a dying declaration of E. should be received by you as such declaration; but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have, when considered in connection with all the other facts and circumstances in evidence.⁶

(d) A statement by one who has been shot, respecting who it was that inflicted the wound, is admissible as a dying declaration if made at a time when he did not expect to survive the injury, but is of no more weight than if the deceased was present and testified.

(e) If you believe from the evidence that the deceased, after he was shot, made a statement as to who shot him, and under what circumstances the shot was fired, and that at the time he made such statement he believed he would die from the effects of said shot, and entertained no hope of recovery, then you will give such statements, if proven, as much weight as if he were duly sworn, present and testifying in the case.⁷

(f) Whenever a party has been injured,—shot, for instance,—and he is in extremis, if he manifests an apprehension of impending death, if he expresses a consciousness that he will soon appear at the bar of his Maker, that he will soon die, then the law allows that person to make a statement of the circumstances under which he received his wound, and that is known in law as a “dying declaration.” Why is that allowed? It is upon the presumption in law that a man who is conscious that he is soon to face his God is under the same sanction and obligation to speak the truth that a witness would be upon the stand under oath; and hence, under those circumstances, that dying declaration is competent and admissible as evidence, although it is an ex parte expression on the part of the dying man. As to the effect of it, that is a question entirely for you. I have held that a portion of this paper purporting to be the dying declaration of the deceased is admissible; it is for you to say what weight you will attach to it.⁸

part or paragraph of this instruction correctly enunciates the law relative to dying declarations, but it is strenuously urged that the last portion of the instruction is erroneous, because it singled out the testimony concerning the subject covered by this part of the charge. The language of the court below is not susceptible of such interpretation placed thereon by counsel. The testimony of no witness is singled out or given undue prominence in the instruction, but the jury were properly advised that the testimony relative to dying declarations was to be weighed under the same rules or tests applicable to other testimony.”

6—State v. Parker, 172 Mo. 191, 72 S. W. 650 (654).

“It will be noted that the court was careful to avoid the error of instructing the jury that such dying declarations should have the same degree of credit as the testimony of the deceased would have if he had testified under oath as a witness. This court in *State v. Vansant*, 80 Mo. 67, repudiated the instruction given in *Green v. State*, 13 Mo. 382; and in giving its instruction the trial court followed *State v. McCanon*, 51 Mo. 160; and *State v. Vansant*, supra.” But see *Allen v. State*, infra.

7—*Allen v. State*, 70 Ark. 337, 68 S. W. 28. But see *State v. Parker*, supra.

8—*State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (996).

§ 3098. Dying Declarations—Weight of for Jury—What May Be Taken into Consideration. The court instructs the jury that to them alone belongs the function of determining what weight shall be given to the dying declarations of the deceased, if any were made by him. In weighing the declarations, the jury should take into consideration the facts that the defendants in this case were not present in person or by attorney when the statements were made, and that there was no opportunity for cross-examination of the deceased, and that there was no opportunity for the jury to observe the manner of the deceased at the time he made the statement, so as to detect malice or feeling or revenge or other improper motive that may have influenced him, and that the deceased was not subject to prosecution for perjury if he made false statements. And if the jury find from the evidence that the deceased had at other times made statements inconsistent with his dying declarations, these contradictory statements should be considered by the jury in weighing the dying declarations, and especially if such contradictory statements were made at a time when his blood was cool or his mind unaffected by passion or feelings of revenge.⁹

§ 3099. Dying Declarations, Foundation for. (a) Dying declarations, made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, are admissible in evidence in a prosecution for the homicide.

(b) It is now for you to determine, first, whether the evidence sufficiently showed that he was conscious of his approaching death, and that his death was really approaching, to authorize the admission of said declaration, and, if not, you should disregard the dying declaration altogether; but, if you think such evidence was sufficient for the introduction of such declaration under the rules as I have given you, you should then consider such declaration as evidence in the case, together with the other evidence.¹⁰

§ 3100. Dying Declaration to Be Received with Caution. Dying declarations are admissible from the necessities of the case, but they should be received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant, and that the declarant might be influenced against the defendant. And for the further reason that the physical condition of the declarant might render the statement more or less reliable. Circumstances surrounding the declaration should be weighed same as those surrounding other evidence.¹¹

⁹—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (198).

¹⁰—Anderson v. State, 117 Ga. 255, 43 S. E. 835 (836), 12 Am. Cr. Rep. 241.

¹¹—State v. Mayo, 42 Wash. 540, 85 Pac. 251 (255).

"This, or an instruction of similar import should have been given State v. Eddon, 8 Wash. 292, 36 Pac. 139."

CHAPTER XCIX.

CRIMINAL—HOMICIDE—SELF-DEFENSE.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 3101. Self-defense—Essential elements.</p> <p>§ 3102. Self-defense — Doctrine of, stated.</p> <p>§ 3103. Self-defense—Law of, stated.</p> <p>§ 3104. Law of necessity—Reasonable cause to apprehend immediate personal injury.</p> <p>§ 3105. What is sufficient and what is insufficient to show self-defense.</p> <p>§ 3106. Belief of danger must be reasonable.</p> <p>§ 3107. Acting on reasonable belief of great bodily harm.</p> <p>§ 3108. If circumstances are insufficient to induce a reasonable and well grounded belief of danger, defendant is guilty of murder.</p> <p>§ 3109. Real or apparent danger.</p> <p>§ 3110. Danger may not be real—May act upon appearances.</p> <p>§ 3111. Defendant may safely act on appearances, even where they turn out to be false.</p> <p>§ 3112. Self-defense—Danger must seem actual, present and urgent.</p> <p>§ 3113. Apprehension of danger—Person must act upon honest belief.</p> <p>§ 3114. Defendant need not believe death of assailant necessary.</p> <p>§ 3115. Deceased, acting together with other persons, assaulting defendant.</p> <p>§ 3116. Deceased assaulting defendant with deadly weapon.</p> <p>§ 3117. Deceased attempting or purporting to draw weapon.</p> <p>§ 3118. Apparent danger—Deceased shooting first.</p> <p>§ 3119. Must employ all reasonable means to avert the necessity of killing.</p> <p>§ 3120. Resistance must be in proportion to the danger which is apprehended—Honestly believed he was in danger of life or great</p> | <p>bodily harm—Reasonable doubt.</p> <p>§ 3121. No more force to be used than the circumstances reasonably indicate to be necessary.</p> <p>§ 3122. Judging defendant from his standpoint.</p> <p>§ 3123. Possession by deceased of deadly weapon.</p> <p>§ 3124. Self-defense—Blow need not actually have been struck—Attack with knife.</p> <p>§ 3125. Killing in revenge after repelling assault.</p> <p>§ 3126. Defendant provoking affray.</p> <p>§ 3127. Commencing the difficulty—Several persons on each side.</p> <p>§ 3128. Defendant seeking interview with deceased with malice and hatred in his heart and inducing deceased to assault him.</p> <p>§ 3129. Defendant seeking the meeting to provoke difficulty—Circumstances must be such as to render killing unavoidable.</p> <p>§ 3130. Defendant attacking brother of deceased.</p> <p>§ 3131. Self-defense—Defendant, if at fault, cannot plead.</p> <p>§ 3132. Plea of self-defense barred by defendant's agreeing to fight.</p> <p>§ 3133. Aggressor cannot plead self-defense.</p> <p>§ 3134. When aggressor, abandoning conflict, may avail of plea of self-defense.</p> <p>§ 3135. Aggressor is not necessarily the person who strikes the first blow or makes the first demonstration to strike—Question of fact.</p> <p>§ 3136. State must prove its contention that defendant began the fight beyond a reasonable doubt.</p> <p>§ 3137. Self-defense—Not available to one who kills through mere cowardice.</p> |
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- § 3133. Self-defense—Not available to one who kills from previously formed design.
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- § 3181. Defendant may kill in defense of person or property.
- § 3182. When killing justifiable in defense of property.
- § 3183. Defense of habitation.

§ 3101. **Self-Defense—Essential Elements.** (a) The essential elements of self-defense are these: First, the defendant must be free from fault; that is, he must not say or do anything for the purpose of provoking a difficulty, nor must he be disregarding of the consequences in this respect of any wrongful word or act. Second there

must be a present impending peril to life, or of great bodily harm, either real or apparent, as to create the bona fide belief of an existing necessity. Third, there must be no convenient or reasonable mode of escape by retreat or declining the combat.¹

(b) Before the jury can acquit the defendant on the ground of self-defense, three essential elements must concur: First, the defendant must be without fault in bringing on the difficulty, and must not be disregardful of the consequences, in this respect or any other wrongful word or act. Second, there must have existed at the time, either really or so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious, impending necessity to shoot, in order to save himself from great bodily harm. Third, and there must have been no other reasonable mode of escape by retreat, or by avoiding the combat with safety.²

(c) Self-defense, in proper cases, is the right of every person. It may be resorted to by anyone who is violently assaulted by another in such a manner as to cause the person so assaulted in good faith to believe that he is in immediate danger of either being killed or of receiving great bodily harm from the assailant, and that the killing of the assailant appears to be the only means of escaping death or great bodily harm. In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and threatening that, in order to preserve his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, or apparently necessary; and it must also appear that the person killed was the assailant, or that the slayer in good faith endeavored to decline further combat before the mortal blow or injury was given. A bare fear of being killed or of receiving great bodily harm is not sufficient to justify a killing. It must appear that the circumstances were sufficient to excite the fear of a reasonable person similarly situated, and the defendant acting in good faith, and viewing the situation and circumstances from his standpoint, and that the party killing really acted under the influence of such fear, and not in a spirit of revenge. The law of self-defense is a law of necessity, pure and simple. It is not an offensive law, but defensive law. Before the defendant would be justified in killing the deceased, he must be in danger, or apparently in danger, as viewed from his standpoint, of either losing his life or of receiving great bodily harm at the hands of the deceased at the place and at the instant when the fatal shot which took the life of deceased was fired.³

1—*Stevens v. State*, 133 Ala. 71, 35 So. 122 (124).

2—*Kilgore v. State*, 124 Ala. 24, 27 So. 4 (5).

The same instruction with the additional word "reasonably" preceding "without fault in bringing on the difficulty," was approved in

Miller v. State, 107 Ala. 40, 19 So. 37 (38). See also *Sherrill v. State*, 138 Ala. 3, 35 So. 129 (131); *Jackson v. State*, 94 Ala. 86, 10 So. 509; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Wilkins v. State*, 98 Ala. 1, 13 So. 312.

3—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871

(d) Homicide is permitted by law and is justifiable when inflicted for the purpose of preventing the offense of murder, maiming, disfiguring, or other serious bodily injury, when the killing takes place under the following circumstances: (1) It must reasonably appear by the acts, of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named; (2) the killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. So, upon this issue, you are charged that the defendant would be justifiable in killing deceased, if it is shown to have been done to prevent the deceased from murdering, maiming, or disfiguring him, or if it is shown that at the very time of the killing, the deceased, J. S., had made, or was in the act of making, some hostile demonstration towards defendant, such as produced in his mind a reasonable fear or expectation of death or of some serious bodily injury; but in that case, to justify the killing, it must reasonably appear from the acts, or words coupled with the acts, of the deceased, that he intended to murder, maim, disfigure, or inflict some serious bodily injury upon defendant, and the killing must have taken place while deceased was in the act of committing such offense, or after some act done by him showing evidently an intention to commit such offense. Therefore, if you believe from the evidence that defendant at the time of the homicide believed that his life was in danger, such fear being produced by hostile acts on the part of deceased, and that at the time he fired the fatal shot (if he did so) it reasonably appeared to defendant, from all the circumstances of the case, viewed from defendant's standpoint alone, that deceased was about to shoot him with a pistol, then defendant would be justifiable in killing deceased; and, if you so believe, you will acquit defendant, though it may appear as a fact that defendant was in no danger at the time of the homicide.⁴

§ 3102. Self-Defense—Doctrine of, Stated. (a) If a person assaulted, being himself without fault, reasonably apprehends death or great bodily harm unless he kills his assailant, the killing is excusable; and if you believe that defendant was assaulted by deceased in such a manner as to cause him to believe, and he did believe, that he was in imminent danger of losing his life or suffering great bodily harm at the hand of the deceased unless he killed him, and, while so believing, he killed deceased, he is entitled to an acquittal.⁵

4—*Matthews v. State*, 42 Tex. Cr. App. 31, 53 S. W. 86 (88).

A long instruction on self-defense was approved in *Bush v. State*, 40 Tex. Cr. App. 539, 51 S. W. 238. See also *Barkman v. State*, 41 Tex. Cr. App. 105, 52 S. W. 73.

5—*Deikes v. State*, 141 Ind. 23, 40 N. E. 120, citing *McDermott v. State*, 89 Ind. 187; *Presser v. State*,

77 Ind. 274; 1 Bish. Cr. Law, § 865; *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52, 2 Am. Cr. Rep. 318.

"The objection urged to this instruction is that it was not required that appellant should have believed it necessary to kill the deceased in order to excuse him from so doing. This objection to the instruction is not well taken. * * * The instruc-

(b) The jury are instructed that the right of self-defense is only given in emergencies to enable persons who are attacked, and to whom it may reasonably appear that their lives or bodies are in danger of great bodily injury, to defend themselves; that this right is based upon what reasonable persons, having due regard for human life, would do under similar circumstances, and the actions of the defendant in this case must be measured by this rule.⁶

(c) If a person kill another in self-defense, it must appear that the danger was so urgent and present that, in order to save his own life or prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.⁷

(d) It is a settled principle of law that when a man is assailed by another, and from the nature of the attack and the surrounding circumstances as they appear to the accused at the time, he has reasonable ground to believe and does believe that the assailant intends presently to take his life, or to do some great bodily injury, he will be justified in killing his assailant, provided he has not previously brought on the assault, and provided that the circumstances are such that the extreme measure would seem to the comprehension of a reasonable man necessary in the situation to prevent the threatened injury.⁸

(e) If you believe from the evidence that, at the time A. W. shot and killed L. M. (if you believe from the evidence, beyond a reasonable doubt, he did do so), he believed, and had reasonable grounds to believe, that he or A. M. were then and there in danger of death or the infliction of great bodily harm at the hands of L. M., or those acting in concert with him, and that it was necessary, or seemed to the defendant, W., in the exercise of a reasonable judgment, to be necessary, to shoot and kill L. M. in order to protect himself or A. M. from death or the infliction of great bodily harm at the hands of said L. M., or those acting with him, then you will find the defendant not guilty, on the grounds of self-defense and apparent necessity.⁹

(f) The jury are instructed, as a matter of law, that if a person believes, and has reasonable cause to believe, that another has sought him out for the purpose of killing him, or of doing him great bodily

tion states that if he did so believe, etc., the killing was excusable. This instruction has often been approved by this court."

6—*Harris v. People*, 32 Colo. 211, 75 Pac. 427 (429).

7—*Ritter v. People*, 130 Ill. 255 (258), 22 N. E. 605.

In connection with the above instruction another was given amplifying it and putting the defendant in the attitude of an assailant and

making it incumbent on him to show that he had in good faith declined further combat. Because of error in that instruction judgment of conviction of manslaughter was reversed.

8—From the oral charge in *State v. Guidor*, 113 La. 727, 37 So. 622 (623), see also *Kirby v. State*, 41 Fla. 81, 32 So. 836 (837).

9—*Wilson v. Commonwealth*, 24 Ky. L. 185, 68 S. W. 121 (122).

harm, and that he is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has the right to stand and defend himself, and pursue his adversary until he has secured himself from danger; and if, in so doing, it is necessary, or upon reasonable grounds it appears to be necessary, to kill his antagonist, the killing is excusable upon the grounds of self-defense.¹⁰

(g) The court instructs the jury that the right of self-defense is a right which the law not only concedes, but guaranties, to all men. The defendant may therefore have killed deceased and still be innocent of any offense against the law. If at the time he struck deceased he had reasonable cause to apprehend on the part of deceased a design to do him great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger he struck deceased, and at the time he did so he had reasonable cause to believe, and did believe, it necessary for him to use the piece of rail in the way he did to protect himself from such apprehended danger, then and in that case the striking was not felonious, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense. It is not necessary to this defense that the danger should have been impending and immediately about to fall; all that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. But before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence, you are to determine, and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit in such case on the ground of self-defense, even though you may believe that the defendant really thought he was in danger.¹¹

§ 3103. **Self-Defense—Law of, Stated.** (a) If you believe from all the circumstances of the case that the situation was such as to excite the fears of a reasonable man, in the situation of the defendant, that a felony was about to be committed upon him, or that his life was in danger, from the act of the decedent, and if he acted under the influence of those fears, and not in a spirit of revenge, and took the life of the decedent, then you should acquit him, gentlemen, notwithstanding you may believe that he was not in danger and that, if he had not acted, the decedent would not have committed a felony upon him.¹²

(b) If the jury believe from the evidence the defendant, S. I., at the time he struck the deceased, G. C. (if he did strike him), had

10—State v. Alley, 68 Mo. 124; Fortenberry v. State, 55 Miss. 403; Erwin v. State, 29 Ohio St. 186.

11—State v. Kinder, 184 Mo. 276, 83 S. W. 964.

12—Williams v. State, 120 Ga. 870, 48 S. E. 368 (370).

reasonable grounds to believe, and that he in good faith believed, he was then in danger of losing his life, or of suffering great bodily harm, at the hands of the defendant, G. C., then he had the right to use such force as appeared to him, in the exercise of a reasonable discretion, to be necessary to protect himself from such danger; and if the jury believe from the evidence the defendant used no more force than was necessary, or no more force than appeared to him, in the exercise of a reasonable discretion, to be necessary, to protect himself from the danger, then the law is for the defendant, and the jury should acquit him on the ground of self-defense.¹³

(c) If from the evidence you believe that defendant killed the said B., and further believe that, at the time of so doing, deceased made an attack on him which, from the manner and character of it, and the relative strength of the parties, and defendant's knowledge of the character and disposition of the deceased, caused him to have reasonable expectation or fear of death, . . . then you will acquit.¹⁴

(d) The court instructs the jury that the right to defend one's self against danger is a right which the law concedes and guaranties to all men. Therefore the defendant may have killed deceased, and be innocent of any offense against the law. If at the time he shot and killed deceased he had reasonable cause to apprehend on the part of deceased a design to do him (the defendant) some great personal injury, and there was reasonable cause for the defendant to apprehend immediate danger of such design being accomplished, and, to avert such apprehended danger to himself, defendant shot deceased, at the time he did so he had reasonable cause to believe, and did believe, it necessary for him to shoot deceased to protect himself from such apprehended danger, then the shooting was not felonious, but was justifiable, and you should acquit him. It is not necessary to this defense that the danger should have been actual or real, or that danger should have been impending and immediately about to fall on the defendant. All that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. But before you acquit on the ground of self-defense, as outlined above, you ought to believe defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause of apprehension have been established by the evidence, you are to determine; and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit him on the ground of self-defense, even though you may believe that defendant really thought he was in danger of great bodily harm or of losing his life.¹⁵

13—Ireland v. Commonwealth, 22 Ky. L. 478, 57 S. W. 616 (617); Utterback v. Commonwealth, 22 Ky. L. 1011, 59 S. W. 515 (516), 88 Am. St. 328.

14—"This charge is correct." *Messer v. State*, 43 Tex. Cr. App. 97, 63 S. W. 643 (645).

15—*State v. Moore*, 156 Mo. 204, 56 S. W. 883 (886).

(e) The court instructs the jury that the law is, if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self-defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant. It is sufficient if, in good faith, he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril.¹⁶

§ 3104. **Law of Necessity—Reasonable Cause to Apprehend Immediate Personal Injury.** (a) The court instructs the jury that the law of self-defense is emphatically the law of necessity, to which the party may have recourse under certain circumstances to prevent any reasonably apprehended great injury which he may have reasonable grounds to believe is about to fall upon him. If you believe that defendant had reasonable cause to apprehend a design on part of deceased to commit a felony upon defendant or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being carried out, and he cut deceased and killed him to prevent the accomplishment of such apprehended design, then the killing is justifiable, upon the ground of self-defense, and you should acquit him.¹⁷

(b) If the defendant did shoot and kill S. L., but, at the time the defendant shot said L. the defendant believed, and had reasonable grounds to believe, that he was then and there in danger of death, or of suffering some serious bodily harm at the hands of said L., and it was necessary, or to the defendant reasonably appeared to be necessary, to shoot said L. to avert the danger, or what appeared to defendant to be such danger, this was a shooting and killing in self-defense. And if the defendant did shoot and kill S. L., yet the jury should find the defendant not guilty unless the jury believe from the evidence, beyond a reasonable doubt, that said shooting was not done in self-defense.¹⁸

16—State v. Yokum, 11 S. D. 544, 79 N. W. 835 (837).

"This instruction is as favorable to the accused as the law authorizes, and covers every possible phase of the defense of justifiable homicide."

17—State v. Maupin, 196 Mo. 164, 93 S. W. 379 (383).

"The objection to this instruction is based solely upon the fact that the court used the phrase 'that the law of self-defense is emphatically the law of necessity.' Read together, it is apparent that the in-

struction is a correct statement of the law and contains no error which would justify the reversal of the judgment."

18—Stout v. Commonwealth, 29 Ky. L. 627, 94 S. W. 15.

In comment the court said: "This does not make his right of self-defense to rest alone upon the appearance of danger, thereby excluding the right of self-defense for real, although not apparent, danger. At best, this is a most unusual criticism. Generally, the defendant complains that the instruction of

(c) If you shall believe from the evidence that, at the time of the shooting the defendant had reasonable cause to apprehend, and did apprehend, a design on the part of W. to take his life or do him some great personal injury, and that there was reasonable cause for him to apprehend, and he did apprehend, immediate danger of such design being accomplished, and that he shot to avert such apprehended danger, and that, at the time of the shooting, he had reasonable cause to believe, and did believe, it was necessary for him to do so to protect himself from such apprehended danger, then he had a right to do such shooting; and you should acquit him on the ground of self-defense. It is not necessary that the defendant should have been in actual or real danger, nor that the danger, if any, should have been impending and about to fall. If he had reasonable cause to believe, and did believe, he was in immediate danger of being killed or receiving some great personal injury, he had a right to act upon such belief. Whether or not he did have reasonable cause to so believe, and whether or not he did so believe, are for you to determine from all the facts and circumstances appearing in evidence.¹⁹

(d) If the defendant had any reasonable cause to believe, from the words, acts, and conduct of the deceased, that he had a design to do him some great personal injury, and that such design was about to be accomplished, then defendant had a right to act on appearances, and to cut or stab deceased (if necessary) to prevent the accomplishment of such design; and in this connection the jury are further

the court excludes the right of self-defense for apparent danger, and it is not usually thought that juries need any special accentuation of real, as against apparent, danger. But, undoubtedly, it is true, that there may be actual danger without its being apparent, although this seldom occurs. An examination of the instruction complained of, however, shows that it recognizes both real and apparent danger, and in every way protects and safeguards the interests of the accused with reference to his right of self-defense. In the case of *Howard v. Commonwealth*, 24 Ky. L. 612, 69 S. W. 721, the following instruction was approved: 'Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, H., in M. County, before the finding of the indictment herein, shot and killed S. with a pistol loaded with powder and leaden ball, or other hard and explosive substance, still if they further believe from the evidence that at the time the defendant did the shooting, if

he did it, he believed and had reasonable grounds to believe that he was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to the defendant about to be inflicted on him by S., they will find the defendant not guilty, upon the grounds of self-defense and apparent necessity.' The self-defense instruction in the case at bar is less amenable to criticism for the reasons urged by appellant than is the one in the case cited."

19—*State v. Todd*, 194 Mo. 377, 92 S. W. 674.

In *State v. McCarver*, 194 Mo. 717, 92 S. W. 684, the same instruction, with the following sentence added, was approved:

"If you shall believe from the evidence that the defendant did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defense, although you may believe from the evidence that the defendant really thought he was in danger."

instructed that defendant was not required to nicely gauge the force used, but that he could see any means that appeared reasonably necessary under the circumstances. Neither is it necessary to this defense that his danger should have been real or actual, or that it should have been impending and about to fall; but if he had reasonable cause to believe, and did believe, these facts, and cut the deceased to prevent such expected harm, then you must acquit on the grounds of self-defense.²⁰

(e) If the jury believe from the evidence that at the time the defendant struck and killed S——, if he did so, he had reasonable grounds to believe, and did in good faith believe, that he was then in danger of losing his life or suffering great bodily harm at the hands of S., and there appeared to the accused, exercising a reasonable judgment at the time and under the circumstances, no other safe means of avoiding the impending real, or apparent danger, then in such case the accused had the right to strike in his necessary self-defense; and, if the killing of S. occurred under such circumstances, then the jury should acquit the defendant.²¹

(f) The court instructs the jury that the defendant in this case has taken the witness stand in his own behalf, and has admitted that he shot the deceased, J., but claims that such shooting was done in self-defense. And the court instructs the jury that the law on the subject of self-defense is that if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. And in this case, if the jury believe from the evidence that the defendant, W., was assaulted by the deceased in such a way as to induce in the defendant a reasonable and well-grounded belief that he was in actual danger of losing his life or of suffering great bodily harm, then he was justified in defending himself, even to the extent in taking the life of his assailant, although the danger was not real, but only apparent.²²

§ 3105. What is Sufficient and What is Insufficient to Show Self-Defense. (a) The law guaranties to every man the right of self-defense, and, if defendant killed J. in necessary defense of his person, he is not guilty. If, therefore, you find from the evidence that the defendant struck J. with some instrument which resulted in the death of said J., and at the time defendant struck deceased he had good reason to believe, and did believe, from the conduct, manner, or appearance of deceased, that the deceased was about to inflict upon him some great personal injury, and defendant struck him for the purpose of averting such apprehended injury, then you must acquit the defendant on the ground of self-defense. In such case it is not neces-

20—State v. Gordon, 191 Mo. 114, 89 S. W. 1025.

21—Austin v. Commonwealth, 28 Ky. L. 1087, 91 S. W. 267.

22—State v. Dotson, 26 Mont. 305, 67 Pac. 938 (940).

sary that the danger should have been real and about to fall. All that is necessary is that the defendant believed, and had good reason to believe, that such danger existed. On the other hand, it is not enough that the defendant believed in the existence of such danger, but he must have had good cause for so believing before he can be acquitted on the ground of self-defense. If, however, you find from the evidence, beyond a reasonable doubt, that defendant, prior to the killing of J., had formed a design to kill said J. or do him some great personal injury, and to carry out such design the defendant armed himself with a deadly weapon and sought said J., and provoked, brought on, or entered into a difficulty with said J., which resulted in his death, for the purpose of wreaking his vengeance or malice upon said J., or for the purpose of taking the life of said J. or doing him some great bodily harm, then there is no self-defense in the case, however, imminent the peril of defendant may have become in consequence of an attack made upon him by the deceased; and if, in such circumstances, you believe defendant killed said J., then he is guilty of murder in the first degree.²³

(b) The court charges the jury that if they believe from the evidence beyond a reasonable doubt, that John G. lay in wait for Bartow L. for the purpose of killing him, and did kill him, then the defendant cannot be excused or justified under his plea of self-defense, and you must convict him.²⁴

(c) If you find from the evidence that the defendant could have retired to a place of safety before S. reached his gun, then it was his duty to have done so, and he was not justified in shooting S. because he may have believed that S. was going after his gun. To justify the use of a deadly weapon by the defendant when an assault has been made upon him, the circumstances must appear to be such that there is no other reasonable means of escape from death or great bodily harm.²⁵

23—State v. Darling, 199 Mo. 163, 97 S. W. 592.

24—Gafford v. State, 125 Ala. 1, 28 So. 406 (407).

25—Delaney v. State, 14 Wyo. 1, 81 Pac. 792.

In comment the court said that in this "instruction the word 'retired' is used, and defendant claims that this is equivalent to the word 'retreated,' and that he was thereby prejudiced. We think, as applied to the law of self-defense, there is a difference in meaning of the two words. The latter always implies an act under pressure or force, a driving back; while the former may, and usually does, rest solely in volition. The use of the word 'escape' in the second part of the instruction was not proper; but in view of the evidence in this case

that the defendant did, after firing the first shot, retire to a less exposed place, we do not think this instruction misleading or prejudicial, especially when considered in connection with, and that its meaning was restricted to, a voluntary withdrawal from the assault by the instruction which was given at the request of the defendant that where one is assaulted in his own house under such circumstances as to induce the belief that he is in danger of losing his life or suffering great bodily harm, he is not obliged to retreat, but may pursue his adversary until he has freed himself from danger—an instruction which, in connection with the other instructions as a whole, embodied the law of the case."

(d) The court instructs the jury, that although they should find, from the evidence, that the said A. B. and the defendants got into a quarrel at the time in question, and that the said A. B. followed the defendant up in a threatening manner, still, the defendant would have no right to assault the said A. B. with a deadly weapon in a manner calculated to take life, or do great bodily injury, unless the circumstances were such as to lead a reasonable person to believe that such an assault was necessary, on the part of the said defendant, in self-defense, to prevent receiving a great bodily injury himself.²⁶

(e) If you believe from the evidence in this case that B., on the simple request of K. for an explanation of the trouble he (B.) had had with K.'s little brother, became angered, and assaulted K. with a stick, capable in his (B.'s) hand of inflicting great bodily harm upon K., and that the manner of such assault caused K. reasonably to believe that such injury was then about to be, or in progress of being, inflicted on him, and to prevent it he reasonably believed it was necessary to shoot him, then he had a right to draw his pistol in his own defense, and shoot B., even if it killed him; and, if the killing occurred under such circumstances, then the jury should acquit K.²⁷

(f) Although you may believe from the evidence that the defendant, C., assaulted and killed J., yet, if you shall further believe from the evidence that such killing was done in self-defense, as hereinafter defined, then you will acquit the defendant. On the question of self-defense you are instructed that if at the time the defendant, C., assaulted and killed J., he, the defendant, C., had reasonable cause to apprehend a design on the part of J. or his brother, B., to take his life, or to do him some great personal injury and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such apprehended danger, he shot J., and that at the time of shooting, he had reasonable cause to believe and did believe that it was necessary for him to shoot to protect himself from such apprehended danger, you will acquit the defendant on the ground of self-defense. It is not necessary that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that the defendant, C., had cause to believe and disbelieve these facts. On the other hand it is not enough that the defendant C. should have so believed. He must have had reasonable cause for so believing. Whether or not he had reasonable cause for so believing is for you to determine, under all the facts and circumstances given in evidence. If you shall believe from the evidence that the defendant C. did not have reasonable cause to so believe you cannot acquit him on the

26—*Judge v. State*, 53 Ala. 406; 27—*King v. State*, — Miss. —, 23 Jackson v. State, 6 Bax. (Tenn.) So. 766.
452; *Davis v. People*, 88 Ill. 350.

ground of self-defense, although you may believe that the defendant really thought he was in danger.²⁸

§ 3106. **Belief of Danger Must Be Reasonable.** (a) Unless such belief of danger is reasonable—that is, unless a reasonably cautious and prudent man would entertain the same belief from the same appearances—it would be no defense, even though it was an honest belief of danger.²⁹

(b) But unless such belief of danger is reasonable—that is, unless a reasonably prudent and cautious man would entertain the same belief from the same appearances—it will be no defense, even though it was an honest belief of danger. Men do not hold their lives at the mercy of the unreasoning fears of excessive caution of others; and if from such motives the defendant killed B. without real or apparent good reason for so doing, he cannot justify his act as being in self-defense.³⁰

(c) The important questions for the jury to determine are: (1) Was the defendant, at the time he fired the fatal shot, in present danger of death or serious bodily harm, or were the circumstances such as to afford him just and reasonable grounds for believing himself to be in such danger? (2) Was the shooting done in good faith to protect himself from such danger or threatened danger? If both these questions can be answered in the affirmative, the shooting would be justifiable. The defendant, under the law, would have the right to defend himself from the appearances of danger, the same and to the same extent as he would were the danger real. That the danger appeared real to the defendant is all the law requires, to justify him in acting; and, in passing upon the question as to the defendant's right to act, the matter must be viewed from the standpoint of the defendant.³¹

(d) The court charges the jury the apparent necessity which will excuse the taking of human life under the doctrine of self-defense in cases of homicide involves two considerations: First, the defendant himself must have entertained an honest belief in the existence of such necessity; and, second, the circumstances surrounding him must

28—State v. May, 172 Mo. 630, 72 S. W. 918 (920).

29—Olds v. State, 44 Fla. 452, 33 So. 296 (300), citing Lane v. State, 44 Fla. 105, 32 So. 896; Howard v. Commonwealth, 24 Ky. L. 612, 69 S. W. 721 (722); Thompson v. State, 55 Ga. 47; Wall v. State, 51 Ind. 453; State v. Stockton, 61 Mo. 382.

30—Morrison v. State, 42 Fla. 149, 28 So. 97 (99).

"The contention is that the charge erroneously requires the appearance of impending imminent danger to life or limb to be such as would actuate a reasonable cautious and prudent man, before they

can excuse the mortal blow. This contention is untenable and the propriety of the charge is fully sustained by the cases of Smith v. State, 25 Fla. 517, 6 So. 482; Pinder v. State, 27 Fla. 370, 8 So. 837, 26 Am. St. 75, and Padgett v. State, 40 Fla. 451, 24 So. 145."

31—Francis v. State, 44 Tex. Cr. App. 246, 70 S. W. 751 (752).

"The latter clause, taken in connection with the first clause, presents the law of reasonable appearances of danger, as we understand the authorities hold it should be done."

have been such as to impress a reasonable man, under the same state of facts, with the belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction on him (the defendant) of grievous bodily harm.³²

(e) There can be no successful setting up of self-defense by a defendant, unless the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from [dreadful] harm or severe calamity, felonious in its character.³³

(f) You are instructed as a matter of law that when a person is assaulted by another, and from the nature of the attack, viewed in the light of any previous threat or hostile declaration made by the assailant, and of his known character for violence, the party assaulted has reasonable grounds to believe and does believe that the assailant intends presently to take his life or do him some bodily injury, he will be justified in killing his assailant, providing the circumstances are such that such extreme measure would seem, to the comprehension of a reasonable man, necessary, in such situation, to prevent the threatened injury. Whether the appearances of danger are sufficient to convince a reasonable man in the situation of the accused that death or the infliction of great bodily harm upon the person of the accused, was intended by the deceased, is a question of fact for the jury.³⁴

(g) The court charges the jury that the apparent necessity which will excuse the taking of human life under the doctrine of self-defense, in cases of homicide, involves two considerations: First, the defendant himself must have entertained an honest belief in the existence of such necessity; and, second, the circumstances surrounding him must have been such as to impress a reasonable man, under the same state of facts, with the belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction on him (the defendant) of grievous bodily harm.³⁵

32—*Miller v. State*, 107 Ala. 40, 19 So. 37 (38). Following *Wilkins v. State*, 98 Ala. 1, 13 So. 312.

33—*State v. Carter*, 15 Wash. 121, 45 Pac. 745 (746).

"It would have been better had the court not used the word 'dreadful,' but we do not think that its use was prejudicial to the defendant. The court had already twice told the jury that the defendant might invoke the law of self-defense to protect his life or person from great 'bodily harm,' and this was emphatically stated to the jury at several subsequent points in the instructions."

34—*Housh v. State*, 43 Neb. 163, 61 N. W. 571 (572). Citing *State v. Harris*, 1 Jones (N. C.) 190—"a well-considered case;" *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72; *State v. Sterrett*, 68 Iowa 76, 25 N. W. 936; *State v. Archer*, 69 Iowa 420, 29 N. W. 333; *State v. Bohan*, 19 Kan. 28; *Davis v. People*, 88 Ill. 350; *Watson v. State*, 82 Ala. 10, 2 So. 455; *Penland's Case*, 19 Tex. App. 365; *Clifford v. State*, 58 Wis. 477, 17 N. W. 304; *Parrish v. State*, 14 Neb. 67, 15 N. W. 357, and *Vollmer v. State*, 24 Neb. 838, 40 N. W. 420.

35—*Bondurant v. State*, 125 Ala. 3, 27 So. 775 (777), citing *Wilkins v.*

(h) If you find that at the time the defendant shot and killed J. he had reasonable cause to believe and did believe that said J. was about to kill or inflict great personal injury upon him, and that he shot him to avert such death or injury, then he must be acquitted on the ground of self-defense. In such a case it is not necessary that the danger should have been real and impending, but it is sufficient if the defendant so believed, and had reasonable cause for so believing; but the fact that he believed himself to be in danger would not be sufficient unless he had reasonable cause for so believing.³⁶

§ 3107. **Acting on Reasonable Belief of Great Bodily Harm.** (a) If the jury find from the evidence that the conduct of N. H. was such as to reasonably lead the defendant to believe that N. H. was about to inflict some great bodily harm on his person and the jury further find that defendant was not at fault in bringing on the difficulty, and that the defendant could not have retreated without increasing his danger, and that defendant acting on such reasonable belief of great bodily harm fired a pistol at said N. H. and wounded him, then the jury should acquit the defendant.³⁷

(b) If you believe from the evidence that C., a short time before the shooting, had threatened violence to the defendant, of which the defendant was informed, and that he struck defendant a blow with his fist, and threw his hand behind him as if to draw a pistol, then the defendant had a perfect right to interpret this act of C.'s in the light of such threats; and if you believe, under these circumstances, that the defendant reasonably believed his life in peril, then he was perfectly justifiable in shooting C., even though you may believe that C. was wholly unarmed, and defendant was in no real danger at his hands.³⁸

(c) If you believe the prosecuting witness, B., knocked the defendant down with his fist or a quirt or a pistol, and then commenced to beat the defendant on the head or face with a pistol, or to cut him in the face with a knife, and the defendant had no other means of defending himself than to use his knife, and that he believed and had reason to believe that the prosecuting witness was about to kill him or do him some great bodily harm and he used his knife to protect himself, then you will find him not guilty.³⁹

(d) If the jury believe and find from the evidence before them that the defendant, C., shot the deceased with a pistol, and thereby killed him, as alleged in the indictment, and further believe from the

State, 98 Ala. 1, 13 So. 312; Miller v. State, 107 Ala. 40, 19 So. 37; Martin v. State, 77 Ala. 1.

36—State v. Goddard, 162 Mo. 198, 62 S. W. 697 (707).

37—Williams v. State, 102 Ala. 33, 15 So. 662 (663).

"The charge itself, as we construe it, asserts the law properly. It might have been better expressed, but as framed, it could not

mislead the jury. Holmes v. State, 100 Ala. 80, 14 So. 864; Keith v. State, 97 Ala. 32, 11 So. 914; Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. 96."

38—Godwin v. State, 73 Miss. 873, 19 So. 712, 55 Am. St. 573, approves the above as one of a series.

39—Territory v. Baca, 11 N. M. 559, 71 Pac. 460 (463).

evidence that at the time he did so, if he did, deceased, L., was then about to assault defendant with a knife, and if the jury further believe from the evidence that defendant believed, and had the right reasonably to believe, from the acts of deceased, if any, and from all other circumstances, viewed from defendant's standpoint at the time, that deceased was about to take his life or to inflict upon him some serious bodily injury, and so believing, if he did, he shot deceased one or more times with a pistol, and thereby killed deceased, believing, if he did, that it was a necessary act to prevent deceased from taking his life or from inflicting upon him some serious bodily injury, then it would be the duty of the jury to find defendant not guilty, upon the ground of self-defense.⁴⁰

(e) If the jury believe from the evidence in this case that at the time of the shooting defendant had a reasonable ground to believe, and did believe, that he was in danger of his life or great bodily harm at the hands of M., then he was justified in shooting him, and this is true even if defendant was in no danger.⁴¹

(f) Where one person assaults another, such person so assaulted has a lawful right to use a sufficient amount of force to resist such assault, and compel the person so assaulting to desist therefrom. But where one person is assaulted by another, it is not lawful for the person so assaulted to use a deadly weapon in his defense, unless such an assault was made with such a weapon, or in such a manner, as would cause a person of ordinary courage and prudence to believe that he was in imminent peril of losing his life, or of receiving great bodily injury.⁴²

(g) But to justify the taking of Y.'s life in self-defense, it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further combat, and to escape from Y., before the fatal blow was given, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that Y. intended to take his life, or to inflict on him a great bodily harm; and, further, that the defendant really acted under the influence of these fears, and not in a spirit of revenge.⁴³

40—Crockett v. State, — Tex. Cr. App. —, 77 S. W. 4 (6). Contrasting Phipps v. State, 34 Tex. Cr. R. 560, 31 S. W. 397; Graham v. State, 61 S. W. 714, 2 Tex. Ct. Rep. 236. Held that this "properly presented the case on the issue made by appellant. All of the state's witnesses either prove that there was no demonstration made by deceased at the time of the homicide, or, if any was made, they did not see it. Those witnesses who testified on behalf of appellant as to the difficulty, with one accord, state that deceased drew his knife and opened it, and made a demonstration as if to get up from his seat, and advanced

toward defendant with his open knife; and the court properly predicated the charge in this regard on the testimony of defendant's witnesses."

41—Johnson v. State, — Miss. —, 27 So. 880 (881).

42—State v. Sullivan, 51 Ia. 142, 50 N. W. 572 (573).

The court said that such an instruction need not call attention to former quarrels between the parties.

43—State v. Bone, 114 Iowa 537, 87 N. W. 507 (510), 89 Am. St. 332; State v. Warner, 100 Iowa 200, 69 N. W. 546; State v. Jones, 89 Iowa 183, 56 N. W. 427.

(h) In determining whether or not the defendant took the life of the deceased under circumstances to render the act justifiable, as hereinbefore explained, you will determine whether or not the circumstances as they appeared to him were such as to lead a reasonable man to believe that there was a design to kill him or do immediate bodily harm, coupled with immediate danger of such design being accomplished.⁴⁴

§ 3108. If Circumstances are Insufficient to Induce a Reasonable and Well-Founded Belief of Danger, Defendant is Guilty of Murder.

(a) The court instructs the jury that if a person kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-founded belief of danger to life or of great bodily harm in the mind of an ordinary courageous man, the law will justify the killing on the ground of self-defense.

(b) In this case the court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, W., on the night of ———, 19—, in the County of N., territory of Oklahoma, left the residence of one L., with a loaded rifle, and went to the place or near the place where J. then resided, and laid in waiting around said premises for the purpose of taking the life of the deceased, J., and that the said defendant shot the deceased while returning to his home, and while riding in the highway in a buggy, and that at the time he shot the deceased he had no reasonable and well-founded belief that his life was in danger, or that he would suffer some great bodily injury at the hands of the deceased, then, in that event, the defendant is guilty of murder as charged in the indictment, and the jury should so find.⁴⁵

§ 3109. Real or Apparent Danger. (a) If you find and believe from the evidence that defendant did shoot and kill B., and if you believe that at the time he so shot B., that B. had made, or was in the act of making, an attack upon the person of defendant, of such a character as to put defendant in danger of death or bodily injury, or if you believe it reasonably appeared to defendant that B. was about to, or had made an attack upon him, the defendant, of such a character as caused it reasonably to appear to defendant, viewed from his standpoint, that he was in danger of death or serious bodily injury, and that, to protect himself from such actual danger, defendant shot and killed B., you will find defendant not guilty.⁴⁶

(b) Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, G. W., shot and killed M., if they believe from the evidence that, when he did so, he had reasonable grounds to believe, and did believe, that deceased, or others in his party acting in concert with him, was then about to inflict upon

44—State v. Appleton, 70 Kan. 217, 78 Pac. 445.

45—State v. Dotson, 26 Mont. 305, 67 Pac. 938 (940).

46—Ham v. State, — Tex. Cr. App. —, 98 S. W. 875.

defendant, C. W., S. W., E. C., or any of them, death or great bodily harm, or it reasonably appeared to him that such was the case, and it further reasonably appeared to him that the only reasonably safe means of protecting himself, or them, against such danger, real or apparent, was to shoot the said M., or others in his party acting in concert with him, and the shooting and killing of the former was done under these circumstances, the same was excusable on the ground of apparent necessity in the defense of himself or associates named, and the jury should acquit the defendant.⁴⁷

(c) A person need not be in actual imminent peril of his life, or of great bodily harm, before he may slay his assailant; it is sufficient if, in good faith, he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril.⁴⁸

(d) If the jury believe, from the evidence, that the defendant was assaulted by the deceased in such a way as to induce in the defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or of suffering great bodily harm, then he was justified in defending himself, whether the danger was real or only apparent. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances and determine therefrom as to the actual state of things surrounding them; and, in such cases, if persons act from honest convictions, induced by reasonable evidence, they will not be held responsible, criminally, for a mistake as to the extent of the actual danger.⁴⁹

§ 3110. Danger Need Not Be Real—May Act upon Appearances.

(a) The court further instructs the jury that a person need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant; it is sufficient if, in good faith, he has a reasonable belief from the facts as they appeared at the time that he is in such imminent peril. The rule of law on the subject of self-defense is this: where a man in the lawful pursuit of his business is attacked, and when, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances will be excusable or justifiable homicide, although it should afterwards appear that no injury was intended and no real danger existed.⁵⁰

(b) The court instructs you that the defendant was justified in acting upon the circumstances as they appeared to him at the time. And in determining whether or not the defendant took the life of deceased under circumstances to render the act justifiable, as hereinbefore explained, you will determine whether or not the circumstances

47—Watkins v. Commonwealth, 29 Ky. 1273, 97 S. W. 740.

48—Murray v. Com., 79 Pa. St. 311; Roach v. People, 71 Ill. 25.

49—Parker v. State, 55 Miss. 414;

Bode v. State, 6 Tex. App. 424; Kennedy v. Com., 14 Bush. (Ky.) 340; West v. State, 59 Ind. 113.

50—Carle v. People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. 208.

as they appeared to him were such as to lead a reasonable man to believe that there was a design to kill him or to do immediate bodily harm, coupled with immediate danger of such design being accomplished.⁵¹

(c) If the defendant shot under a bona fide belief that his life was in danger, and had had, under all the circumstances, reasonable cause to believe he was in imminent danger at the moment the shot was fired, it would be immaterial whether there was such actual danger or not.⁵²

(d) The defendant was entitled to act upon appearances, and if the language and conduct of the deceased was such as to induce in the mind of a reasonable man, under all the circumstances then existing, and viewed from the standpoint of the defendant a fear that death or great bodily harm was about to be inflicted by deceased upon the defendant, it does not matter if such danger was real or only apparent; and if defendant acted in self-defense from real and honest convictions as to the character of the danger, induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger.⁵³

(e) It is not necessary to the right of self-defense that the danger should in fact exist. It may be only apparent, and not real. If it reasonably appears from the circumstances of the case that the danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have were the danger real. And, in determining whether there was reason to believe that danger did exist, the appearances must be

51—State v. Appleton, 70 Kan. 217, 78 Pac. 445; State v. Foster, 66 S. C. 469, 45 S. E. 2.

52—Kennedy v. State, 140 Ala. 1, 37 So. 90 (91).

"The above charge requested by defendant is not abstract. There was evidence tending to show that defendant was in imminent peril, to all appearances, and that he believed he was about to be shot by Y. when he shot Y. The charge is a correct statement of the law—that it is immaterial in such case whether the apparent danger was in fact real danger. It deals only with this question. It does not affirm that on the facts postulated, viz., the apparent danger, and defendant's belief in its reality, the defendant had a right to shoot, nor that he should be acquitted. It does not profess to deal with the other condition to defendant's right to kill, namely, his freedom from fault in bringing on the difficulty; nor, in our opinion, has it any tendency to mislead the jury to the

conclusion that if he was, or reasonably appeared to be, presently in danger of life or grievous bodily harm, and believed he was in such danger, he had the right to shoot, whether he was the aggressor or not. The charge does not deal with the subject of aggression, nor purport to state the law in that connection. It deals only with the character of danger as being real, or apparent only, which is one of the three elements of self-defense in ordinary cases, the other two being freedom from fault and inability to retreat, and one of the two in this case, as the defendant was within the curtilage of his castle, and hence under no duty to retreat. It has no bearing upon the inquiry of the aggression vel non, and we cannot believe it would have misled the jury to a pretermission of that inquiry. The court erred in refusing it."

53—People v. Thompson, 145 Cal. 717, 79 Pac. 435 (436).

viewed from the standpoint of the person who acted upon them, and from no other standpoint.⁵⁴

(f) In order to justify the defendant in taking the life of W. L., it is not necessary for the jury to find that said W. L. did have a pistol in his pocket at the time of said killing, or that the defendant was then and there in actual danger of losing his life or of receiving serious bodily injury at the hands of said L.; but it is sufficient in law to justify the defendant in taking the life of the said L. if, from the words and acts of the said L. at the time, the defendant had reasonable grounds to believe, and in good faith did believe, that the said L. was then and there about to make an unlawful, deadly assault upon him, the said defendant; and in determining how this may be you must view the facts and circumstances of this case as they then reasonably appeared to the defendant.⁵⁵

(g) The law does not require that a party must establish as a fact that the danger he apprehended was actual, and in fact existed; but, if the accused had reasonable grounds to apprehend a design that his life was in danger, or that there was reasonable ground to apprehend that great personal injury was to be done him, then he had a right to act upon such apprehension, though it may turn out that he was not in actual danger of life or great personal injury.⁵⁶

(h) In order to justify self-defense, it is not indispensable that there should exist actual and positive danger. A party who is assaulted in such a way as to infuse in him a well-grounded and reasonable belief that he is in danger of suffering great bodily harm will be justified in defending himself, although the danger be not real, but only apparent. In other words, he is justified in acting upon the facts as they appear to him at that time, and is not to be judged by the facts as they actually are.⁵⁷

§ 3111. Defendant May Safely Act on Appearances, Even Where They Turn Out to be False. (a) The court further instructs the jury that when a person has reasonable grounds to apprehend that some one is about to do him great bodily harm, and there are reasonable grounds for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and kill the assailant if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and that there was in fact no design to do him serious injury nor danger that it would be done.⁵⁸

(b) The court instructs the jury that if you find from the evidence that at the time the defendant first fired the shot that killed the deceased that it appeared to him acting as a reasonable person, with-

54—*Swanner v. State*, — Tex. Cr. App. —, 58 S. W. 72 (74).

55—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871.

56—*Frank v. State*, 94 Wis. 211, 68 N. W. 657 (659).

57—*Argabright v. State*, 62 Neb. 402, 87 N. W. 146 (147).

58—*State v. McCarver*, 194 Mo. 717, 92 S. W. 684.

out fault or carelessness on his part, that the danger at that time was so urgent and pressing that it was necessary to kill the deceased to save his own life or prevent his receiving great bodily injury, and that he acted in good faith, then you must acquit the defendant, though the jury may believe that it was not necessary for the defendant to have fired the shot.⁵⁹

(c) The court instructs the jury, that the law is: If a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible, criminally, if he acts in self-defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger.⁶⁰

(d) It is enough that there be an apparent danger—such an appearance as would induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety. Nor will he be held accountable though it should afterwards appear that the indications were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person—a person of ordinary caution, judgment and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearance.⁶¹

§ 3112. Self-Defense—Danger Must Seem Actual, Present and Urgent. (a) The taking of human life is a matter of such serious import that it cannot be justified by only slight danger. The danger which will justify the killing of a human being must be actual, present and urgent to the apprehension of the defendant. Anything less than this will not suffice to justify one human being in taking the life of another.⁶²

(b) The danger apprehended must be urgent and pressing, or apparently so, at the time of the killing.⁶³

59—Velvin v. State, 77 Ark. 97, 90 S. W. 851.

60—Steinmeyer v. People, 95 Ill. 383; Roach v. People, 77 Ill. 25; State v. Fraunburg, 40 Ia. 555; State v. Bohan, 19 Kan. 28; Crews v. People, 120 Ill. 317.

61—Carleton v. State, 43 Neb. 373, 61 N. W. 699 (710); State v. Burali, 27 Nev. 41, 71 Pac. 532 (535).

62—Ryan v. State, 115 Wis. 488, 92 N. W. 271 (276).

63—Williams v. State, 120 Ga. 870, 48 S. E. 368 (369).

The court said: "The doctrine of reasonable fear as a defense does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing," citing Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. 22.

(c) The court further tells you that it must appear to the defendant, without fault or carelessness on his part, that the danger was not only impending, but so pressing and urgent as to render the killing necessary to save his own life, or to prevent his receiving great bodily harm, and that the defendant really acted under this influence, and not in a spirit of revenge.⁶⁴

§ 3113. **Apprehension of Danger—Person Must Act Upon Honest Belief.** (a) A bare fear or a mere apprehension of a shooting to prevent which a killing was done will not justify. The circumstances must be such as to excite the reasonable fears in a rational mind, and the person shooting must act under the influence of such fears, and not in a spirit of revenge. Not only must the shooting be in defense, but it must be absolutely necessary to prevent the attack and injury on the person shooting, or the person shooting must really and honestly believe at the time, and in good faith act upon such belief, and not in a spirit of revenge.⁶⁵

(b) No man can take another man's life, and justify it before a jury on the ground of self-defense, unless he is prepared to show that there was a necessity to take that man's life; and, in order to show that, it must appear that the danger to his own life or of receiving great bodily harm from the hands of the deceased was then and there hanging over him and about to fall upon him, and that he could not prevent it except by slaying his adversary.

(c) In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing of the other person was necessary.⁶⁶

(d) The court instructs the jury that by the language, "lawful defense of the person" is meant what we sometimes term "self-defense." The right of self-defense is founded upon the natural right of a man to protect himself against the unlawful assault upon him by another. This defense having been made in this case, the jury should weigh each fact and circumstance that is offered as justifiable grounds in connection with all the other testimony in the case. Mere apprehension that a person designs to kill another or to commit some great bodily harm upon him is not sufficient to justify such other in first making an attack and committing the act complained of in the indictment herein; and to perform such act, when the excuse therefor is mere apprehension, would not be sufficient to justify the act as one having been committed in the lawful defense of the person. In a case where a person attacks another, or attempts to execute a design upon the life of such other, and is in an apparent situation to do so, thereby creating a reasonable belief that such design is about to be accomplished, then the person so threatened may resist

64—*Lee v. State*, 72 Ark. 436, 81 S. W. 385 (1886); *Henry v. People*, 198 Ill. 162 (1898), 65 N. E. 120.

65—*Frazier v. State*, 112 Ga. 868, 38 S. E. 349.

66—*Williams v. U. S.*, — Ind. Ter. —, 88 S. W. 334 (1904).

and use all necessary force to prevent the accomplishment of such design even to the extent of taking life, and it is justifiable. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances and to determine therefrom the exact state of things surrounding them, and in such case, if a person acts from an honest conviction, induced by reasonable evidence he will not be held criminally liable for a mistake as to the extent of actual danger. If the jury believe from the evidence that at the time the defendant is alleged to have shot the deceased the circumstances surrounding him were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the deceased some great bodily harm, and that the defendant in doing what he did, was acting solely from the instincts of self-preservation, then he is not guilty, and you should so find.⁶⁷

(e) If the jury believe from the evidence that at the time of the shooting in question the said O. M. made an attack upon the defendant with a chair under such circumstances as to create in the mind of a reasonably and ordinarily prudent man a belief that he was in danger of being killed or of receiving great bodily harm immediately, and if the jury further believe from the evidence that the defendant at the time did honestly believe that he was in imminent danger of receiving great bodily harm, and in good faith shot to protect himself therefrom, and if you further believe that the defendant, acting in good faith, did not fire any more shots than he had a reasonable right to believe, under the circumstances in which he was placed, was necessary to protect himself or his wife from death or great bodily harm, then you should find the defendant not guilty.⁶⁸

(f) If the jury find from the evidence that at the time the defendant is alleged to have shot said A. B. the circumstances surrounding the defendant were such as, in sound reason, would justify or induce in his mind an honest belief that he was in danger of receiving from the said A. B. great bodily harm, and that the defendant, in doing what he then did, was acting from the instinct of self-preservation, then he is not guilty, although there may in fact have been no real or actual danger.⁶⁹

(g) You are instructed that before the defendant can avail himself of the plea of self-defense and justify himself of the killing charged against him, it must appear from all the evidence that there

67—*Robinson v. Territory*, 16 Okla. 241, 85 Pac. 451 (455, 456).

68—*State v. Buffington*, 71 Kan. 804, 81 Pac. 465 (466).

69—*Coil v. State*, 62 Neb. 15, 86 N. W. 925 (928).

The court said that "the phrase 'sound reason' is equivalent to saying that the reasoning powers must be exercised honestly and in good

faith, leading to a conviction of the threatened danger, which is actual and substantial, before a person will be excused or justified for a homicide on the ground of self-defense," citing *Vollmer v. State*, 24 Neb. 838, 40 N. W. 420; *Darling v. Williams*, 35 Ohio St. 59; *Johnson v. State*, 79 Miss. 42, 30 So. 39 (40).

was a reasonable ground on the part of the defendant to apprehend a design on the part of the deceased, M. C., or those who defendant claims were with him to do him, the defendant, great personal injury, and that at the time there was imminent danger of such design being accomplished, and that the said defendant then and there honestly believed that he was in imminent danger of then and there receiving from the deceased and those who defendant claims were with said deceased some great personal injury; and that the said deceased, M. C., and those who defendant claims were with him were in a position and had the ability then and there to do the defendant great personal injury, and that the facts and circumstances were at the time sufficient to convince the defendant of an honest belief that he was then in imminent danger of receiving some great personal injury from the deceased, C., or those who defendant claims were with C.⁷⁰

§ 3114. Defendant Need Not Believe Death of Assailant Necessary. The court instructs the jury that the law of self-defense gives the party assailed the right to repel force by force; and he need not believe that his safety requires him to kill his adversary, in order to give him the right to make use of force for that purpose. When his life is in danger, or he is in danger of great bodily harm, or when, from the acts of the assailant, he believes and has reasonable ground to believe, that he is in danger of losing life or receiving great bodily harm from his adversary, the right to defend himself from such danger or apprehended danger may be exercised by him, and he may use it to any extent which is reasonably necessary. He need not believe that he can only defend himself by taking the life of his assailant. If the death of his assailant results from the reasonable defense of himself, he is excusable whether he intended that consequence or not, or whether he believed such result was necessary or not.⁷¹

§ 3115. Deceased, Acting Together with Other Persons, Assaulting Defendant. (a) If you believe from the evidence that at the time the wound was inflicted from which the deceased subsequently died, the deceased, whether alone or acting together with other persons, assaulted the defendant, and that it then and there reasonably appeared to the defendant that he was in imminent danger of being wounded or receiving great personal injury at the hands of the deceased, M. C., and other persons acting in concert with him, and that the defendant fired the fatal shot in the protection of his person, while he was under the impression that he was in imminent danger of being murdered, or of receiving some serious personal injury to himself, then if you so believe, you will find the defendant not guilty.⁷²

70—Territory v. Gonzales, 11 N. M. 301, 68 Pac. 925 (930).

"This instruction is very full and presents the law substantially within the doctrine laid down in the

case of Territory v. Baker, 1 Ohio St. 66."

71—Lyons v. People, 137 Ill. 602 (620), 27 N. E. 677.

72—Territory v. Gonzales, 11 N. M. 301, 68 Pac. 925 (931).

(b) If you believe from the evidence that at the time of the stabbing of the deceased the defendant had good cause to believe and did believe, under all the facts and circumstances in evidence, that deceased, alone or along with others, was about to kill defendant, or do him great bodily harm, and that defendant had good cause to believe and did believe that it was necessary to stab the deceased in order to prevent such apprehended danger, then the jury should acquit the defendant on the ground of self-defense.⁷³

§ 3116. Deceased Assaulting Defendant with Deadly Weapon. (a) The court instructs the jury that if they believe from the evidence that M. assaulted the defendant with a deadly weapon, to-wit, a stick, the defendant had the right, under the law of the land, to repel such an assault by the use of a deadly weapon; and if, in repelling such assault, the defendant wounded the deceased by cutting him with a knife, from which deceased died, then such killing was justifiable, and the jury should find the defendant not guilty.

(b) The court instructs the jury that they are not called upon to determine in this case which of the parties was the aggressor in the fight between J. L. and the defendant. But the jury is to determine whether or not at the time the defendant cut M. the said M. was in the act of committing an assault upon the defendant with a deadly weapon; and if the jury believe that, at the time B. cut deceased, the deceased was in the act of so assaulting the defendant, then such cutting was justifiable, and the jury should find the defendant not guilty, or, if the jury entertain a reasonable doubt as to whether the cutting was justifiable or not, they should resolve such doubt in favor of the defendant, and acquit him.

(c) The court instructs the jury that if they believe from the evidence that L. began the assault upon the defendant with his fist, and if they further believe from the evidence that L. was thus assaulting defendant, M. began beating defendant with a deadly weapon, then defendant had a right to defend himself against such attacks, even to the point of taking the life of either or both of the said M. or L., if actually or apparently necessary to save his own life or limb; and, if the jury entertain a reasonable doubt as to this, they should resolve such doubt in favor of the defendant, and acquit him.

(d) Even though the jury should believe from the evidence beyond a reasonable doubt that the defendant was the aggressor in the difficulty between himself and L., and even though the jury should further believe from the evidence beyond a reasonable doubt that M. began beating the defendant with a deadly weapon to prevent the defendant from committing a felony upon L., still the said M. had no right to continue beating defendant after said defendant had ceased such attack upon said L.; and, if the jury believe from the

73—State v. Price, 186 Mo. 140, 84 the case of State v. Adler, 146 Mo. S. W. 920 (921). 19, 47 S. W. 794, and the criticism "This instruction is in line with of it without merit."

evidence that M. did so continue to beat the defendant with a deadly weapon, then the defendant had a right to defend himself against such continued attack, even to the point of taking the life of said M., if actually or apparently necessary to save himself from great bodily harm, or, if the jury are in doubt as to this, they should acquit.⁷⁴

§ 3117. **Deceased Attempting or Purporting to Draw Weapon.** (a) If you believe from the evidence that the defendant did not start or provoke the quarrel with the deceased, but that the deceased began quarreling with the defendant without just cause; that deceased cursed defendant, applying to him a foul epithet, and threatened to kill defendant; that the deceased had a revolver in his pocket; that he arose from his seat and put his right hand to his right pants pocket in a threatening manner, and attempted to draw his pistol for the purpose of shooting defendant—then and in that case the defendant had a lawful right to defend himself, even to the extent of taking the life of the deceased.⁷⁵

(b) The court instructs the jury that if they believe from the evidence that F. and M. were enemies, and that when they met at the time of the homicide, M., in a loud and angry tone of voice called the defendant a “damned liar,” or a “God damned liar,” and immediately threw his hand behind him in a threatening and menacing manner, as though he intended to draw a pistol, and that his acts and conduct were such as to engender in the mind of F., and did engender in the mind of F., a reasonable belief that he (M.) was armed with a pistol, and was attempting to draw it to shoot F., when F. was making no assault on him, and that F. shot him under such circumstances, then F. is justifiable, even if you should believe M. was unarmed at the time.⁷⁶

§ 3118. **Apparent Danger—Deceased Shooting First.** If you be-

74—Boykin v. State, 86 Miss. 481, 38 So. 725.

The trial court modified the first instruction by adding after the word “stick” the following: “And not in necessary self-defense.”

The trial court modified the second instruction by adding after the word “weapon” the words “and not in his necessary self-defense.”

The trial court modified the third instruction by adding after the word “weapon” the following: “At a time when defendant was not cutting Jackson with his knife.”

The supreme court said:

“We deem the modifications made by the court of instructions Nos. 1, 3, 19 and 20 for appellant erroneous. We think the charges as framed and asked by appellant’s counsel correctly announced the principles of law as applied to the competent, pertinent evidence, and his theory of the case; and, as held in Lamar

v. State, 64 Miss. 428, 1 So. 354, and other cases, this was a right which the law guaranteed him, and the modifying, restrictive clauses inserted by the court, by injecting other propositions into them, might and probably did serve to confuse and mislead the minds of the jury, and to deprive the defendant of a clean, clear-cut enunciation of the law as applicable to his theory of self-defense. As this case might be reversed, we will only add this observation to this branch of it: That, where the prosecution desires a modification of the principles of law as set forth in defendant’s instructions, the better practice is for it to ask the court for separate instructions. Mask v. State, 36 Miss. 77; Archer v. Sinclair, 49 Miss. 343.”

75—Williams v. U. S., 4 Ind. Ter. 269, 69 S. W. 871.

76—Fore v. State, 75 Miss. 727, 23 So. 710 (711).

lieve from the evidence that the deceased shot at the defendant first with a pistol; and if you further believe from the evidence that this caused the defendant to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant shot the deceased, then I charge you, that the defendant had the right to continue to shoot him, viewed from his standpoint, at the time, that danger existed to his life or to his person; that is, that there was danger of either losing his life or to his person—that is, that there was danger of either losing his life or suffering serious bodily injury—at the hands of the deceased. It was not necessary that danger did in fact exist to the life or person of defendant, provided you believe from all the evidence that it reasonably appeared to defendant, viewed from his standpoint, at the time, that such danger existed to his life or person, if you find the above facts are true, then you will find the defendant not guilty, on the ground of self-defense.⁷⁷

§ 3119. Must Employ All Reasonable Means to Avert the Necessity of Killing. (a) As a matter of law, no one has a right to kill another, even in self-defense, unless such killing is apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing.⁷⁸

(b) The law enjoins upon a defendant who pleads self-defense to show that he had no other probable means of avoiding the danger to

77—Wallace v. State, — Tex. Cr. App. —, 97 S. W. 471.

"The objection is to that portion of the charge which reads: 'If you find the above facts are true.' The insistence is that, to entitle the defendant to a verdict of not guilty upon the ground of self-defense, it was not necessary that the jury should find the facts enumerated in said charge to be true. We do not believe that said charge, when considered in connection with the entire charge of the court, injured or was calculated to injure the rights of appellant. On the other hand, the court tells the jury that if they believe that defendant thought his life was in danger, or his person in danger of serious bodily injury, and he acted under such appearances, then they should find him not guilty, regardless of whether he was injured or not. The court properly gave a charge of reasonable doubt to the jury on all phases of the case."

In Harkness v. State, 129 Ala. 71,

30 So. 73 (74), the court held it proper to instruct the jury that for the defendant "to be in position to invoke the doctrine of self-defense, the defendant must have been without fault in bringing on the fatal encounter. McLeroy v. State, 120 Ala. 274, 25 So. 247. Besides being himself free from fault, as above stated, the defendant to be entitled to acquittal on the ground of self-defense, must have found a necessity, real or apparent, for firing the fatal shot, as a means of averting grievous bodily harm to himself; and also he must have retreated, if by retreat he could have avoided killing the deceased without materially increasing his own danger. Evans v. State, 120 Ala. 268, 25 So. 175; Henson v. State, 120 Ala. 316, 25 So. 23; Teague v. State, 120 Ala. 309, 25 So. 209; Hendricks v. State, 122 Ala. 42, 26 So. 242; Naugher v. State, 105 Ala. 29, 17 So. 24; Howard v. State, 110 Ala. 92, 20 So. 365."

78—Smith v. Territory, 11 Okla. 669, 69 Pac. 805 (808).

himself, of losing his own life, or of sustaining serious bodily harm than to act as he did in this instance. Because the defendant who invokes that plea must not only have believed that his life was in danger, or that he was in danger of sustaining some serious bodily harm, but the facts and circumstances under which he formed that belief, or under which he came to that conclusion, must have been such as to cause you to believe that a man of ordinary firmness and courage, situated as he was at that time, would be justified in so believing.⁷⁹

(c) You are instructed that, in order to justify the defendant taking the life of deceased in self-defense, he must have employed all the means in his power consistent with his safety to have averted his danger and avoided the necessity of the killing; and if you find that he could, by retreating, have averted the danger and avoided the necessity of the killing, it was his duty to do so.⁸⁰

(d) The taking of human life is a matter of such deep significance that it cannot be justified by some slight appearance of danger, and, if the defendant was in fault in creating the situation of danger, his right of self-defense does not arise until he shall have done all that reasonably could be done by him to avoid the necessity of killing his assailant in order to protect himself.⁸¹

§ 3120. Resistance Must Be in Proportion to the Danger Which Is Apprehended—Honestly Believed He Was in Danger of Life or Great Bodily Harm—Reasonable Doubt. (a) Now, gentlemen of the jury, it is for you to say whether this respondent was assaulted in the manner claimed. The law gives to every person the right to protect him-

79—State v. Hutto, 66 S. C. 449, 45 S. E. 13 (14); State v. Fontenot, 50 La. Ann. 537, 23 So. 634 (635), 69 Am. St. 455.

80—Bishop v. State, 73 Ark. 568, 84 S. W. 707.

The court said that the rule that defendant when attacked "need not retreat, but may stand his ground, and if need be, kill his adversary, and the reasons given therefor are limited to cases where a murderous assault is made by deceased upon the defendant, and where the defendant is free from fault in bringing on the difficulty and does not apply in cases where the defendant was the aggressor or provoked the difficulty, nor in cases where the assault was the result of a sudden quarrel in the heat of passion. Carpenter v. State, 62 Ark. 309, 36 S. W. 906; McPherson v. State, 29 Ark. 225; Paltmore v. State, 29 Ark. 248; Fitzpatrick v. State, 37 Ark. 238; Dolan v. State, 40 Ark. 454; Duncan v. State, 49 Ark. 543, 6 S. W. 164."

81—Frank v. State, 94 Wis. 211, 68 N. W. 657 (659).

The court said: "Exception is

taken to the last sentence on the ground that F. was not bound to retreat at all, nor to endeavor to escape, but was excusable in doing as he did. This court has, perhaps, gone as far as any court in excusing a person from fleeing from his assailant. Bird v. State, 77 Wis. 281-283, 45 N. W. 1126; Perkins v. State, 78 Wis. 555-557, 47 N. W. 827. The difficulty with the contention of counsel on this point is that it has no application to the evidence in the case. P. had no weapon. There is no evidence that he entered the house with any intent to injure F. or any one; nor that he knew F. was in the house when he entered. The moment he entered, F. was in the act of raising his gun toward him, and cocking it. He at once disclaimed all intent to injure, but F. did not desist. Thereby F. became the assailant, and what P. said and did was in self-defense. A similar contention was expressly overruled in Clifford v. State, 58 Wis. 491, 17 N. W. 304. See also Housk v. State, 43 Neb. 163, 61 N. W. 573."

self from unlawful assault. Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended, it is not every assault that would justify a person in using a deadly weapon. If, however, the person assailed honestly believes his life in danger or that he may suffer serious bodily harm, he has the right to resist, even to taking the life of his assailant. The person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time. The defense of self-defense necessarily assumes an assault. There can be no self-defense by a person until he is assaulted by another. It is for you to say, from all the evidence in this cause, whether the respondent honestly believed he was in danger of losing his life, or in danger of great bodily harm, and that it was necessary for him to fire this fatal shot in order to save himself from such apparent and threatened danger. Although you may not be satisfied that the respondent in committing the act, acted in self-defense, still, if the testimony in this case creates in your mind a reasonable doubt as to whether or not the act was done in self-defense, the respondent is entitled to the benefit of the doubt, and it will be your duty to acquit him.⁸²

(b) A party in the exercise of self-defense cannot use more force than appears to be necessary for his own protection, and if he exceeds the force apparently necessary to his own defense or safety he is guilty of either murder or manslaughter, as defined by these instructions, if the homicide results from his acts.⁸³

§ 3121. No More Force to Be Used Than the Circumstances Reasonably Indicate to be Necessary. (a) Every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary.⁸⁴

(b) If you find from the evidence in this case that P. killed the deceased in self-defense, honestly believing his own life to be in jeopardy, or that he was in imminent danger of receiving serious bodily injury at the hands of the deceased, and that he used no more force than was necessary to protect himself, then it would be justifiable homicide; and under such circumstances, of course, the defendant would not be guilty.⁸⁵

(c) If the jury believe, from the evidence, that the defendant procured the stick with which the blow in question was struck, only for the purpose of self-defense, and did not intend to use it for any

82—"This was a correct statement of the law." *People v. Hull*, 86 Mich. 449, 49 N. W. 288 (291).

83—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871.

84—*Swanner v. State*, — Tex. Cr. App. —, 58 S. W. 72 (74).

85—This is a correct statement of

the law. *People v. Piper*, 112 Mich. 644, 71 N. W. 174 (175). Compare *Housh v. State*, 43 Neb. 163, 61 N. W. 571 (572); *State v. Harper*, 149 Mo. 514, 51 S. W. 89 (91), as to the propriety of using the word necessary without qualification. Also *Brandon v. State*, 75 Miss. 904, 23 So. 517.

other purpose, and that the deceased was armed with a deadly weapon, and was turning to attack the defendant, and that the defendant was aware of these facts and knew or had good ground to believe and did believe when he struck, etc., that that was the only mode by which he could avoid great bodily harm to himself, and that he used no more force than was reasonably necessary for his own defense, then his act was not unlawful, and the jury should find the defendant not guilty.⁸⁶

§ 3122. **Judging Defendant from His Standpoint.** (a) You are instructed that, in judging the defendant, it must be from his standpoint, and as it reasonably appeared to him, judged by all the facts and circumstances in evidence, and it would make no difference if the danger was real or only apparent, if danger reasonably appeared to defendant; and, if assaulted, the defendant would not be bound to retreat to avoid shooting said J., and he would have the right to act so long as the danger was apparent to him.⁸⁷

(b) In determining whether the circumstances existed that would justify the defendant in inflicting the wound upon M. C. which subsequently resulted in his death, you are instructed that you must determine that fact from the condition and circumstances that surrounded the defendant at the time and place of the affray, as they reasonably appeared to him at the time; that is by placing yourself in your own minds, as far as may be possible from the evidence, under the same circumstances in which the defendant was placed at the time

86—*Marts v. State*, 26 Ohio St. 162.

87—*Cooper v. State*, — Tex. Cr. App. —, 89 S. W. 1068.

"This charge in regard to self-defense is criticised because it confines the jury to the consideration of an actual assault and one of real danger, instead of a threatened assault and apparent danger. Upon another trial, the court should bear this in mind, and charge the jury in accordance with the testimony relied upon to prove that theory of the case. Suffice it to say that a party who has the right of self-defense from the standpoint of apparent danger, or any other danger that threatens his life or serious bodily injury to his person, is not bound to retreat, and he can stand his ground, even though an assault has not been made upon him. Under our law, if anybody is required to retreat, it is not the man acting in self-defense. It is the attacking party, it is the man bringing on the difficulty that is responsible. As between the attacking party and the attacked, it is the duty of the party attacking to desist and retreat. It was the

other way at common law. There the man in the right was bound to retreat to the wall. That is not so with us. The man whose rights are attacked can stand his ground, has the legal right to do so; and the attacking party, or the one in the wrong, must do the retreating, if any is required. Ours is the correct rule; the English is the incorrect rule, when applied to our laws."

In *State v. McCarver*, 194 Mo. 717, 92 S. W. 684, the court instructed the jury that in passing upon the question whether the defendant had reasonable grounds for believing that there was imminent danger that the deceased was about to kill him or do him some great bodily harm, the jury should determine the question from the standpoint of the defendant at the time he acted, and under his surroundings at that particular instant of time, and the jury must also, in passing upon that question, take into consideration the threats, if any, made by the deceased against the defendant.

of the shooting, taking into consideration as far as the evidence may enable you to do so, the temperament of the defendant and his moral and physical courage, or the lack thereof.⁸⁸

(c) The accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether the necessity for taking life existed must be determined from the situation of the accused at the time, and it is the province and duty of the jury to determine that question.⁸⁹

(d) As to the imminency of the danger which threatened the prisoner, and the necessity of the killing in the first instance, the prisoner, C., was the judge; but he acted at his peril, as the jury must pass upon his action in the premises, viewing said action from the prisoner's standpoint at the time of the killing; and if the jury believe from all the facts and circumstances in the case that the prisoner, C., had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life or to protect him from great bodily harm, he was excusable for using a deadly weapon in his defense; otherwise he was not.⁹⁰

(e) If you believe that the said A. B., by his acts and conduct, or by his words coupled with his acts, reasonably induced defendant that he intended and was about to attack defendant with a deadly weapon, or did any act which reasonably indicated to defendant that he, said A. B., intended and was about to attack defendant with a deadly weapon, which would probably cause the death or serious bodily injury of defendant; and if the acts of said A. B., or his words coupled with his acts, if any, reasonably created in the mind of defendant at the time, viewed from the defendant's standpoint, a reasonable expectation or fear of death or some serious bodily injury; and you further believe that defendant, then and there moved and actuated by such reasonable expectation or fear of death or serious bodily injury, if any, shot the said A. B.,—then, under such circumstances, it would be in his lawful self-defense, and if you so believe you will acquit defendant.⁹¹

88—*Territory v. Gonzales*, 11 New Mex. 301, 68 Pac. 925 (931).

89—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (823).

90—*State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244 (245).

The same instruction was approved in *State v. Clark*, 51 W. Va. 457, 41 S. E. 204 (209).

91—*Ditmer v. State*, 45 Tex. Cr. App. 103, 74 S. W. 34 (35).

"The charge of the court in question is not restrictive, as in the cases of *Lynch v. State*, 24 Tex. App. 350 (364), 6 S. W. 190, 5 Am. St. 888; *Bush v. State*, 40 Tex. Cr. App. 540, 51 S. W. 238. And see *Harrington v. State*, 2 Tex. Ct. Rep. 809, 63 S. W. 562. Under these authorities we understand the law

to be that, if the danger is imminent and pressing, defendant had the right of self-defense from such danger; but if it is a future contemplated danger and contingency, a remote possibility or probability, defendant has no right, under such circumstances, to shoot in his supposed self-defense. According to appellant's evidence, the injured party said to defendant, 'You G—d d—d son of a b—, I'll kill you,' and immediately started to the house, about 60 feet away, to get a gun, and defendant then shot the injured party. Now, it will be seen that the above quoted charge tells the jury that, if defendant believed at the time he shot the injured party he

(f) That, in deciding upon the guilt or innocence of defendant H., they should determine what an ordinary and reasonable man might have fairly inferred from all the facts and circumstances by which the evidence shows that the defendant was at the time surrounded (and, in so doing must not try him in the light of subsequent developments, nor must they require of him the same cool judgement that the jury can now bring to bear upon the occurrence. The jury must put themselves, as far as possible, in the defendant H.'s place, and then judge whether the danger was apparent, or should have been considered apparent by a man of ordinary caution and prudence in like condition). The danger to life, or great bodily harm, need not have been real, present, or urgent at the very moment of the killing, but only apparently so. The question is, was the danger apparently so imminent and present at the time of the killing that a reasonable man and prudent man, situated as H. was, would believe it was necessary to kill in order to avoid loss of life, or to prevent great bodily harm; and if, from all the evidence in the case, the jury have a reasonable doubt whether such was the case when the defendant H. killed the deceased, then they must find the defendant not guilty.⁹²

§ 3123. Possession by Deceased of a Deadly Weapon—Presumption.

(a) If the deceased was armed at the time he was killed, and that he made an attack upon defendant with a weapon, and if the weapon used or attempted to be used by deceased in making said attack, if any, and the manner of its use or attempted use were such as were reasonably calculated to produce death or serious bodily injury, then and in that event the law presumes it was the intention of the deceased to kill defendant or inflict serious bodily injury upon him.⁹³

(b) If the jury find and believe from the evidence that, at the time defendant fired the shot, that the prosecuting witness, S. H., was making a violent attack upon him under circumstances which reasonably indicated her intention to murder him or inflict serious bodily injury upon him, and the weapon used by her, and the manner of its use, were such as was reasonably calculated to produce either of those results, then the law would presume that the said S. H. intended to kill him or inflict serious bodily injury upon him; and in such case, if defendant so acted, he would be justifiable.⁹⁴

was in danger of losing his life or of serious bodily injury at the hands of the injured party, to acquit defendant, unless you further believe from the evidence that defendant provoked the difficulty. This charge certainly is as liberal as the facts of the case authorize."

⁹²—Hood v. State, — Miss. —, 27 So. 643 (644).

⁹³—Teel v. State, — Tex. Cr. App. —, 73 S. W. 11 (12); Curtis v.

State, — Tex. Cr. App. —, 59 S. W. 263 (264).

⁹⁴—Hall v. State, 43 Tex. Cr. App. 479, 66 S. W. 783 (784), citing Kendall v. State, 8 Tex. App. 569; Jones v. State, 17 Tex. App. 612; Cochran v. State, 28 Tex. App. 422, 13 S. W. 651, 8 Am. Cr. Rep. 496.

The court said: "This charge should have been given. Article 676, Pen. Code, provides: 'When the homicide takes place to prevent murder, maiming, disfiguring

§ 3124. Self-Defense—Blow Need Not Actually Have Been Struck—Attack with Knife. (a) The court further instructs you that a man need not wait until the blow is actually struck before he has a right to act upon appearances and defend himself. It is enough if he honestly believes, and has reason to believe, from the attitude, conduct and manner of the deceased, that he was in danger of his life, or of great bodily harm.⁹⁵

(b) If J. W. first attacked defendant with an open knife as if to cut defendant, and if thereupon defendant cut said W. he would be guilty of no offense.⁹⁶

§ 3125. Killing in Revenge After Repelling Assault. The jury are instructed that while a person has the right, when assaulted by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, to resist the attack by using such force as is apparently necessary to defend himself, yet if, after he has secured himself from danger, he takes the life of his assailant in a spirit of revenge, or for some unlawful purpose, he cannot claim exemption from punishment on the ground of self-defense.⁹⁷

§ 3126. Defendant Provoking Affray. (a) Therefore, gentlemen, as a summing up of this topic of self-defense, I charge you that if you find beyond a reasonable doubt that J. prepared for, or provoked, the affray, he cannot successfully set up the plea of self-defense.⁹⁸

(b) The law of self-defense is emphatically the law of necessity,

or castration, if the weapons or means used by the party attempting or committing such murder, maim, disfiguring or castration, are such as would have been calculated to produce that result, it is to be presumed the person using them designed to inflict the injury.' It will be seen from this article that when the homicide is committed to prevent murder, and the weapon or means used by the aggressor was calculated to effect that purpose, the Code makes it an absolute presumption of law that his design was to inflict the injury indicated. This legal presumption is imperative with the jury as well as with the court, and, when applicable, must be given in charge to the jury.'

95—State v. Stockhammer, 34 Wash. 262, 75 Pac. 810 (811).

96—Approved as supplemented with other instructions in *Moody v. State*, — Tex. Cr. App. —, 59 S. W. 894.

97—*Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (710).

98—*State v. Jones*, — N. J. L. —, 60 Atl. 396 (398).

"It is contended that by this

instruction the jury were told, in effect, that if they should conclude from the evidence that the defendant had prepared for the affray, but had subsequently abandoned his intention, and was in nowise responsible for D.'s attack upon him, they must nevertheless find that he was not justified in protecting himself. It may be that, standing alone, the instruction is susceptible to this criticism; but when the portion of the charge from which it is taken is examined, this criticism falls. The instruction was rested upon a supposed finding by the jury 'that after the quarrel which had taken place between J. and D. in the morning' (it appeared in the case that there had been a quarrel between these two some hours before the homicide) 'each armed himself, one with the scissors blade and the other with a razor, and, after they got in the cell, hot words led to a mutual fight—a fight for which both were ready, and into which both entered.' On such a finding of fact the legal rule charged by the court was entirely accurate."

to which a party may have recourse under certain circumstances to prevent any reasonably apprehended great personal injury which he may have reasonable ground to believe is about to fall upon him. If you believe that the defendant had reasonable cause to apprehend a design on the part of F. to commit a felony upon defendant, or to do him some great personal injury, and that there was a reasonable cause to apprehend immediate danger of such design being carried out, and he struck F. as charged to prevent the accomplishment of such apprehended design, you should acquit him on the ground of self-defense. It is not necessary to this defense that the danger should have been real or actual, or that the danger should have been impending and immediately about to fall. If you believe that the defendant, at the time he struck F., had reasonable cause and did believe these facts, and he struck said F. under such circumstances, as he believed, to prevent such expected harm, then you should acquit him; but before you can acquit him on the ground of self-defense you ought to believe that defendant's cause of apprehension was reasonable. You are to determine whether the facts constituting such reasonable cause have been established before you by evidence, and, if such facts have not been established, you cannot acquit the defendant on the ground of self-defense, even though you may believe defendant really thought his cause of apprehension reasonable. Words and epithets, however vile or grievous, will not justify an assault; and if you believe from the evidence that the defendant sought or brought on a difficulty with F., or voluntarily entered into a difficulty with said F., with the intent to kill him or do him some great bodily harm, then he could not excuse himself on the plea of self-defense.⁹⁹

(c) You are instructed that no man by his own lawless act can create a necessity for acting in self-defense, and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it.¹⁰⁰

(d) You are instructed if you believe from the evidence in this case beyond a reasonable doubt that the defendant, on the evening of the killing, went to where the deceased was at work in his pea patch, and without provocation at the time on the part of the deceased with a shotgun in a violent and threatening manner, such as would put a reasonable man in the situation of the deceased in fear of losing his life or of receiving great bodily injury, and that the deceased was aroused to such sense of fear by said assault, then the deceased had a right

99—State v. Tooker, 188 Mo. 438, 87 S. W. 487 (490).

The court said in comment that "this instruction, substantially covering the same subject, was approved in State v. Shoultz, 25 Mo. 128, and is cited with approval in

a long line of subsequent cases. This instruction fully and fairly covers the law of self-defense as applicable to the facts developed at the trial of this cause."

100—Robinson v. Territory, 16 Okla. 241, 85 Pac. 451 (455).

to seek assistance of weapons with which to defend himself, and the fact that he called to some one to bring him a gun, or attempted to run to his house for the purpose of procuring a gun with which to shoot the defendant, would not justify the defendant in taking the life of the deceased, unless the defendant had abandoned in good faith the difficulty, and had done all within his power, and consistent with his safety, acting as a reasonable person, to avert danger to himself and avoid the necessity of killing the deceased.¹

(e) The court further instructs the jury that the law of self-defense does not mean or imply the right of attack, nor will it permit of acts done in retaliation or for revenge. And in this case, if you believe from the evidence that the defendant sought out or brought on the difficulty at the time the fatal shot was fired, and for the purpose of wreaking vengeance upon the deceased, J., on account of the acts of the deceased in reference to the sale of a farm in controversy and to deliver the possession thereto, and that at the time the defendant shot the deceased there was no reasonable apprehension or immediate and pending injury to the defendant, and that the defendant shot the deceased from a spirit of retaliation or revenge, and for the purpose of punishing the deceased for past injuries, then you are charged that the defendant cannot avail himself of the law of self-defense, and that the shooting and killing of the deceased affords no justification or excuse.²

(f) If you find from the evidence in this case that the defendant was the aggressor in the personal difficulty that resulted in the death of the deceased, and that the killing was unlawful, and not justifiable or excusable homicide, nor murder in any degree, then self-defense could not avail, and the defendant would be guilty of manslaughter.³

(g) The court instructs the jury that a party charged with an unlawful or deadly assault upon another, cannot avail himself of the claim of necessary self-defense if the necessity for such defense was brought on by his own deliberate, wrongful act.⁴

(h) If the defendant provoked, or brought on the difficulty, or entered willingly into the fight with deceased, then he cannot set up self-defense in this case.⁵

§ 3127. Commencing the Difficulty—Several Persons on Each Side.

But if the jury believe from the evidence, beyond a reasonable doubt, that the defendant, G. W., C. W., S. W., or E. C. or any of them, when they met M. and his party, commenced the difficulty with them by first shooting at them, or any of them, or making the first demon-

1—*Velim v. State*, 77 Ark. 97, 90 S. W. 851.

2—*State v. Dotson*, 26 Mont. 305, 67 Pac. 938 (1900).

3—*Marlow v. State*, 49 Fla. 7, 38 So. 653.

"It was not necessary as contended, that the intention of the aggressor should be referred to in

this charge, particularly as a charge of who is considered an aggressor had been given by the court. *Bassett v. State*, 44 Fla. 12, 33 So. 262. The verdict is fully sustained by the evidence."

4—*Adams v. People*, 47 Ill. 376.

5—*Boulden v. State*, 102 Ala. 78, 15 So. 341 (1900).

stration to shoot at any of them, or that defendants, C. W., S. W., and E. C. met the parties named, and both parties were armed and determined on a conflict, and did engage in such conflict by mutual consent, then in either event the defendant, G. W., cannot rely on the right of self-defense, or that he acted in defense of his associates named.⁶

§ 3128. **Defendant Seeking Interview with Deceased with Malice and Hatred in His Heart and Inducing Deceased to Assault Him.** If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, A., with malice and hatred in his heart towards B., sought an interview with B., and accused him of writing the damaging article about A., and used offensive and opprobrious language toward B., or did any act or thing for the purpose and with intent of provoking a difficulty with B., so as to induce B. to assault him, with the premeditated design that, if the said B. did assault him, to shoot and kill the said B., then A. cannot avail himself of the plea of self-defense, and you will find him guilty as charged.⁷

§ 3129. **Defendant Seeking the Meeting to Provoke Difficulty—Circumstances Must Be Such as to Render Killing Unavoidable.** (a) I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant could have avoided any conflict between himself and X. without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary.⁸

(b) If you believe that defendant committed the assault as a

⁶—*Watkins v. Commonwealth*, 29 Ky. L. 1273, 97 S. W. 740.

⁷—*Marlow v. State*, 49 Fla. 7, 38 So. 653.

"This charge is not amenable to the criticism that it invades the province of the jury by stating what constitutes the bringing on of the difficulty. Taken in connection with other charges given, it is not reversible error. *Bassett v. State*, 44 Fla. 12, 33 So. 262."

⁸—*State v. McCann*, 43 Ore. 155, 72 Pac. 137 (139).

The court said: "It is possible that under some circumstances the charge might be subject to objection, for in a free country it is not expected that one person shall flee from another, and it may be that the demands of business might require one intentionally to go where he knows or has reason to believe he may be in imminent danger, and possibly compelled to resort to force as a matter of self-defense.

In the case at bar, however, though it is conceded that the defendant had a right to enter the hotel, yet in passing out of it he purposely turned aside to assault X. No apparent necessity existed for the course which he adopted, and he could evidently have avoided any conflict without increasing the danger to himself. If the defendant, after precipitating the attack, withdrew from the conflict, thereby evincing a determination to avoid further difficulty, the testimony fails to disclose such fact, and it was unnecessary to instruct the jury upon a theory that had no facts to support it. * * * The instruction, in our opinion, correctly states the law applicable to the facts involved, and no error was committed in giving it. *State v. Morey*, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573; *State v. Smith*, 43 Ore. 109, 71 Pac. 973; *State v. Hawkins*, 18 Ore. 476, 23 Pac. 475."

means of defense, believing at the time he did so, if he did so, that he was in danger of losing his life or of serious bodily injury at the hands of said A. B., then you will acquit defendant, unless you further believe from the evidence beyond a reasonable doubt that defendant sought the meeting with said A. B. for the purpose of provoking a difficulty with said A. B., with intent to take the life of said A. B., or to do him such serious bodily injury as might probably end in the death of A. B.; and if you so believe from the evidence beyond a reasonable doubt, then you are instructed that, if defendant sought such meeting for the said purpose and with such intent, defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own self-defense; but if he had no such purpose and intention in seeking to meet the said A. B., then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger or what reasonably appeared to him at the time to be danger.⁹

(c) The law says that, if you invoke the plea of self-defense, you must show that you were without fault in bringing about the necessity for the killing.¹⁰

(d) If A. B. said to defendant's hired man that defendant was indebted to him, or that he would not sell to defendant, on credit, until such debt was paid, it was proper and lawful for the defendant, when informed of such claims, to go to A. B.'s shop, for the purpose of learning what amount, if any, was owing by him to A. B., or to pay it; and, if defendant went to A. B.'s shop for such purpose or purposes, and not to provoke a difficulty or quarrel with A. B., he was in the proper exercise of his lawful rights. But if you find from the evidence that the defendant went to A. B.'s shop with a view to provoke or bring on a difficulty with A. B., he was not acting lawfully in doing so, and, in that case, he cannot avail himself of the plea of self-defense in killing A. B., if he killed him in the difficulty so sought by defendant, though such killing may have been necessary to preserve the defendant's life, or his person, from an imminent and enormous injury; but he would be guilty of murder or manslaughter as you find the facts to be, under the rules given you elsewhere in these instructions.¹¹

§ 3130. Defendant Attacking Brother of Deceased. You are instructed that, if you find and believe from the evidence beyond a reasonable doubt that defendant provoked and made an unlawful assault upon S. G., the brother of deceased, with a knife, the deceased had the right to go to his brother's assistance to protect his brother

9—Ditmer v. State, 45 Tex. Cr. App. 103, 74 S. W. 34 (35).

10—State v. Hutto, 66 S. C. 449, 45 S. E. 13 (14).

11—State v. Murdy, 81 Ia. 603, 47 N. W. 867 (871).

"This instruction expressed the law as announced in State v. Neeley, 29 Iowa 115."

from death or serious bodily injury at the hands of defendant, if he believed his brother was in such danger; and if you find that he did so go to the assistance of his brother, and while attempting to protect him from the assault (if any) of the defendant, the defendant stabbed and killed deceased,—the killing would not be justifiable or in self-defense, notwithstanding the fact that it may have been necessary for the defendant to kill deceased in order to save his own life; and the homicide would be murder in the first degree, murder in the second degree, or manslaughter, as the jury may find and determine from all the facts and circumstances of the case, bearing in mind the instructions herein given you fully explaining the necessary elements to constitute the different degrees of homicide. The offense, if any, under such circumstances and conditions, would be the same in law as it would have been had the defendant killed S. G., instead of R. G.¹²

§ 3131. Self-Defense—Defendant if at Fault Cannot Plead. (a) If the jury believe from the evidence that the defendant provoked the difficulty or began the quarrel with the purpose of taking advantage of W., and of taking his life, or of doing him some great bodily harm, then there is no self-defense in the case, however imminent the peril of defendant may have become in consequence of an attack made upon him by W.; and if, in such circumstances, the jury believe that the defendant struck and killed W., then the defendant is guilty of murder in the first degree, and the jury should so find.¹³

(b) The court charges the jury that to make the plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the deceased struck him, and whether the necessity to take the life of the deceased was real or only apparent, if brought about by design, contrivance or fault of the defendant, he cannot be excused on the plea of self-defense.¹⁴

§ 3132. Plea of Self-Defense Barred by Defendant's Agreeing to Fight. (a) If you believe from the evidence, beyond a reasonable doubt, that defendant and H. met together and quarreled, bandying opprobrious or insulting words, and fought willingly or by mutual consent, it is immaterial which of them commenced the quarrel; and

12—Thornton v. State, — Tex. Cr. App. —, 65 S. W. 1105 (1107).

The court said: "We think the charge is correct. Clearly, the law is, if appellant provoked a difficulty with S. G., and made an unlawful assault upon him with a knife, deceased would have the right to interfere in the necessary and proper defense of his brother against the unlawful assault of appellant. And if appellant, while engaged in said unlawful assault, killed deceased, he certainly would be guilty of whatever degree of

homicide should be assessed against him if he had killed S. G."

13—State v. Smith, 164 Mo. 567, 65 S. W. 270.

The plea of self-defense is also unavailing to the helper of the transgressor. See Sherrill v. State, 138 Ala. 3, 35 So. 129, and the instructions in the case.

14—Ragsdale v. State, 134 Ala. 24, 32 So. 674 (675); Whitney v. State, 154 Ind. 573, 57 N. E. 398 (400); Stevens v. State, 133 Ala. 28, 32 So. 270 (271).

the defendant cannot, under this state of facts, if you believe such beyond a reasonable doubt, set up the plea of self-defense.¹⁵

(b) If the defendant provoked or brought on the difficulty, or entered willingly into the fight with deceased, then he cannot set up self-defense in this case.¹⁶

(c) If you believe from the evidence that the defendant willingly and voluntarily and without provocation on the part of the deceased entered into the difficulty at a time when he was not endangered by any acts of the deceased, he is cut off from the law of self-defense; for it is the law, where parties voluntarily enter into a mutual combat, in which one of the parties is slain, such slaying is murder.¹⁷

§ 3133. **Aggressor Cannot Plead Self-Defense.** (a) To make the plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the deceased was approaching him in a hostile manner; and whether the necessity to take the life of the deceased was real or only apparent, if brought about by the design, contrivance or fault of the defendant, he cannot be excused on the plea of self-defense.¹⁸

(b) The court charges the jury that if they believe beyond a reasonable doubt, from the evidence, that the defendant R., and the deceased H. had had some trouble a few days before the homicide, and that when he R., on the day of the homicide came to where the deceased H. was standing at the "new home base" he stepped up in front of the deceased, and in an angry manner said to him "You said you wanted to see me," and the jury should further find, from the evidence beyond a reasonable doubt that the deceased left the place and went to the pitcher's stand, some 60 or 65 feet away, and the defendant followed the deceased to that place, and they there became involved in a difficulty, and the defendant killed deceased, then he cannot set up self-defense in this case.¹⁹

(c) A necessity brought about by parties who act under its compulsion cannot be relied upon to justify their conduct. The aggressors in a personal difficulty, and not reasonably free from fault cannot acquit themselves of liability for its consequences on the ground of self-defense, unless, after having begun the difficulty, they in good faith decline the combat, and their adversary had become the aggressor.²⁰

15—Johnson v. State, 136 Ala. 76, 34 So. 209.

"This charge given at the request of the solicitor asserted a correct proposition of law, and was properly given. Howell v. State, 79 Ala. 283."

16—Jarvis v. State, 138 Ala. 17, 34 So. 1025 (1030).

17—Williams v. State, 4 Ind. Ter. 269, 69 S. W. 871.

18—Jarvis v. State, 138 Ala. 17, 34 So. 1025 (1030).

19—Ragsdale v. State, 134 Ala. 24, 32 So. 674 (675).

20—Mercer v. State, 41 Fla. 279, 26 So. 317 (318).

"Counsel for the accused admit that the statement of the charge contains a correct abstract proposition of law. Lovett v. State, 30 Fla. 142, 11 So. 550."

(d) The law of self-defense does not imply the right to retaliate upon another for real or supposed injuries, nor for revenge, and I therefore charge you that if you find from the evidence that the accused at the bar sought, brought on or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him for some supposed or real injury, then the accused cannot avail himself of the law of self-defense. I further instruct you that in case you find that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased, it does not matter, in the application of the law of self-defense, how great the danger or imminent the peril which confronted him at the time he shot the deceased.²¹

(e) The jury are further instructed that, if they believe from the evidence beyond a reasonable doubt that the defendant, W. H., brought on the difficulty between the deceased, C. J., and himself at the time of the killing, and that the defendant was the first assailant, he cannot avail himself of the right of self-defense in order to shield himself from the consequences of the killing of C. J., if such is the proof, however imminent the danger in which he may have found himself in the progress of the affray which he so brought on himself, unless you further believe that the defendant in good faith endeavored to decline any further struggle before the mortal shot was fired.²²

(f) If you believe from the evidence that the accused provoked the difficulty, and slew the deceased, he would not be entitled to use the plea of self-defense to obtain an acquittal; but as to whether he did provoke the difficulty or not the jury must determine from the evidence.²³

(g) If the jury believe from the evidence, beyond a reasonable doubt, that, shortly before the difficulty, S. hired a gun, loaded it, and went about town making threats against the life of J., and that he went to where J. was standing, called him aside, and provoked the difficulty, by cursing J., and by attempting to draw his gun on J., and that such conduct on the part of S. compelled J. to draw his pistol, and shoot, to protect his life or person from great bodily harm at the hands of S., and thereupon S. shot and killed J., then S. is guilty as charged, if the jury further believe the shooting on the part of S. was done with a deliberate design to effect the death.

(h) If the jury believe from the evidence that the defendant hired the gun, and bought the cartridges, intending to seek and find deceased, and provoke a difficulty with him, and in said difficulty to use said gun to slay and overcome him, and that, pursuant to such intent, did seek and find him, and did by word or act provoke a

21—State v. Guidor, 113 La. 727, v. People, 97 Ill. 270, 37 Am. Rep. 37 So. 622. 109.

22—Henry v. People, 198 Ill. 162 23—State v. Owen, 50 La. An. 1181, (195), 65 N. E. 120, following Gainey 24 So. 187 (189).

difficulty with deceased, in which difficulty he (defendant) did kill deceased, then he is guilty as charged, though deceased fired the first shot, and the jury should so find him.²⁴

(i) The law of self-defense does not imply the right to attack. If you believe from the evidence that the defendant armed himself with a deadly weapon, and sought the deceased with the formed felonious intent of killing deceased, or sought or brought on or voluntarily entered into a difficulty with deceased with the felonious intention to kill deceased, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself.²⁵

(j) The court instructs the jury that a person charged with the murder of another cannot avail himself of the claim of necessary self-defense, if the necessity for such defense was brought on by his own deliberate wrongful act.²⁶

(k) Unless you should further believe from the evidence, beyond a reasonable doubt, that the defendant sought and brought on the difficulty with the deceased in which the shooting occurred in the use or the threatened use of a deadly weapon, or that the defendant and the deceased mutually and willingly entered into a combat with each other with deadly weapons, in either of which later state of case, the defendant cannot be excused on the grounds of self-defense, unless you believe from the evidence that he in good faith abandoned the difficulty or mutual combat before he shot D.²⁷

§ 3134. When Aggressor, Abandoning Conflict, May Avail of Plea of Self-Defense. (a) On the other hand if you believe from the evidence that the defendant commenced the affray by assaulting K., or by so menacing him as to induce in K. a reasonable belief that he

24—*Smith v. State*, 75 Miss. 542, 23 So. 260 (262).

25—*State v. Hicks*, 178 Mo. 433, 77 S. W. 539 (540).

"The first instruction above quoted is challenged upon the ground that it does not go far enough, in that it does not tell the jury that, if defendant entered into the difficulty without the intent to kill the deceased, then he would only be guilty of manslaughter in the fourth degree. We are unable to agree to this contention, and are clearly of opinion that, under the facts disclosed by the record, the instruction is a correct presentation of the law of the case.

26—*Territory v. Gonzales*, 11 N. M. 301, 68 Pac. 925 (930).

"This instruction is in almost the identical language used by the court and approved in the case of *Adams v. People*, 47 Ill. 376. The language used by the court in that case was as follows: "The defend-

ant cannot avail himself of necessary self-defense, if the necessity of that defense was brought on by the deliberate and lawless act of the defendant, or his bantering Bostic to a fight for the purpose of taking his life, or committing a bodily harm upon him in which he killed Bostic by the use of a deadly weapon." *Horr & T. Cas.*, p. 208; *Stewart v. State*, 1 Ohio St. 66. Of course the instructions of the court must be interpreted in the light of the evidence in the case showing the circumstances under which the killing was done, and this paragraph of the court's instructions was a proper instruction in the event of the jury believing the testimony for the prosecution and disbelieving the testimony given in behalf of the defense."

27—*Hellard v. Commonwealth*, 26 Ky. L. 38, 80 S. W. 482 (483), citing *Logsdon v. Commonwealth*, 19 Ky. L. 413, 40 S. W. 775.

was in immediate danger of physical violence at the hands of the defendant, then the defendant is not entitled to a verdict of acquittal upon the ground that he killed K. in self-defense, unless the defendant, really and in good faith endeavored to decline any further struggle, and in some way by words or conduct notified K. thereof, and thereafter acted only upon a well grounded fear in him as a reasonable man, that he was in imminent danger of being killed by, or of receiving great bodily harm from K. The words used by defendant did not constitute an assault nor were they sufficient to excite in K. a reasonable fear that he was about to be assailed by the defendant.

(b) If you find from the evidence that at the time he stabbed K. the defendant did not, as a reasonable man, believe he was in imminent danger of losing his life, or suffering great bodily injury at the hands of K. then the killing was not done in self-defense, but was either murder or manslaughter, no matter who began the affray, and even though the defendant had really and in good faith endeavored to decline further struggle and had so informed K.²⁸

(c) The jury are instructed, that although you may believe, from the evidence, that the defendant commenced the fight in question, and made the first attack upon the deceased, still, if the jury further believe, from the evidence, that the defendant afterwards, and before the fatal blow was struck, ceased to fight, and in good faith withdrew from the conflict by retreating, or otherwise, then the right of deceased to employ force against the defendant ceased; and if the deceased did not then desist from attempting to use violence towards the defendant, then the defendant's right to defend himself revived; and if he then found himself in apparent danger of losing his life, or of sustaining great bodily injury at the hands of the deceased, he had the same right to defend himself that he would have had if he had not originally commenced the conflict.²⁹

(d) To justify the taking of life, in self-defense, it must appear, from the evidence, that the defendant not only really, and in good faith, endeavored to decline any further struggle, and to escape from his assailant before the fatal blow was given, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that the deceased intended to take his life, or to inflict on him great bodily harm, and that the defendant really acted under the influence of these fears and not in a spirit of revenge.³⁰

§ 3135. Aggressor Is Not Necessarily the Person Who Strikes the First Blow or Makes the First Demonstration to Strike—Question of Fact. The question as to who was the aggressor is one of fact, to be determined by the jury from the evidence in the case, in the same

28—State v. Tighe, 27 Mont. 327, 71 Pac. 3 (3).

29—Terrell v. Commonwealth, 13 Bush. (Ky.) 246.

30—Parish v. State, 14 Neb. 60, 15 N. W. 357; State v. Sorenson, 32 Minn. 118, 19 N. W. 738.

manner as they determine in other cases of fact. An aggressor is not necessarily a person who may strike the first blow in a personal encounter, or make the first demonstration indicating an intent to strike; but if a person, with malice and hatred in his heart towards another, purposely acts towards such other person as to provoke a difficulty, either by acts or words, with the intent to induce such other person to strike the first blow or make the demonstration, in order to form a pretext to take his life, then the defendant could not avail himself of the right to self-defense.³¹

§ 3136. State Must Prove Its Contention that Defendant Began the Fight Beyond a Reasonable Doubt. You are further instructed that under the facts and circumstances of this cause the determination of the question as to who provoked the affray and made the first assault materially affects the logical conclusions and the responsibility of the defendant, inasmuch as under the law it becomes the duty of the prosecution to prove every material ingredient of this crime beyond any reasonable doubt, and to the satisfaction of the jury. Before you can be authorized in convicting the defendant you must be satisfied in your own minds beyond all reasonable doubt that the defendant provoked the fight,—made the first assault on the deceased; therefore if you are in doubt on this point; that is if your minds are not satisfied whether the defendant provoked the fight and made the first assault, or whether the deceased did so then it becomes your duty under the law, to give the defendant the benefit of the doubt and acquit the defendant.³²

§ 3137. Self-Defense—Not Available to One Who Kills Through Mere Cowardice. (a) The court further instructs the jury that if a person shoots another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous person, the law will not justify the shooting on the ground of self-defense.³³

31—Marlow v. State, 49 Fla. 7, 38 So. 653.

"It is contended that this charge is erroneous because it does not state that the act done or words spoken by the defendant should have been reasonably calculated to produce a difficulty with the deceased. The objection is not well taken. The charge is that 'if a person, with malice and hatred in his heart towards another, purposely acts towards such other person as to provoke a difficulty, etc., then the right of self-defense is not available. Where conduct is intended to provoke and does provoke a difficulty, the question whether or not the conduct was reasonably calculated to provoke the difficulty

is not a practical one, in considering the matter of self-defense. Bassett v. State, 44 Fla. 12, 33 So. 262; Sylvester v. State, 46 Fla. 166, 35 So. 142."

32—Territory v. Gonzales, 11 N. M. 301, 68 Pac. 925 (931).

The term satisfied might be objected to in other jurisdictions.

33—Coil v. State, 62 Neb. 15, 86 N. W. 925 (928).

The court said: "The instruction correctly states the law. 'Cowardice' is the antonym of 'courage.' The rule is that a defendant is excusable if he does nothing more than a reasonably prudent and courageous man would have done under like circumstances. State v. Crawford, 66 Ia. 231, 23 N. W. 684."

(b) If, without excuse or justification in law, or a premeditated design to effect the death, defendant should, from excessive fear or cowardice, have taken the life of H. when the circumstances were not such as to justify him in so acting in self-defense, he would be guilty of manslaughter.³⁴

(c) The law does not allow any man who interposes a plea of self-defense here to say under what circumstances he will fire his pistol and take human life. He must be without fault in bringing about the difficulty. Then, again, the assault made upon him by the deceased must be of such a character as to lead him honestly to believe that he was in imminent peril of his life or of great bodily harm. He must not only honestly believe this, but you are to determine whether a man of ordinary reason and firmness, situated as the defendant was situated, would have been led to the same conclusion under the same circumstances. If he would have been, then the plea has been made out, and should avail the defendant. If not, then the plea has not been made out.³⁵

§ 3138. **Self-Defense—Not Available to One Who Kills from Previously Formed Design.** A defendant may, as a reasonable man, have believed that he was in danger of losing his life or of incurring great bodily harm, and yet the killing may not, under some circumstances, be justifiable or excusable. One instance is where he has brought about the necessity without being reasonably free from fault. Again, the circumstances of the case may at least make it a question for the jury whether a killing was not in pursuance of a previously formed design to kill, instead of having been the result of a mere purpose of self-defense, although at the time of the altercation the first overt act may have come from the person slain.³⁶

34—*Padgett v. State*, 40 Fla. 451, 24 So. 145 (147).

35—*State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (997); *State v. Whittle*, 59 S. C. 297, 37 S. E. 923 (925).

36—*Kennard v. State*, 42 Fla. 581, 28 So. 858.

"At common law a man assailed under certain circumstances could, in order to protect himself, take the life of his assailant, and excuse himself on the ground of self-defense. It was essential, however, that it be shown that the killing was necessary to save his life or protect him from grievous bodily harm, and that he did not wrongfully bring about the necessity to kill. No man was permitted to take life under a pretense of necessity that he occasioned by his own wrongful act, and this was in harmony with the principle pervading all branches of the law, that no man should be permitted to take advantage of his own wrong. Our

statute does not exclude this principle of the common law, but recognizes it, in limiting the right to take life to a lawful defense, and this court has approved the statement of the principle in the following formula: That a necessity brought about by the party who acts under its compulsion cannot be relied upon to justify his conduct. The aggressor in a personal difficulty—one not reasonably free from fault—can never be heard to acquit himself of liability for its consequences on the ground of self-defense. *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

"The abstract statement of the law by the court, that a defendant, as a reasonable man may believe he is in danger of losing his life, or of incurring great bodily harm, and yet under some circumstances the killing will not be justifiable or excusable, was correct. If a reasonably prudent man has reasonable

§ 3139. Insulting Words by Defendant Would Not Deprive Him of the Right of Self-Defense. (a) The court charges the jury that even though the defendant called J. "a son of a bitch," or used any other insulting words, yet those words would not, nor would any other words, amount to such provocation as to deprive defendant of the right of self-defense.³⁷

(b) If you find from the evidence that the defendant invited or provoked an assault to be made upon himself by G., then the defendant's plea of self-defense will be of no avail. No mere words however insulting will justify an assault.³⁸

§ 3140. Justification—That Defendant and Deceased Were Engaged in Unlawful Occupation Immaterial. Although you may believe from the evidence that at the time of the killing of L. by the defendant, both the defendant and L. were engaged in the unlawful business of running a gaming house, and that each of them was violating the law by carrying concealed deadly weapons, these unlawful acts alone would not justify the defendant in taking the life of his partner in crime, since it is as much a violation of the law to kill a bad man as a good man.³⁹

§ 3141. Malice in the Slayer Immaterial—When. If you find that the assault by A. B. upon the defendant was fierce, violent and sudden, and was not caused by anything that the defendant had done, and the defendant was justified in repelling it, even to taking the life of A. B., it will be unnecessary to inquire what ill feeling or malice was entertained by the defendant towards A. B. for if a person is assailed in a violent, fierce and sudden manner, so that the only way left is for him to slay his antagonist, then it is wholly immaterial what ill will or malice he may entertain towards him, if he contributed nothing to the attack, or in any manner caused it, for the malice and ill will, if any existed, are wholly swallowed up in the defense of life and limb.⁴⁰

§ 3142. What the Jury May Consider in Determining Whether the Blows or Shots Were Given or Fired in Self-Defense. (a) In considering whether the killing was justifiable on the ground that the killing was in self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what is claimed to be this self-defense, as bear-

ground to apprehend danger of losing his life, or of suffering great bodily harm, yet, if he wrongfully occasions or brings about the necessity for his action, he cannot justify his conduct on the plea of self-defense. This disposes of the only objection made to the charge, that it contains an incorrect proposition of law."

Compare *Karr v. State*, 106 Ala.

1, 17 So. 328 (332); *De Arman v. State*, 71 Ala. 351; *Hornsby v. State*, 94 Ala. 55, 10 So. 522, contra.

37—*Smith v. State*, 75 Miss. 542, 23 So. 260 (262).

38—*State v. Jones*, 125 Iowa 508, 99 N. W. 179 (181).

39—*Williams v. U. S.*, 4 Ind. Ter. 269, 69 S. W. 871.

40—*People v. Macard*, 73 Mich. 15, 40 N. W. 784 (788).

ing upon the question whether the blows, if given, were actually given in self-defense, or whether they were given in carrying out an unlawful purpose; and if the jury believe, from the evidence, that the force used was unreasonable, in amount and character, and such as a reasonable mind would have so considered, under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense.⁴¹

(b) In considering whether the killing of A. B. was justifiable, on the grounds of self-defense, you should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what he claimed to be this self-defense, as bearing upon the question whether the shot or shots were actually fired in self-defense, or whether fired in carrying out an unlawful purpose.⁴²

(c) If the jury shall further believe, from all the evidence herein, that the accused, at the time he shot and killed said P., had reasonable grounds to believe, and did believe, from all the circumstances as they appeared to him, that the said P. was then and there about to take his life, or inflict upon his person some great bodily harm, he had a right to use any means at his command that were to him apparently necessary. * * *⁴³

(d) The jury are instructed that in considering whether the killing was justifiable on the ground that the killing was in self-defense, you should consider all the circumstances attending the killing, the character, number and place of the wounds, the conduct of the parties at the time and immediately prior thereto, and the degree and nature of the force used by the defendant in making what is claimed to be his self-defense, as bearing upon the question whether the shots, if fired, were actually shot in self-defense, or whether they were shot in carrying out an unlawful purpose; and if the jury believe from the evidence beyond a reasonable doubt that the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered, under the circumstances, it is proper for the jury to consider that fact, if it is proven, in determining whether the killing was in self-defense.⁴⁴

§ 3143. Quarrelsome Disposition of Deceased. (a) You are in-

41—Close v. Cooper, 34 Ohio St. 98.

42—Willis v. State, 43 Neb. 102, 61 N. W. 254 (257).

43—Wade v. Commonwealth, 106 Ky. 321, 50 S. W. 271.

It was contended that this restricted the jury to the circumstances immediately attending the homicide in their consideration of the evidence as to whether his life was in danger, or whether he had reasonable grounds to so believe, and that threats previously made were withdrawn from their consid-

eration. The court said: "We do not so regard it. The phrase complained of is an extremely broad one, and, while not customarily used in such instructions in this commonwealth, is frequently used in the self-defense instructions in other states, and seems to us,—if it can be assumed to make any change in the meaning of the instruction—to tend rather to the advantage of the accused," citing Sackett Inst. Jur. 2d ed., p. 528.

44—Carleton v. State, 43 Neb. 373, 61 N. W. 699 (710).

structed that the fact that the deceased, B., may or may not have been of a quarrelsome disposition, or that he may have made assaults upon other parties, does not affect the nature of the act of killing him. Such testimony is admissible only as it may tend to throw light upon the question as to whether or not the defendant acted in self-defense, and can only be considered by you for this purpose. If you find, beyond a reasonable doubt, that the killing was not done in self-defense, then the act was murder or manslaughter and the character of the deceased is immaterial, and it matters not whether he was a good or a bad man.⁴⁵

(b) You are to determine from the evidence the state of mind of the defendant when he shot and killed the deceased (if he did so) and in that connection you may consider threats (if any) made by the deceased regarding the defendant, the reputation of the deceased (if such it was) as a violent and dangerous man, the defendant's personal knowledge (if such he had) that the deceased was a violent and dangerous man, the relative strength of deceased and the defendant, and all other facts in the case that may shed any light upon such state of mind.⁴⁶

§ 3144. Physical Power of Deceased May Be Considered. I charge you that the relative size and strength of the deceased and the accused should be considered by you in determining the question whether or not the defendant had reasonable grounds to apprehend death or great bodily harm at the hands of the deceased.⁴⁷

§ 3145. Ill-Will—Abuse—Threats. The court further instructs the jury that, although you may believe from the evidence that defendant entertained ill will towards the deceased and had abused and threatened him, still the defendant was not thereby deprived of the right to defend himself against any attack upon him by the deceased. And if you shall find from the evidence that defendant shot and killed the deceased in self-defense, as defined in other instructions, then you must acquit him, notwithstanding such ill-will, abuse, and threats.⁴⁸

§ 3146. Threats, Without Effort to Carry Them Out, Will Not Justify Killing—Overt Act Necessary. (a) All threats which you believe from the evidence were made by either the deceased, H. L., or by L. L. against the defendant should be considered by you in arriving at a verdict. Any threats which were communicated to defendant should be considered as explaining the conduct and apprehensions of defendant at the time of the shooting, and all threats whether communicated to the defendant or not, should be considered in passing upon the evidence as to the conduct and demeanor of deceased and L. L. at the time of the shooting. Although you may believe from the evidence that prior to the shooting deceased, H. L. and

45—"The instruction was correct."
Willis v. State, 43 Neb. 102, 61 N.
W. 254 (259).

46—Clark v. State, 45 Tex. Cr.
App. 479, 76 S. W. 573 (574).

47—State v. Petsch, 43 S. C. 132,
20 S. E. 993 (995).

48—State v. Todd, 194 Mo. 377, 92
S. W. 674.

L. L. made threats against the defendant, yet such threats alone did not justify defendant for shooting H. L., and although such threats were communicated to defendant before the shooting, yet, if, at the time defendant fired the fatal shot, neither H. L. nor L. L. made any threat or threats against defendant, and made no assault upon defendant, and were making no effort to carry out such threats, then the same did not justify defendant in shooting H. L.⁴⁹

(b) Previous threats or even acts of hostility, how violent soever, nor the violent and dangerous character of the deceased, if you should so find, will not of themselves excuse the slayer; but there must be some overt act (that is, an open manifest act) on the part of the deceased at the time, clearly indicative of a present purpose to do injury. To constitute the defense the belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the fear that it will at that time be executed. If any animosity existed on the part of the deceased to the defendant as indicated by words and actions, then and before, it is proper matter for the consideration of the jury on the question of reasonable apprehension. The jury is the judge, under all the facts and circumstances whether or not there was reasonable ground to justify the defendant in believing that he was in danger of death or great bodily harm at the time he fired the fatal shot.⁵⁰

(c) If you believe from the evidence that the deceased, R., had made threats to kill the defendant, or to do him great bodily harm, and that these threats were communicated to the defendant, such threats entitled the accused to be more watchful, and to interpret the acts of the deceased more harshly, than he otherwise would have interpreted them, and these are facts for your consideration, independent of who brought on the difficulty, and whether or not the defendant had reason to apprehend danger to his life or great bodily harm.

(d) While it is well calculated to make the party against whom the threats are made more vigilant for his own safety, and security on meeting the party who made the threats, the party against whom the threats are made more vigilant for his own safety and security on demonstration on the part of the party making the threats before he can resort to a deadly weapon. There must be some act or demonstration on the part of the deceased manifesting an intention to carry out the threats before the prisoner at the bar would be justified in law in resorting to a deadly weapon. It is not for me to say what is to be the character of this demonstration; you are to judge of that, in connection with the threats and the conduct of the deceased at the time of the conflict between the parties.⁵¹

49—State v. McCarver, 194 Mo. 717, 92 S. W. 684.

51—State v. Petsch, 43 S. C. 132, 20 S. E. 993 (995).

50—Ray v. State, 108 Tenn. 282, 67 S. W. 553 (556).

§ 3147. Mere Fear Not Sufficient—Some Overt Act Required—What Constitutes. (a) The court instructs the jury that mere fear, however well grounded, that another intends to kill the defendant, or to do him some great bodily harm, will not justify a killing, unless there is some overt act indicating a purpose to immediately carry out such an intention; and you are instructed that it is not enough that the defendant should show that he believed himself in danger, unless the facts were such that in the light of all the facts and circumstances known to the defendant at the time, or by him believed to be true, you can see that as a reasonable man he had grounds for such belief.

(b) The jury are instructed that if you find from the evidence that the deceased, X., made threats against the defendant which, if carried into execution, would endanger his life or subject him to great bodily harm, and the defendant feared or had reason to fear that such threats were liable to be carried into execution, then the defendant might lawfully arm himself for the purpose of self-defense in anticipation of such threats being carried into execution; but you are instructed that the defendant could not lawfully assault the deceased on account of such threats, or because of fear induced thereby, unless the deceased at the time made some demonstration or performed some overt act that caused reasonable apprehension that such threats were about to be put into execution, and in case of such demonstration or overt act the defendant might lawfully become the aggressor only to the extent of putting himself in a position of safety as against the unlawful threatened acts of the deceased. If, under the circumstances, and facts in this case, you find the defendant intentionally carried his act of aggression further than was reasonably necessary to place himself in a situation of apparent safety, his acts would be such as to render his act of aggression unlawful, and you should under such circumstances consider the evidence as a whole together with such act of aggression in determining his guilt or innocence under the charge laid in the indictment.⁵²

(c) The design, real or apparent, to kill the defendant or to do him some great personal injury, and the danger, real or apparent, of the execution of such design by the deceased, to cause the killing, must be manifested by some overt act, conduct, or behavior of the deceased at the time of the killing, indicating to the defendant H., situated as he was, such design and danger; but what shows such design, real or apparent, or such danger, real or apparent, are not matters of law for the court to decide, but are matters of fact, determined by the jury according to all the evidence in the case. No exact definition of an "overt act" can be given. It may be a motion, a gesture, conduct, or demonstration, or anything else which evidences reasonably a present design to take the life of the defendant or to do him great bodily harm. Trifles light as air when

viewed alone, may become fraught with deadly meaning when viewed in connection with all the preceding facts disclosed, and with all the evidence in the case.⁵³

(d) You are instructed that what is or is not an overt act of violence,—that is, what acts on the part of a person slain would justify the taking of his life,—varies with the circumstances of each particular case. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances this would not be so; and it is for the jury passing upon the weight and effect of the evidence to determine how this may be.⁵⁴

§ 3148. Threats with Acts Indicating an Intention to Carry Them Out. Threats made against the life of a defendant when the evidence shows an act done by deceased at the time of the killing manifesting an intention to execute the threats so made will justify homicide in the defense and protection of himself, but mere threats, unaccompanied by any act manifesting an intention to put such threat into execution, will not justify the homicide. If you believe from the evidence that deceased, J. W., had threatened to take the life of defendant, and that while the deceased was doing some act which manifested an intention on his part of executing his threats to take the life of defendant, or which was reasonably calculated to and caused defendant to believe from his standpoint that he was about to execute said threats, defendant shot deceased with a gun, and thereby killed him, you should acquit him.⁵⁵

§ 3149. Previous Threats May Be Considered in Determining Who Was Aggressor—Mutual Threats. (a) If you shall believe from the evidence that, prior to the time of the shooting, the deceased had made threats against the defendant, or that defendant had made threats against the deceased, or that each had made threats against the other, you should take such threats into consideration, together with all the other facts and circumstances appearing in evidence, in determining who was the aggressor in this case.⁵⁶

(b) If the jury believe from the evidence that W. made any threats against the life of defendant, and that such threats were communicated to defendant before the killing, the jury may take into consideration such threats in determining whether defendant was justified in acting upon appearances when he struck W. with the billiard cues, provided the jury believe from the evidence that W. provoked and entered into the difficulty with the defendant.⁵⁷

(c) If, from the evidence in this case, the jury have a doubt

53—Held error to refuse the above and conviction therefore reversed. Hood v. State, — Miss. —, 27 So. 643 (644). See also Johnson v. State, 79 Miss. 42, 30 So. 39 (40).

54—Williams v. U. S., 4 Ind. Ter. 269, 69 S. W. 871.

55—Curtis v. State, — Tex. Cr. App. —, 59 S. W. 263 (264).

56—State v. Todd, 194 Mo. 377, 92 S. W. 674.

57—State v. Smith, 164 Mo. 567, 65 S. W. 270.

as to whether defendant, E. D., or S. J. was the aggressor in the difficulty in which S. J. lost his life, then, in determining who was the aggressor, you may take into consideration any threat or threats you may find were made by said S. J. against defendant, and which threats were communicated to said defendant, for the purpose of explaining the conduct and demeanor of said S. J. at the time of said difficulty. If you find from the evidence that S. J., prior to the tragedy, made any threats against the defendant, E. D., and that such threats were communicated to said defendant, or that he made any threats to defendant himself, then such threat or threats, if any, so made and communicated to said defendant, should be considered by you as explaining the conduct or apprehension of said defendant, if any, at the time of such killing. On the other hand, if you find from the evidence that said defendant, E. D., was the aggressor, and at the time he struck said S. J., if he did strike him, said S. J. was not assaulting or attempting to assault said defendant, was not making any hostile or apparently hostile demonstrations toward defendant, and was making no effort to carry out such threat or threats, then such threat or threats would not excuse or justify defendant in killing deceased, if he did kill him, and, so finding, you will disregard and not in any manner consider the evidence of such threats made by the deceased against said defendant in arriving at your verdict.⁵⁸

§ 3150. **Threatening Language Used May Be Considered as Evidence of State of Feeling or Who Was the Aggressor.** Evidence has been offered tending to prove that at Fremont, a few hours before the homicide, the defendant and X. had a difficulty, disagreement or quarrel, and that at that time certain threatening language was used by the said X. towards the defendant, both there and on his way homeward. These statements, both in whole or in part, have been contradicted by other evidence. It is for you to determine from the evidence in this case whether or not such threatening language was used; and, if you find it established by the evidence that such threats or threatening language were used on the part of X. at the time in question, this may be considered by you as tending to prove the state of feeling of said X. at the time of the conflict which resulted in his death; and, if established, it would be competent evidence bearing upon the question as to whether or not the said X. began the conflict or was the assaulting party.⁵⁹

§ 3151. **Prior Threats—Purporting to Draw Weapon—Reputation as Dangerous and Violent Man.** If a person has been threatened by another, such threatened person has the right to go about his ordinary business, and is under no legal obligation to avoid the person who threatened him, but upon meeting such person, has the right, under the law, to protect himself, if assailed, and in thus protecting

⁵⁸—State v. Darling, 199 Mo. 168, 97 S. W. 592.

⁵⁹—State v. Helm, 92 Iowa 540, 61 N. W. 246 (248).

himself has the right to act upon circumstances as they appear to him, and if he believes, and as a prudent and cautious man has a right to believe, from the attitude of the person who threatened him, that his life is in imminent danger, or that he is in imminent danger of great bodily harm, to defend himself, even to the extent of taking human life. If, therefore, the jury believe from the evidence in this case that the deceased, M., threatened the life of the defendant; and if the jury further believe from the evidence that the said M. was a man who bore reputation of being a violent and dangerous character; that these threats had been communicated to the defendant, and that the defendant knew that the deceased bore such reputation as a dangerous and violent man; and if the jury believe further from the evidence that on the day of the fatal encounter the deceased and the defendant met, and that after exchanging a few words the deceased threw his right hand behind him as if to draw a weapon, and the defendant believed at the time, and as a prudent and cautious man had a right to believe, that his life was in imminent danger, or that he was in imminent danger of suffering great bodily harm—then the court charges you that the defendant had the right to fire the fatal shot, although in point of fact there may have been no actual or real danger, and it will be your duty, under the circumstances to acquit the defendant.⁶⁰

§ 3152. **Uncommunicated Threats, Admissible When.** (a) Uncommunicated threats are only valuable, in a case of this kind, as tending to show the feelings and interest of the deceased towards the defendant at the time of their encounter, and whether or not the deceased was the first assailant, and whether or not the deceased so acted at the time of the shooting as to induce in the mind of the defendant an honest belief that the deceased intended to kill him or do him great bodily harm. Communicated threats, and threats made to defendant are valuable for the same purpose, and as also tending to throw light on the state of mind of the defendant at and just before the shooting, and as tending to show that his acts in shooting were not malicious.⁶¹

(b) The court instructs the jury that the evidence of threats made by deceased against defendant was admitted in the case solely because there was evidence showing or tending to show that just before the deceased met his death he was making or attempting to make an assault on the defendant, and if, from all the facts and circumstances in evidence the jury believe that at the time or just before defendant shot deceased, the deceased was not assaulting or

60—Kennard v. State, 42 Fla. 581, 28 So. 858 (860).

61—State v. Cushing, 14 Wash. 527, 45 Pac. 145 (146), 53 Am. St. 883. "This instruction was approved by the territorial supreme court in White v. Washington Territory, 3 Wash. T. 397, 19 Pac. 37; and is sus-

tained by Brown v. State, 55 Ark. 593, 18 S. W. 1051; Wiggins v. People, 93 U. S. 465, 4 Am. Cr. Rep. 494. We think it correctly states the law upon the subject of non-communicated threats and threats made directly to a defendant."

attempting to assault the defendant, or making any hostile or apparently hostile demonstration towards defendant, then you are instructed to disregard and not in any way consider, the evidence of threats made by deceased against defendant in arriving at your verdict.⁶²

§ 3153. **Previous Malice or Threats by Defendant Do Not Bar Plea of Self-Defense—Threats a Question of Fact.** (a) If the defendant was assaulted and placed under such circumstances that he had good reason to believe that it was necessary to defend himself from such attack to prevent the infliction of great bodily injury, the fact of any previous threat, or even the existence of any previous malice, if any is shown, toward the deceased, could not take away from the defendant the right of self-defense.

(b) It is solely the province of the jury to determine whether the defendant in fact did make threats against the deceased, and the weight to be given to evidence of alleged previous threats depends upon their character, the manner and occasion of their utterance, nearness of time, and the particular circumstances surrounding their alleged making.⁶³

§ 3154. **Mere Threat of Arrest Not Sufficient Provocation.** If one merely announces his intentions of arresting a person, such person is not justified in shooting him, although the former's official character is not known to the latter, and although in fact the arrest would be unwarrantable.⁶⁴

§ 3155. **Threats—Defendant Entitled to a Separate Instruction as to.** The jury are instructed that you may consider, in determining as to whether the defendant had reasonable grounds for believing that he was in imminent danger of death or great personal injury from the deceased, that the deceased, prior to the shooting, had made threats to the defendant that he would kill or injure him.⁶⁵

62—State v. Spencer, 160 Mo. 118, 60 S. W. 1048 (1049), 83 Am. St. 463, following State v. Rider, 95 Mo. 482, 8 S. W. 723.

That evidence of uncommunicated threats is admissible where there is doubt who was the aggressor. See State v. Bailey, 94 Mo. 316, 7 S. W. 43; State v. Sloan, 47 Mo. 610; State v. Herrod, 102 Mo. 609, 15 S. W. 373; State v. Elkins, 63 Mo. 165.

63—People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014 (1017).

64—Keady v. People, 32 Col. 57, 74 Pac. 892 (895).

65—People v. Zigouras, 163 N. Y. 250, 57 N. E. 465 (467), new trial granted.

Held error to refuse the above instruction. There was evidence of threats by the deceased. The court said:

"This is a capital case. The evi-

dence presents a crime of naked and motiveless enormity. The defendant's previous good character is so attested that we naturally look for some justification or excuse. The defendant proffered the justification or excuse of threatening acts of violence, made more alarming by the threatening words accompanying them, and he properly asked for an explicit instruction as to his right to act according to the import of the threatening words. It may be that other parts of the charge can be construed as covering and complying with this request; but the difference between a direct charge upon this point, and a general charge, in which the point needs to be discovered and identified by constructive processes, may involve the life of the defendant."

§ 3156. **Prisoner Shooting Officer Making Arrest.** Although you may believe from the evidence beyond a reasonable doubt that the defendant sold beer within the corporate limits of the city of Danville in the presence of C., and that defendant shot and killed C. while C. had him under arrest, or was endeavoring to arrest him, for that offense, yet, if you further believe from the evidence that, while C. had him under arrest, or was endeavoring to arrest him, the defendant neither forcibly resisted the attempt to arrest, nor forcibly endeavored to break the arrest, and that C. began an attack on defendant with a knife, from which defendant believed, and had reasonable grounds to believe that he was in imminent danger of suffering loss of life or great bodily harm at the hands of C., and that he could not, by the use of any available means, avert the danger, except by shooting and killing C., and that defendant did shoot and kill C. for that purpose—then you will acquit defendant on the ground of self-defense.⁶⁶

§ 3157. **Self-Defense—Available Where Defendant Kills An Officer in Ignorance of His Character.** If the jury, from the evidence, believe that the defendant was placed in the position, at the time of the killing, in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, or to prevent his receiving a great bodily injury, then the killing of deceased was homicide in self-defense; nor does it matter that deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact, or reasonable grounds to know that he was an officer.⁶⁷

§ 3158. **Self-Defense Against Rape.** If, at the time the fatal shot was fired, defendant was in her house, and the deceased was attempting to enter her house, against her objection, for the purpose of forcibly having sexual intercourse with her, and against her will, and defendant fired the fatal shot to prevent this, you should acquit the defendant.⁶⁸

§ 3159. **Resisting Lawful Expulsion From Another's House.** If the defendant and said G. L. were in the house of one L. K. and she wanted the defendant to leave her house, she had the right to order him out of the house, and if he failed to go she would have the right to use sufficient force to put him out of her house, and in case of such refusal she would have the right to ask the said G. L. to put him out, and he would have the right without unnecessary injury to the defendant to put him out of said house, and in such case defendant would not have the right to resist any proper force applied to him for

66—The instructions fairly state the law. *Quinn v. Commonwealth*, 23 Ky. L. 1302, 63 S. W. 792 (793-4). See *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (823), for another approved instruction on this subject.

67—*Bruce v. State*, 68 Ark. 310, 57 S. W. 1103 (1104).

68—"The above charge should have been given." *Osborne v. State*, 140 Ala. 84, 37 So. 105 (106).

that purpose; and if the conflict was brought about by the attempt to expel defendant from the house of said L. K. at her request, the defendant would not have the right to resort to the use of a dangerous weapon, or the right to use it in a dangerous manner, unless it reasonably appeared to the defendant to be necessary to protect him from receiving great bodily harm, and unless it further appeared to be the only means at hand to save his life or prevent great bodily injury at the hands of the said G. L.⁶⁹

§ 3160. **No Duty of Retreat—When.** (a) If the defendant was free from fault in bringing on the difficulty, then he was under no duty to retreat, unless you believe he could have retreated without increasing his danger, or with reasonable safety.⁷⁰

(b) If you should believe from the evidence that the defendant was free from fault in bringing on the difficulty, and was not the aggressor therein, and that he was assaulted by the deceased, or by the deceased and another, who were armed with deadly weapons, and that such assault was made under such circumstances that it reasonably appeared to the defendant, as an ordinarily cautious and prudent man, that he was in danger of death or great bodily harm at the hands of the deceased, or of the deceased and another, as aforesaid, then you are instructed that, under such circumstances, it would not be incumbent upon the defendant to flee in order to avoid the difficulty or avert the necessity of taking the life of his assailant; but, on the other hand, under such circumstances, he might lawfully stand his ground, and, if assaulted by the deceased, or the deceased and another, under the circumstances aforesaid, then, in such event, he would be justified in his acts, and you would find him not guilty.⁷¹

(c) The question then is simply this: "Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm."⁷²

69—State v. Roan, 122 Ia. 136, 97 N. W. 997 (998).

70—Deal v. State, 136 Ala. 52, 34 So. 23 (24); State v. Fontenot, 50 La. 537, 23 So. 634 (636), 69 Am. St. 455. See also State v. Carter, 15 Wash. 121, 45 Pac. 745 (746), and Territory v. Gonzales, 11 New Mex. 301, 68 Pac. 925 (931).

71—Snelling v. State, 49 Fla. 34, 37 So. 917 (918).

The court said that if, under the circumstances stated in the charge,

the defendant would be required to retreat if it could safely be done. The charge was too favorable to him and he could not complain. If not so required, the charge fully preserves the right to act without retreating.

72—State v. Gardner, — Minn. —, 104 N. W. 971 (974).

"The Supreme Court of the United States approved of this rule and of Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52, in 1894; and

(d) In cases of personal peril, such as this defendant claimed he was placed under, the defendant had not only the legal right to defend himself, but the law supposes it to be his duty to defend himself so far as he has personal capacity, and any serious bodily harm apprehended from a felonious attack would not merely excuse but justify extreme resistance; and this defendant should not be required, if hard pressed by A. B., to draw very fine distinctions concerning the extent of the injuries the man A. B. might inflict.

(e) The defendant claims that the attack upon him was so sudden, fierce and violent that a retreat would not diminish, but increase, his danger. You will therefore ascertain from the proofs of the condition of the defendant and his surroundings, his means of getting out of the way of the defendant, so that the man A. B. could no further assault or shoot him, whether he would have been able to secure shelter in buildings or woods or other obstructions to be out of range of A. B.'s gun; always bearing in mind that he was under no obligation, nor was it his duty, to protect himself from the assault by shielding himself with M. or his house, for the law does not warrant a person, when hotly assailed, under circumstances indicating intent to take human life or do grievous bodily harm, to withhold measures proper in self-defense, and expose others to the same danger; and if you find, as claimed by defendant, he had no means of escape except to enter his own house, and in doing so it would expose him to the range of A. B.'s gun, and the circumstances appeared to him that in so doing he would be shot, it was his right to defend himself; and if, in doing so, A. B. was killed, the homicide is excusable, and the defendant should be acquitted.⁷³

§ 3161. Duty of Retreat, When There is Any Reasonable Safe Way of Escape. (a) The right of self-defense is recognized by the law. A man's duty is to defend himself, and he is not bound to endanger himself by retreating; but if there is any reasonable safe way of escape, the law says he ought to do that, and not take the life of his fellow man. I don't mean that he has got to go away from the place because his adversary is there. He is not bound to turn out of his way. But, after the immediate conflict is commenced, it is his duty to retreat from it; avoid taking a man's life; to retire, if he can do so safely, but [he is] not bound to do otherwise, because he has the right to defend himself.⁷⁴

(b) To entitle the defendant to the benefit of this law of lawful self-defense, the defendant must either be without fault himself, or must have attempted to withdraw from the contest, if such withdrawal could have safely been done before firing the fatal shot.⁷⁵

in *Beard v. United States*, 153 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086. This accords with the general law on the subject."

⁷³—"These requests should have been given." *People v. Macard*, 73 Mich. 15, 40 N. W. 784 (787).

⁷⁴—*State v. Sumner*, 55 S. C. 32, 32 S. E. 771 (772), 74 Am. St. 767; *State v. Foster*, 66 S. C. 469, 45 S. E. 2.

⁷⁵—*Kirby v. State*, 44 Fla. 81, 32 So. 836 (837).

(c) Where a party is assaulted, and the party upon whom the assault is committed is without fault in bringing on the difficulty, he is not compelled to run, but he must avoid the necessity of the killing, if he can reasonably and safely do so, because the law is jealous of human life. But if the appearances to him at the time were such that he could not reasonably and safely avoid taking human life, and a man of ordinary reason and firmness would have arrived at the same conclusion, then it was not necessary for him to go any further; and I wish you to understand me on that point, that it is only incumbent on the defendant to avoid the necessity of taking human life when he can do so with safety to himself.⁷⁶

(d) If the jury believe from the evidence that, at the time the defendant shot and killed deceased, he was being assaulted or menaced by the deceased, and he (defendant) believed, and had reasonable grounds to believe, from the character of the deceased, his previous threats, if any proven, and from the circumstances of the meeting, and the nature of the assault or menace, that he (defendant) was then and there in danger of loss of life or suffering great bodily harm, and he believed, and had reasonable grounds to believe, that he had no safe, or to him apparently safe, means of avoiding said danger, then the defendant had the right to use such force as was necessary, or to him apparently necessary, to repel such assault, and protect himself from such danger; and, if he shot deceased under such circumstances, the jury should acquit defendant on the grounds of self-defense.⁷⁷

§ 3162. **Duty of Retreat—Without Increasing Danger to Life, etc.** Before a person can take the life of an assailant, he must be in a position where he cannot retreat without increasing danger to his life, or subjecting himself to great bodily harm. And if he can retreat without so increasing his danger to life or great bodily harm, he cannot successfully invoke the doctrine of self-defense.⁷⁸

§ 3163. **Attack with a Pistol, No Duty of Retreat.** If you believe from the evidence that defendant L. did with a knife cut M., and you further believe from the evidence that at the time said M. did with a pistol make a demonstration that induced defendant to believe, viewed by you from the defendant's standpoint at the time, that he was in danger of death or serious bodily injury at the hands of said M., then

76—From oral charge in *State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (1897).

77—*Connor v. Commonwealth*, — Ky. —, 81 S. W. 259 (260-261).

The court said: "It used to be laid down as the rule that, before killing his assailant, the assailed, to be justified on the ground of self-defense, must retreat to the wall, and only slay him as a last resort, when he could retreat no further. But the rule now is that whether

he should stand his ground or give back is a question for the jury, and that he may properly follow that course which is apparently necessary to save himself from death or great bodily harm. The case of *Oder v. Commonwealth*, 80 Ky. 32, was overruled in *Reynolds v. Commonwealth*, 72 S. W. 277, 24 Ky. L. R. 1743. * * *

78—*Washington v. State*, 125 Ala. 40, 28 So. 78.

you are charged that defendant had the right to act and cut said M., and he would not be required to retreat in order to avoid the necessity or apparent necessity of killing M.; and if you so find, you will acquit.⁷⁹

§ 3164. **Drawing of a Gun by Deceased, Defendant not Bound to Flee.** (a) The court instructs the jury that if they find from the evidence that the defendant had reasonable cause to believe, and did believe, that the deceased was about to draw a pistol at the time and place of the shooting, to shoot him, then he was not bound to flee, but had the right to defend himself from such threatened attack.

(b) The court instructs the jury that if you shall believe from the evidence that at the time defendant shot and killed W. he (the defendant) had reasonable cause to believe, and did believe, from the acts and conduct of W., that W. was attempting to draw a pistol and shoot defendant, and that defendant had reasonable cause to believe, and did believe, that there was imminent danger of W. so doing, then you must acquit the defendant on the ground of self-defense, even though the jury may further believe that W. was unarmed, and that there was no real danger.⁸⁰

(c) When a person is attacked by his adversary, and his adversary makes a demonstration as if to draw a weapon and his adversary retreats, and it reasonably appears to the person so attacked, or against whom the demonstration is made, that his adversary is only retreating for the purpose of getting into a better attitude or condition to carry on or renew such attack, then the person so attacked or the person against whom the demonstration has been made has the right to inflict violence upon his adversary so long as such reasonable appearances of danger continue.⁸¹

§ 3165. **One Attacked in His Own Dwelling Need Not Retreat.** (a) The defendant, while on his own premises, outside of his dwelling-

79—Lewis v. State, — Tex. Cr. App. —, 65 S. W. 185.

Held that this, and an instruction that defendant would have had the right to arm himself and go back to M.'s place of business and ask him for his money, if any was due him covered the theory of self-defense presented by the testimony.

80—State v. Todd, 194 Mo. 377, 92 S. W. 674.

81—Moore v. State, — Tex. Cr. App. —, 96 S. W. 321 (323).

"This charge is given in connection with threats. It is true that he charges with reference to an attack, but the charge goes further and gives the appearance of danger independent of the attack, and in the alternative. So it places before the jury two avenues of escape for appellant along the theory of self-

defense, independent of threats; and then, in addition, gives the same charges in connection with threats. Swain's Case, 12 Tex. Ct. Rep. 812, 86 S. W. 335; Phipps v. State, 34 Tex. Cr. R. 560, 608, 31 S. W. 397, are not in point. In those cases the charge of self-defense confined appellant's right to an attack, omitting the question of appearances of danger from any other view than from such attack. In this case, however, he is given the benefit of both theories, and instead of it being injurious, in our judgment, it was favorable to appellant."

In Delaney v. State, 14 Wyo. 1, 81 Pac. 792, the court instructed that defendant was not justified in shooting because he may have believed deceased was going after his gun.

house, was where he had a right to be, and, if you find that the deceased advanced upon him in a threatening manner, and the defendant at the time had reasonable grounds to believe, and in good faith did believe, that the deceased intended to take his life, or do him great bodily harm, the defendant was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him, in such a way and with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life or protect himself from great bodily injury.⁸²

(b) The court charges the jury that the law does not require one who is assailed in his own dwelling to retreat from it, but the law permits him, and says that it is his right, to stand his ground, and kill his assailant, if it is necessary to do so to save his life, or to protect himself from great bodily harm, provided he is without fault in bringing on the difficulty. And in this case the court charges the jury that if they believe from the evidence that the defendant, on coming to his yard, found the deceased in his dwelling house, or in the act of entering his dwelling house, and that the deceased so acted as to create in the mind of defendant reasonable belief that himself, or any member of his family was in danger of his life, or sustaining great bodily harm at the hands of deceased, then the defendant, under the law, had a right to shoot deceased, and take his life, if such shooting was necessary to protect his own life, or that of any member of his family, from sustaining great bodily harm at the hands of deceased.⁸³

(c) If you believe from the evidence that defendant had the premises rented, on which the homicide occurred, and that deceased went into the inclosure on said premises without the consent of defendant, and after defendant had requested him not to come into said inclosure, and that he (deceased) continued to go into said inclosure and onto said premises after defendant had remonstrated with deceased against coming into said field and inclosure, and if you further believe from the evidence that such verbal remonstrances, if any, were of no avail, and that deceased on the occasion of the homicide went into said inclosure, and was approaching defendant in said inclosure, and from the acts of deceased, or from his words coupled with his acts, it reasonably appeared to defendant that his life was in danger or that he was in danger of serious bodily injury at the hands of deceased, and that while such danger, if any, was imminent and pending, defendant shot and killed deceased, then you will acquit defendant. So, also, if deceased was in the act of forcibly ejecting defendant from said premises, and defendant to

82—State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883.

Note.—The immunity pertaining to the defense of a habitation does not extend beyond the limits of the dwellinghouse and the customary

outbuildings. See instruction and comment in State v. Bartmess, 33 Ore. 110, 54 Pac. 167 (173).

83—Naugher v. State (Sup. Ct.), 105 Ala. 26, 17 So. 24 (26).

avoid being driven off of said premises by force, shot and killed deceased, he was justified in so doing, provided he resorted to all other means to prevent being driven from said premises before killing, except that he was not bound to retreat in any event.⁸⁴

§ 3166. **Burden of Proof as to Retreat.** (a) To sustain the plea of self-defense set up in this case the burden is on the defendant to prove to your satisfaction that he had no reasonable and safe avenue of escape from the danger which threatened him, and not on the state to prove it.⁸⁵

(b) The burden of the proof is also on the defendant to show that he could not retreat without danger or apparent danger of losing his life, or of suffering great bodily harm, and when the court says that the burden of proof is on the defendant it means that the evidence must be sufficient to raise a reasonable doubt.⁸⁶

§ 3167. **Aiming at Aggressor, Accidentally Killing Another.** (a) The court instructs the jury that if they believe from the evidence that at the time the defendant shot and killed A., if he did shoot and kill him, that defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by S., then the defendant had a right to use such force as reasonably appeared to him to be necessary to protect himself from death or great bodily harm at the hands of said S., and if the jury believe from the evidence that at a time when defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by S., he (defendant) shot at said S. and missed him, and accidentally and unintentionally shot and killed A., then the jury will find the defendant not guilty, upon the grounds of self-defense and apparent necessity; but this instruction is subject to this modification: that if the jury believe from the evidence beyond a reasonable doubt that the defendant began the difficulty, in which said A. was killed, by assaulting S. with a deadly weapon, when it did not reasonably appear to him to be necessary to protect himself from immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by said S., then and in that event the jury cannot acquit the defendant upon the grounds of self-defense and apparent necessity.⁸⁷

84—"This charge is the law applicable to the facts of this case." *Bearden v. State*, 44 Tex. Cr. Rep. 578, 73 S. W. 17 (19).

85—Held that this instruction "given for the state correctly placed the burden of proof touching the duty of retreat, and was properly given." *Boulden v. State*, 102 Ala. 78, 15 So. 341 (344).

86—This, "if faulty, was too fa-

vorable to defendant." *Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1030).

87—*Turner v. Commonwealth*, 28 Ky. Law Rep. 487, 89 S. W. 482.

"The instruction gave the correct law of self-defense as applicable to the facts proven. Appellant's only claim was that he was defending himself from assaults made upon him by S."

(b) If the defendant, L., was holding and cocking his gun immediately before it fired the shots which killed R. (if he was so killed) for the purpose and sole purpose of protecting himself against an actual or anticipated attack or assault with a pistol by the witness, S., which might have resulted in death or serious bodily harm to said L. (if it did so appear to him), then if under these circumstances the gun was fired off by accident, the defendant should be acquitted; and if you so believe, or if you have a reasonable doubt on this issue, you will acquit the defendant.

(c) If you believe that defendant committed the assault (if any) as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life or of serious bodily injury at the hands of one S., and that the shots were intended as a means of defense against an assault by said S., the defendant would be excused in law, if thereby he accidentally killed said R., and in such event, or if you have a reasonable doubt upon the issue, you will find the defendant not guilty.⁸⁸

§ 3168. **Trespass by Deceased.** The court instructs the jury that if you believe from the evidence the sugar cane testified about was cane which had been banked on B.'s land by L. as the tenant of B. and that B. forbade the said L. from removing said cane from the premises until such time as a settlement between the parties should be had, and that said L. together with the deceased, attempted to remove said cane from said premises without the consent of B., then such attempted removal amounted to a trespass, and B. had the right to employ such reasonable force as might be necessary to prevent the trespass, and that in such case neither L. nor the deceased had the lawful right to resist such force. And if the jury believe that either L. or the deceased, or both, employed any means in resisting such force as was likely to produce death or to inflict great bodily harm on the defendant, then the defendant had the lawful right to meet such resistance; and if, in so doing, the defendant wounded the deceased by cutting him with a knife, from which wound the deceased died, such killing was justifiable and the jury should find the defendant not guilty.⁸⁹

§ 3169. **The Right to Continue Firing Until Safe.** (a) If the jury find from the evidence that after defendant first shot deceased, if you so find, he (defendant) was in a room, and his gun was caught, and failed to fire again, and the house he was in had been fired into by other parties, there in company with deceased, and the defendant, under the facts, picked up the pistol of deceased, and,

⁸⁸—Lankster v. State, —Tex. Cr. App. —, 72 S. W. 388 (390).

⁸⁹—Boykin v. State, 38 So. 725, 86 Miss. 481.

"We think the instruction announced, in well guarded language, the rights of the defendant under

the law as applied to this competent and material evidence which has been adduced and that its refusal was error under the principles enunciated in Ayers v. State, 60 Miss. 709, and other cases."

hearing a noise, and believing he was in danger, fired another shot into deceased after he was down, in a room that was dark to such an extent that defendant could not know fully his danger from attack by the companions of deceased, then such shooting would not be murder, and you should acquit defendant of murder under such facts.⁹⁰

(b) If the jury further believe that at the time of the difficulty H. N. and L. B. or either of them, acting together, was making or attempting to make, an unlawful attack upon defendant, which reasonably appeared to defendant therefrom that their purpose was either to kill or do him serious bodily injury, then, if you so believe, defendant would have the lawful right to defend himself from such attack; and, if he commenced to shoot under such circumstances, you are instructed that he would have the right to continue shooting at them, or either of them, until it reasonably appeared to him, from his standpoint, that he was out of danger from such unlawful attack.⁹¹

§ 3170. Defendant not Obligated to Wait—May Act Promptly. (a) The law does not require, gentlemen, that a defendant should wait until an actual assault upon him has reached a stage where resistance would be useless. If the situation is such that a reasonable man, in the situation of the defendant, would be justified in believing that his life was in danger, or that a felony was about to be committed upon him, he could act; and what is the apparent danger should be considered by you as the real danger.⁹²

(b) If the jury believe that the evidence established, beyond a reasonable doubt, that the defendant shot and killed the deceased, and that the reason for that killing on the part of the defendant was because the deceased was seeking to commit a serious personal injury upon the defendant with a pistol, and that the deceased was the assailant, or if the jury believe that the defendant was the assailant,

90—*Jones v. State*, 44 Tex. Cr. App. 405, 71 S. W. 962 (963).

"The court instructed the jury, if, when he fired the first shot he knew that he was in no danger, to convict him of either murder or manslaughter. This was a proper charge on the part of the state, but then the converse of the proposition should have been given; that is, if appellant did not know that his danger had ceased, but reasonably believed that it was continuing, under such circumstances he would have the right to continue to shoot."

91—*Kelly v. State*, 43 Tex. Cr. App. 40, 62 S. W. 915 (917).

"This charge should have been given. Certainly the mere fact that appellant may have written a valentine, however obnoxious it

might have been to the prosecutor, would not, per se, authorize the prosecutor to assault defendant; and if he, acting with his brother, made or was attempting to make an unlawful attack upon appellant, and it reasonably appeared to defendant that their purpose was either to kill him or do him serious bodily injury, then certainly appellant would have the right to defend himself against such attack, and to follow up such attack until all appearances of danger had ceased; and all this, of course, must be viewed from appellant's standpoint."

92—"An instruction more favorable to the accused would have been wholly unwarranted." *Williams v. State*, 120 Ga. 870, 48 S. E. 368 (369).

and that the defendant had really and in good faith endeavored to decline any further struggle before the fatal shot was fired, and that the circumstances were sufficient to excite the fears of the defendant, as a reasonable man, that his life was in danger, or that some great bodily harm would come to him, from the assault of the deceased, and under the influence of these fears, and not in a spirit of revenge, he shot and killed the deceased, that would be a killing in self-defense, and the defendant would be justifiable, and it would be the duty of the jury to acquit the defendant.⁹³

§ 3171. Defendant Must Warn Before Killing, if Practicable. The court informs you that in law the defendant, if he was where he had a right to be, if the deceased advanced upon him in a threatening manner, or induced defendant to believe that he was in danger of life or limb, the defendant need not retreat, but had a right to stand his ground and defend himself. When a man is where he has a perfect right to be, and deceased so acts under such circumstances as to induce in him a reasonable and honest ground of apprehension that he is in danger of life or limb, he may at once use necessary force to prevent the threatened blow, even to the extent of taking his life; still he would have no right to take the life of deceased without first warning him to desist from his attack, unless you find from the evidence that defendant was justified in believing that he had not time to give such warning.⁹⁴

§ 3172. Excusable Homicide Defined—State Must Prove Homicide a Crime. (a) The law of the state defines excusable homicide to be a homicide committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat without any undue advantage being taken, and without any dangerous weapons being used, and not done in a cruel and unusual manner.⁹⁵

(b) In order to convict, the jury must believe from the evidence beyond a reasonable doubt, not only that the defendant killed R. M., but that the killing was done in such a manner and under such circumstances as would make the homicide a crime. If the proof shows that the killing was done in self-defense or under such circumstances as would make the killing excusable homicide, or justifiable homicide, you must find the defendant not guilty.⁹⁶

93—Roark v. State, 105 Ga. 736, 32 S. E. 125 (126).

94—State v. Stockhammer, 34 Wash. 262, 75 Pac. 810 (811).

95—Frank v. State, 94 Wis. 211, 68 N. W. 657 (660).

"The first part of this instruction was requested by counsel for the accused, and is substantially in the language of the first half of Section

4367 Rev. St., and the balance of the instruction consists of the balance of that section, and is manifestly more applicable to the case than the part requested."

96—Gray v. State, 42 Fla. 174, 28 So. 53 (55). This instruction must, of course, be supplemented with others, defining self-defense and excusable and justifiable homicide.

§ 3173. **The Assault on Defendant Need not Have Been Felonious—Interfering in Combat.** If the jury believe from the evidence that the deceased was engaged in a difficulty with A. Miller with a knife in the presence of the defendant, it was his duty to endeavor to suppress and prevent the same; and if, in attempting to do so, the deceased left off his difficulty with Miller, and made upon the defendant with a drawn knife in such a manner as to cause the defendant to apprehend, and he did apprehend, that he was about to be slain or to receive enormous bodily harm, then the defendant had a right to stand his ground, and, if necessary, to take the life of the deceased, without retreating.⁹⁷

§ 3174. **Whether the Court May Disparage Plea of Self-Defense.** The defense of self-defense is one frequently made in cases of this kind, and it is one which, I may say to you, should be very carefully scrutinized by the jury. The evidence to this point should be carefully considered and weighed by the jury, for the reason that, if the accused in fact acted in self-defense at the time of the alleged killing, then he ought not to be punished for such act. The evidence on this question of self-defense ought to be carefully considered by the jury for another reason, and that is because a due regard for the ends of justice and the peace and welfare of society demands it to the end that parties charged with crime may not make use of the plea of self-defense as a means to defeat the ends of justice, and a shield to protect them from criminal responsibility in case of violation of the law.⁹⁸

Gilmore v. State, 126 Ala. 20, 28 So. 595 (602); Harbour v. State, 140 Ala. 103, 37 So. 330.

97—State v. Clark, 134 N. C. 698, 47 S. E. 36 (38).

The trial judge added at the end of this instruction the words "provided the assault made upon the defendant was felonious or with felonious intent." Held that such added words made this instruction erroneous. Under the instruction as modified, "the jury could not have acquitted the defendant if they had found that he had a well-grounded apprehension that the deceased was about to assault him with the intent to kill him or to do him great bodily harm, unless they further found that an assault had been actually committed with a felonious intent."

Compare Freeman v. State, 112 Ga. 48, 37 S. E. 172 (173).

98—McIntosh v. State, 151 Ind. 251, 51 N. E. 354 (357).

The court said: "An instruction similar to the one in question relative to the insanity as interposed

to the charge of murder, was approved by this court in Sawyer v. State, 35 Ind. 80, and a like caution given by the trial court to the jury was also approved in Sanders v. State, 94 Ind. 147, while in the appeal of Aszman v. State, 123 Ind. 347, 24 N. E. 123, the same instruction was by a divided court criticised, upon the ground that it could not be said to embrace a statement of any legal proposition, but this was rather in the nature of a general disparagement of the defense of insanity, pleaded by the accused in that case. It was asserted, however, that a case might possibly arise in which such a statement by the court could be properly made; but the court passed the question without deciding whether the charge in controversy constituted reversible error." It was held that in the absence of the evidence it could not be said that the instruction was prejudicial. The court had the right to caution the jury, but not to cast suspicion on any legitimate defense. Conviction affirmed.

§ 3175. **Self-Defense—Burden of Proof.** When the defendant sets up self-defense in justification or excuse of a killing, the burden of proof is upon him to reasonably show to the jury by the evidence that there was a present, impending danger, real or apparent, to life or limb, or of grievous bodily harm, from which there was no other probable means of escape unless the evidence which proves the homicide proves also its excuse or justification.⁹⁹

§ 3176. **Self-Defense—Evidence Equally Balanced Acquits.** The jury are further instructed that if there be, in the opinion of the jury, a substantial conflict in the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it be equally balanced as to the killing being done in self-defense, the jury ought not to convict either of murder or manslaughter.¹⁰⁰

§ 3177. **Self-Defense—Series of Instructions Approved in Missouri.**

(a) The court instructs the jury that they cannot acquit the defendant on the ground of self-defense unless they believe from the evidence in the case on both sides, that defendant, J., had reasonable ground to believe, and did believe, that deceased, H., was about, then and there, to take his (defendant's) life or to do him some great bodily harm, and that the danger of his doing so was then and there imminent and impending; and in this connection the court further instructs the jury that if the defendant did not have reasonable cause to believe and did not believe, at the time and place of the shooting and killing, as set forth in the indictment, that such danger was imminent and impending, and if they believe from the evidence that defendant could with safety to himself have avoided thus shooting and killing H. at the time and by the means mentioned in the indictment, he did such shooting and killing, but notwithstanding he could with safety to himself, have avoided such shooting and killing, he then and there, willfully, feloniously, on purpose, and of his malice aforethought, as heretofore defined in these instructions, with a pistol, as set forth in the indictment, shot and killed H., you will find him guilty of murder in the second degree, and assess his punishment as hereinbefore provided.

(b) The court instructs the jury that to justify the killing of J. H. by the defendant, it is not sufficient that defendant may have acted upon an honest belief that danger was impending to his life, or that deceased was about to inflict great injury to defendant, but it must appear from the evidence that he had reasonable cause to apprehend danger, real and imminent, at the time of the killing, and the jurors herein are final judges of the reasonableness of his apprehensions.

(c) The court instructs the jury that when danger is threatened and impending, a person is not compelled to stand with arms folded until it is too late to strike or shoot, but the law permits him to

⁹⁹—Robinson v. State, 108 Ala. 14, 18 So. 732 (734).

¹⁰⁰—State v. Cottrill, 52 W. Va. 363, 43 S. E. 45, 59 L. R. A. 513.

act on reasonable fear; and in this case, if the defendant had reasonable cause to apprehend that H. had a design to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, then J. had a right to act on appearances, and kill H. to prevent such design being accomplished, and such killing would be justifiable, although it should afterwards turn out that the appearances of danger were false and unfounded, and the finding in that case should be for the defendant.

(d) The court instructs the jury that if the jury believe and find from the evidence that the deceased, H., sought and brought on the difficulty, and then and there assaulted the defendant with a dangerous and deadly weapon, to wit, a knife, giving him reasonable cause to believe that H. was about to kill or do him great bodily harm, and that said assault was without just provocation, then defendant had a right to shoot and kill the deceased, in the necessary defense of his life, or to prevent any great bodily harm or injury, and their verdict should be for the defendant.¹

§ 3178. **Self-Defense—Includes Saving the Life of Another.** Self-defense means, gentlemen, just what these words imply. It means that when one man kills another of necessity. It exists when one man finds himself in a position of peril—imminent peril either to himself or to another—in peril of his life or in peril of serious bodily harm; and where he finds himself in that position, and strikes to save his life, or strikes to save his body from serious harm, or to save the life of another person, or to save another person from serious bodily harm, the law constitutes that self-defense; and, if you believe the defendant in this case did that, then you should render a verdict of not guilty.²

§ 3179. **Right to Protect and Defend Another—Defense of Parent.**

(a) The jury are instructed that the defendant, R. P., had as much right, under the law, to protect the life and body of his father, as he had to protect his own; and if you find from the evidence that the deceased, B., was making an effort to either take the life of L. P., the father of the defendant, or to do him some great bodily harm, and the defendant struck, honestly believing, and without fault or carelessness, to prevent it, then he would not be guilty and you say so by your verdict.³

1—State v. McKenzie, 177 Mo. 699, 76 S. W. 1015 (1019), citing State v. Kloss, 117 Mo. 592, 23 S. W. 780; State v. Lewis, 118 Mo. 79, 23 S. W. 1082; State v. Johnson, 76 Mo. 121; State v. Brown, 63 Mo. 439.

The court said: "They simply declare the law as applicable to self-defense, and are in harmony with the repeated declarations of this court."

2—State v. Bowers, 65 S. C. 207, 43 S. E. 656 (658), 95 Am. St. 795, referring to State v. McGregor, 13

S. C. 466. See also State v. Clark, 134 N. C. 698, 47 S. E. 36 (38).

3—Pratt v. State, 75 Ark. 350, 87 S. W. 651 (652).

The court said: "The appellant complains of the modification but the doctrine inserted is sustained expressly by Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; Magness v. State, 67 Ark. 594, 50 S. W. 554, 59 S. W. 529; Elder v. State, 69 Ark. 649, 65 S. W. 938, 86 Am. St. 220."

(b) You are charged that even though you may find from the evidence that there had been a conspiracy between the defendants and others to resist the officers, and you further find from the evidence that the killing was not done in furtherance of such conspiracy, but was done by defendant in the necessary defense of his mother, under the law as given you in charge, then you will acquit the defendant.⁴

(c) If the jury believe from the evidence that the defendant honestly believed, without fault or carelessness on his part, that at the time he struck the blow that killed the deceased, that the deceased was in the act of killing the father of defendant or of inflicting upon him great bodily injury, and that the danger appeared to defendant to be urgent and pressing, then the defendant was justified in assaulting and striking the deceased to prevent his father from being killed or from receiving great bodily injury.

(d) But the defendant would not be justified in assaulting and striking the deceased, unless it appeared that the deceased was in the act of killing defendant's father or inflicting upon him great bodily injury. If deceased was in the act of assaulting and beating defendant's father, with no manifest intention of killing him or inflicting upon him great bodily injury, the defendant would be guilty of some degree of unlawful homicide; and this would be true, although deceased was in the wrong in his assault upon defendant's father.⁵

(e) The court instructs the jury that the right to defend one's self or his parents against danger is a right which the law concedes and guaranties to all men. Therefore the defendant may have killed deceased, O., and be innocent of any offense against the law.

(f) If, at the time he shot the deceased, he had reasonable cause to apprehend, on the part of deceased, a design to do S. H., defendant's father, some great personal injury, and there was reasonable cause for defendant to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger to his father he shot deceased, and, at the time he did so, he had reasonable cause to believe, and did believe, it necessary for him to shoot deceased to protect his father from such apprehended danger, then, and in that case, the shooting was not felonious, but was justifiable, and you will acquit him.

(g) It is not necessary to this defense that the danger should have been actual or real, or that danger should have been impending, and immediately about to fall on the father of defendant. All that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. But, before you acquit on the ground of defending his father against threatened danger, you ought to believe defendant's cause of apprehension was reasonable.⁶

4—Smith v. State, — Tex. Cr. App. —, 89 S. W. 817.

5—Mabry v. State, 80 Ark. 345, 97 S. W. 285.

6—State v. Harper, 149 Mo. 514, 51 S. W. 89 (92).

§ 3180. **Killing in Defense of Defendant's Son.** (a) If the jury believe from the evidence that when the defendant shot and killed G., if he did so, he had reasonable grounds to believe, either real or apparent, and did in good faith believe, that his son R. was then in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased, G., and there were no other apparently safe means of escape by R. from the impending danger, then the defendant had the right, and it was lawful for him, in the exercise of a reasonable judgment, to use such force as was reasonably necessary, or apparently necessary, to save and protect his son R.'s life, or his person from great bodily harm, even to the taking of the life of said G. On such grounds, and under such circumstances, the defendant is excusable under the law of defense of another. The danger to one's life, or great bodily harm to his person, which authorized defendant to act in his defense, or in the defense of his son, as herein indicated, may be real danger or apparent danger.

(b) The court further instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that defendant's son R. made a demonstration to assault G. with a knife, for the purpose of killing the said G., or inflicting upon him great bodily harm, then the jury cannot acquit the defendant upon the ground that he acted in the defense of his son R. But if the jury believe from the evidence that R. approached G., if he did so, not for the purpose of assaulting him and killing him, or inflicting upon him great bodily harm, and that G. first made a demonstration to strike R. with a deadly weapon, if he did so, and then the defendant believed, and had reasonable grounds to believe, that G. was then and there about to kill his son R., or inflict great bodily harm upon him, then the defendant had the right to use such means in defense of his son, as, in the exercise of a reasonable judgment, were apparently necessary for his safety, as set out in the instruction on defense of his son.⁷

(c) If the killing was willful and intentional, yet, if it was without malice, then the defendant could be guilty of no higher grade of offense than manslaughter; and, if the killing was the result of sudden passion aroused in the breast of the defendant by an attempt by T. to assault defendant or either of his sons with a gun, then the killing, if not justifiable on the grounds of self-defense, would be only manslaughter.⁸

(d) If the jury believe from the evidence that at the time defendant shot and killed the said C., if he did shoot him, he believed, and had reasonable grounds to believe, that the said C. was then and

7—Thacker v. Commonwealth, 24 Ky. Law R. 1584, 71 S. W. 931 (1932).

8—Mitchell v. State, 129 Ala. 23, 30 So. 348 (1932).

The court said: "Defendant's right to kill in defense of his son depended on the same conditions

as would have been necessary to excuse the son if he had killed the deceased. If the son was at fault in commencing the difficulty, that fact precluded any right of the defendant to kill in order to extricate or protect him."

there about to take the life of his son, W. U., or inflict on his said son great bodily harm, and there appeared to him, the said H. U., in the exercise of a reasonable judgment, no other means to avert the then real, or, to him, apparent, danger, if any, to his said son, W. U., but to shoot said C., then he had the right to do so, and they ought to acquit him on the grounds of defending his said son, W. U., from death or the infliction of great bodily harm, at the hands of the said C.⁹

§ 3181. Defendant May Kill in Defense of Person or Property. A person may repel force by force in defense of person, property or life against one who manifestly intends or endeavors by violence or surprise to commit a known misdemeanor or felony or either or to do great bodily injury to his person; and the danger which would justify the defendant in the act charged against him may be either real or apparent; and the jury are not to consider whether the defendant was in actual peril of his life or property but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property. And if he so believed reasonably (and had sufficient cause so to believe), and committed the act complained of under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant.¹⁰

§ 3182. When Killing Justifiable in Defense of Property—Landlord and Tenant. Every person has the right to oppose force in the protection of property lawfully in his possession. And where one has property in his possession which he has raised as tenant on the land of another, under agreement to give to his landlord a portion thereof as rent, his possession thereof is lawful, and he has the right to defend his possession thereof against the landlord, opposing force to force for that purpose, unless such landlord be assisting a peace officer in taking the same, under authority of a writ of legal process. And a want of knowledge that the landlord is acting with the authority of such writ or process would, if the landlord attempted to take by force or violence the property from the possession of the tenant, excuse the tenant in opposing force to force to prevent the taking from his possession, and in slaying the landlord, if necessary, or if reasonably appearing necessary, in order to prevent the taking, or in protecting his own person from injury or death which reasonably appears to menace him as an accompaniment of the taking. But in every case where one acts in defending his possession of property, as distinguished from his protection of his life or of his person from great bodily injury, before the person in possession would be justified in killing the other or excused therefor, every other effort in his power must have been used to repel the aggression. However, one may, in the defense of his property, be placed in such position as to

9—Utterback v. Commonwealth, 10—People v. Glover, 141 Cal. 233, 22 Ky. Law R. 1011, 59 S. W. 515. 74 Pac. 745 (747).
88 Am. St. 328.

become himself in danger or apparent danger of death or serious bodily injury, in which case the rule stated in the previous section as to defense of person would apply to his case as though the question had been in the first instance a question of self-defense. So, if you believe from the evidence that defendant killed the said K., but further believe that, from the standpoint of defendant, it appeared necessary at the time to kill the said K. as the only means of protecting the possession of his property from a forcible taking, and that the defendant had no knowledge of the fact, if true, that deceased and his companion, or the latter of them, had legal process authorizing them to take forcible possession of said cotton, then you will acquit the defendant.¹¹

§ 3183. Defense of Habitation. (a) The law is that one assailed with a deadly weapon in his own house is not obliged to flee. If such a person is violently assaulted, without being in fault, he may repel force by force, and if, in the reasonable exercise of his right of self-defense, and using no more force than is apparently necessary in defense of himself and habitation, he kills his assailant, the killing is justifiable homicide.¹²

(b) The jury, in considering whether the killing was in defense of habitation, should consider all the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used as bearing upon the question of whether the killing was in defense of habitation, in good faith, or whether it was done maliciously and in a spirit of hatred or revenge.¹³

11—Howell v. State, — Tex. Cr. App. —, 60 S. W. 44.

See Wells v. Territory, 14 Okla. 436, for instructions relating to taking forcible possession of land.

12—Runyan v. State, 57 Ind. 80, 2 Am. Cr. Rep. 318; State v. Harman, 78 N. C. 515; State v. Middleham, 62 Ia. 150, 17 N. W. 446.

13—Greschia v. People, 53 Ill. 295.

CHAPTER C.

CRIMINAL—INTOXICATING LIQUOR.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 3184. Definition of intoxicating liquor.</p> <p>§ 3185. When a liquor is considered as intoxicating within the meaning of the law.</p> <p>§ 3186. What constitutes a sale within the state.</p> <p>§ 3187. Burden of proof as to license.</p> <p>§ 3188. Keeping of liquors is presumptive evidence of illegal sale, when.</p> <p>§ 3189. Sale of liquor by druggist.</p> <p>§ 3190. Authority of bar tender in making sales—No presumption of law either way.</p> <p>§ 3191. Presumption of law that the bar tender has authority to make only lawful sale.</p> <p>§ 3192. When and when not liable for act of servant.</p> <p>§ 3193. Keeping a place for the sale of intoxicating liquors as agent, clerk, servant or principal.</p> <p>§ 3194. One sale delivered at different times.</p> <p>§ 3195. Selling liquor to minor—Knowledge and intent material.</p> <p>§ 3196. Knowledge of minority immaterial.</p> <p>§ 3197. Burden of proof as to written order.</p> | <p>§ 3198. Drunkenness defined.</p> <p>§ 3199. Habit must exist at the time, etc.</p> <p>§ 3200. Selling to a person in the habit.</p> <p>§ 3201. Knowledge of criminal intent necessary.</p> <p>§ 3202. Sale in prohibition limits—No words necessary to constitute a sale—Leaving money where vender may get it and taking of property is sufficient.</p> <p>§ 3203. Keeping or using a place for the illegal sale of intoxicants.</p> <p>§ 3204. Making a public resort of a dwelling house and the finding of liquor there is presumptive evidence of keeping for illegal sale.</p> <p>§ 3205. Keeping for sale of liquors in club house without license.</p> <p>§ 3206. Opening on prohibited days—Sales in side or rear rooms unlawful.</p> <p>§ 3207. Order of liquor by an agent is not a sale.</p> <p>§ 3208. What constitutes residence district.</p> <p>§ 3209. Illegal sale—Local option.</p> |
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§ 3184. **Definition of Intoxicating Liquor.** You are instructed that intoxicating liquor is such as is intended for use as a beverage, or is capable of being so used, which contains alcohol, either obtained by fermentation, or by the additional process of distillation, in such proportion that it would produce intoxication when taken in such quantities as may practically be drunk; and unless you believe from the evidence beyond a reasonable doubt that the liquor sold by the defendant comes within the above definition, you will find defendant not guilty.¹

§ 3185. **When a Liquor is Considered as Intoxicating Within the Meaning of the Law.** A liquor is intoxicating, within the meaning of

1—Sebastion v. State, 44 Tex. Cr. App. 508, 72 S. W. 849 (850).

the law, when it is intended for use as a beverage, or is capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it would produce intoxication when taken in such quantities as may practically be drunk; and, unless you believe from the evidence beyond a reasonable doubt that the liquor sold by defendant comes within the above definition, you will find the defendant not guilty.²

§ 3186. **What Constitutes a Sale Within the State.** The jury are instructed that if you find the defendant received a written order for beer at the village of Lyle accompanied with a money order for the price thereof, and sent the beer pursuant to the order to the party in Iowa sending the order, this would constitute a sale at Lyle, this State, in violation of the statute, and the defendant would be guilty of the charge contained in the indictment.³

§ 3187. **Burden of Proof as to License.** If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant by himself, agent or servant, made the sales, as charged in the indictment, then it is not necessary for the people to show, by proof in the first instance, that he had no license to sell intoxicating liquors. That is a matter of defense, and should be proved by the defendant if he had such license.⁴

§ 3188. **Keeping of Liquors is Presumptive Evidence of Illegal Sale, When.** It is also provided that in all actions, prosecutions and proceedings under the law of this state prohibiting the illegal manufacture and sale of intoxicating liquors, the finding of such liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling-house which does not include, or is not used in connection with, a tavern, public eating-house, restaurant, grocery or other places of public resort, shall be presumptive evidence that such liquors were kept for illegal sale, and proof of actual sale shall be presumptive evidence of illegal sale.⁵

§ 3189. **Sale of Liquor by Druggist.** The law allows druggists to sell liquor, as you have already been instructed, for medicinal, mechanical, scientific and sacramental purposes, and for that alone. The law absolutely prohibits the sale of liquor by druggists to be used as a beverage or to be drunk on the premises. There are other restrictions and prohibitions which it is not necessary to name, as they are not involved in this case. So long as a druggist complies with the law in these regards, he is justified in making sales.⁶

The jury is instructed that a druggist and apothecary has a right to have in his possession intoxicating liquors in any quantity to

2—Malone v. State, — Tex. Cr. App. —, 51 S. W. 381.

3—State v. Johnson, 81 Minn. 121, 90 N. W. 161 (162).

4—Potter v. Deyo, 19 Wend. 361; Smith v. Jolce, 12 Barb. 21; Pendergrast v. Peru, 20 Ill. 51; Gerring v.

State, 1 McCord, 573; Contra: Mehan v. State, 7 Wis. 670.

5—State v. Illsley, 81 Ia. 49, 46 N. W. 977 (978).

6—People v. Hilliard, 119 Mich. 24, 77 N. W. 306.

be used solely for the purpose of mixing and combining with other ingredients as a medicine, and that the only question for the jury is to decide whether the liquors found in defendant's possession were so kept by him solely for the purpose of combining with other ingredients as a medicine, or were kept to be sold in violation of law; if you should find that they were so kept solely for combining with other ingredients as a medicine, you should return a verdict of not guilty, but if you find that they were kept for sale, you should bring in a verdict of guilty.⁷

§ 3190. Authority of Bar Tender in Making Sales—No Presumption of Law Either Way. The jury are further instructed that, nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale, would, if believed, warrant the jury in finding the sale was authorized by the master, and that this would be so although the defendant was not on the premises at the time the sale was made.⁸

§ 3191. Presumption of Law that the Bar Tender has Authority to Make Only Lawful Sales. Although the jury may believe, from the evidence, that the bar tender of the defendant sold intoxicating liquor to the said A. B., as charged in the indictment, and that the said A. B. was at the time a person in the habit of getting intoxicated, still, if the jury further believe, from the evidence, that such sale was without the knowledge or consent of the defendant, and against his wishes, then the defendant would not be liable therefor, and the jury have no right to presume that the defendant authorized his bar tender to make such sale simply because he was employed as bar tender at defendant's saloon; if the jury find there is no evidence to the contrary, the presumption of law is, that the bar tender only had authority from the defendant to make such sales as were lawful.⁹

7—Commonwealth v. Boutwell, 162 Mass. 230, 38 N. E. 441.

The court said that under these instructions "the jury could not find the defendant guilty unless they were satisfied beyond a reasonable doubt that the liquors were kept for sale. So far as appears, there was no evidence which called for any other instructions. The defendant did not testify, and there was nothing to show that any part of the liquors was on hand previous to May 1st as a part of his stock, when he held the license to sell for medicinal, mechanical and chemical purposes. His statement to that effect at the time of the seizure was not evidence in his favor."

8—Commonwealth v. Houle, 147 Mass. 380, 17 N. E. 896 (897).

The court said that this "instruction submitted the whole question of the authority of the bar-keeper

to the jury, under all the circumstances of the case, stating that there was no presumption of law either way. This left the weight of the evidence offered by the commonwealth and the inferences to be drawn from it entirely to the jury, and is in accordance with the view expressed in Commonwealth v. Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707. It was as a question of fact solely that the jury were to determine whether an authorized sale by the bar-keeper had been proved, and the jury were permitted to make this inference if, under all the circumstances, they should see fit to do so. In Commonwealth v. Hayes, 145 Mass. 289, 14 N. E. 151, it is also intimated that instructions precisely similar to those given in the case at bar would be unobjectionable."

9—State v. Mahoney, 23 Minn. 181, 2 Am. Cr. Rep. 408.

§ 3192. **When and When not Liable for Act of Servant.** (a) If a clerk or bar keeper in a saloon sell intoxicating liquor, without the knowledge and against the instructions of his employer, the latter is not criminally responsible for the act.¹⁰

(b) A sale by an agent, against the known will and instructions of his principal, will not render the principal liable.¹¹

(c) If the jury believe from the evidence beyond a reasonable doubt that defendant, ———, did at the time and place alleged unlawfully and willfully sell, or assist in the sale of, a pint of whiskey, to F., then you will find defendant guilty, etc.¹²

(d) You are instructed that if the defendant had no interest in the whiskey, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whiskey in making a sale to the witness, K., if such a sale was made, he is guilty. That before they (the jury) could convict the defendant, they must believe from the evidence beyond all reasonable doubt, that the defendant sold the whiskey to the witness, K., or that if he did not own the whiskey, he aided and assisted in the sale as the agent of the owner, etc.¹³

§ 3193. **Keeping a Place for the Sale of Intoxicating Liquors as Agent, Clerk, Servant or Principal.** (a) If you believe from the evidence in this case that the defendant is not guilty, that he has not kept this place, that he has not sold this liquor, then it is your duty, under your oaths as jurors, to find this defendant not guilty. It is equally your duty, if you believe this defendant beyond a reasonable doubt to be guilty, to say so by your verdict.¹⁴

(b) If you find from the evidence introduced upon the trial, under these instructions, that the defendant, between the 1st day of January, ———, and the 24th day of May, ———, on lots 4 and 5 in block 10 of St. Charles City, in Floyd county, Iowa, did maintain or continue to use a certain building or place wherein he sold, kept for sale or kept with intent to sell, intoxicating liquors of any sort or character, in violation of law, whether as clerk, agent, servant or as principal, then you ought to find the defendant guilty. If you do not

10—Lathrop v. State, 51 Ind. 192, 1 Am. Cr. Rep. 468; Com. v. Putnam, 4 Gray 16.

11—Anderson v. State, 22 Ohio St. 305.

12—Burnett v. State, 42 Tex. Cr. App. 600, 62 S. W. 1063 (1064).

The court said in comment that "the complaint here is that it assumed appellant was the agent or employe of K., the owner of the saloon. This is certainly the effect of the charge, and, if his employment was controverted or in issue, the charge would be erroneous. The state, by its testimony, proved that he was in the employ of K. as

porter. Appellant, who testified on his own behalf, states that he was working in K.'s saloon on the day of the alleged sale of the whisky to F.; that he was helping to clean up that day, and moving the bar fixtures; that he did not work for said K. before that day, and had no contract for employment for any other day. It occurs to us that this is an admission on his part that he was in the employ of K. on that Sunday."

13—Winter v. State, 133 Ala. 176, 32 So. 125.

14—State v. Currie, 8 N. Dak. 545, 80 N. W. 475 (476).

so find beyond a reasonable doubt, then you should find the defendant not guilty.¹⁵

§ 3194. **One Sale Delivered at Different Times.** If the jury believe, from the evidence, that the defendant, on the occasion testified to by the witnesses, sold to the said A. B. (one gallon) and no less, and that the quantity so sold was drawn from the cask and placed in a keg (or bottles) separate by itself and set away for the said A. B. as his property and charged to him (or paid for by him), then in such case the title to the whole quantity so sold and set apart passed to the purchaser, although he may have taken away but a part of it at the time of the sale, and in such case it is a matter of no consequence what may have been the motives of the parties in making such sale, and the jury should find for the defendant.¹⁶

§ 3195. **Selling Liquor to Minor—Knowledge and Intent Material.** The jury are instructed, as a matter of law, that intent is necessary to the commission of a crime, and it is a good defense to a charge of selling intoxicating drink to a minor, that the dealer had good reason to believe, and did believe him to be of age. Whether in this case the defendant did sell to a minor, and whether he took reasonable care to find out whether the said A. B. was a minor, and whether he, in good faith, believed him to be over the age of twenty-one years, are questions of fact to be determined by the jury, from the evidence in the case.¹⁷

§ 3196. **Knowledge of Minority Immaterial.** The jury are instructed, that if they believe, from the evidence, that the defendant by himself, his agent or servant, sold or gave intoxicating liquor to the said A. B., and that the said A. B. was at that time a minor, under the age of twenty-one years, then it is wholly immaterial whether the defendant knew, or did not know, that the said A. B. was a minor, nor whether the said defendant was himself deceived in regard to the age of the said minor. A person engaged in the business of selling intoxicating liquors sells to a minor at his peril, and is equally guilty whether he knows, or does not know, the age of the person to whom he is selling.¹⁸

15—State v. Caffrey, 94 Iowa 65, 62 N. W. 664.

Sale with knowledge, authority or approval of defendant.

The court instructs the jury that there does not seem to be very much dispute, and I don't think you will have any hard work to ascertain, as to whether this liquor was sold or not. It was either brandy or whisky. The sale was on the 5th day of January this year. Upon that there cannot be much question, because I do not understand that defendant, or his counsel, upon his argument to you, denies this. But the question for your consideration is whether it was sold with the knowledge, au-

thority or approval of the accused; and upon that fact you must be satisfied from the evidence in the case, beyond a reasonable doubt, before you can say he was guilty.

Approved in State v. Lewis, 86 Minn. 174, 90 N. W. 318.

16—Dobson v. State, 57 Ind. 69.

17—Faulker v. People, 39 Mich. 200; Robbins v. State, 63 Ind. 235; Anderson v. State, 22 Ohio St. 305; Adler v. State, 55 Ala. 16.

18—State v. Hartfield, 24 Wis. 60; Com. v. Emmons, 98 Mass. 6; State v. Cain, 9 W. Va. 559; Com. v. Finnegan, 124 Mass. 324; Roborge v. Burnham, 124 Mass. 277, McCutcheon v. People, 69 Ill. 601, 1 Am. Cr. Rep. 471.

§ 3197. **Burden of Proof as to Written Order.** The fact of the defendant having a written order from parents, guardian or family physicians authorizing a sale to a minor is a matter of defense, and if the people have proved to the jury by the evidence, beyond a reasonable doubt, the sale or giving of intoxicating liquors to a minor, as charged in the indictment, then the jury should find defendant guilty; unless the jury believe, from the evidence, that at the time of such sale he had such written order.¹⁹

§ 3198. **Drunkenness Defined.** The court instructs the jury that a man is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor.²⁰

§ 3199. **Habit Must Exist at the Time, etc.** The court further instructs the jury, on the part of the defendants, as a matter of law, that before they can convict the defendants they must believe, from the evidence, beyond a reasonable doubt, that the person named in the indictment had been in the habit of getting intoxicated at the time of the alleged sale, and whether he was or was not in such habit is a question for the jury to determine, from all the evidence in the case.²¹

§ 3200. **Selling to a Person in the Habit—Intent Necessary.** Although the jury may believe, from the evidence, that the defendant sold intoxicating liquors to the said A. B., as charged in the indictment, and that the said A. B. was at the time a person in the habit of getting intoxicated, still if the jury further believe, from the evidence, that before making such sale, defendant made inquiry of persons well acquainted with the said A. B., as to whether he was in the habit of getting intoxicated, and was told that he was not, and that the defendant used reasonable care before selling said liquor, in good faith, to ascertain whether the said A. B. was in the habit of getting intoxicated, and that when he sold the said liquor he honestly and in good faith believed that the said A. B. was not in the habit of getting intoxicated, then the jury should find the defendant not guilty.²²

§ 3201. **Knowledge or Criminal Intent Necessary.** The jury are instructed, that if they believe, from the evidence, beyond a reasonable doubt, that the defendant sold or gave to the said A. B. intoxicating liquor, as charged in the indictment, and that the said A. B. was, at the time, in the habit of getting intoxicated, then it is wholly immaterial whether the defendant knew or did not know that the said A. B. was a person in the habit of getting intoxicated. A person engaged in the business of selling intoxicating drinks, selling to a person who is in the habit of getting intoxicated, sells at his peril,

19—State v. Cornan, 48 Ia. 567.

20—State v. Pierce, 65 Ia. 85, 21 N. W. 195; 1 Bouv. Law Dic. 510.

21—Gallagher v. The People, 120 Ill. 179, 11 N. E. 335.

22—Crabtree v. State, 30 Ohio St. 382.

and he is equally guilty whether he does or does not know the habits of the person to whom he is selling.²³

§ 3202. Sale in Prohibition Limits—No Words Necessary to Constitute a Sale—Leaving Money Where Vender May Get it and Taking of Property is Sufficient. (a) Before you can convict the defendant you must believe from the evidence beyond a reasonable doubt that within five miles of the Methodist Church house located in Center, in Cherokee county, Alabama, and within twelve months before the finding of this indictment, the defendant sold or gave away vinous, spirituous or malt liquors. A sale of personal property is a transfer of the same for a price paid or agreed to be paid. Words need not be spoken to constitute a sale; it may be inferred from the conduct of the parties. If one in possession of personal property permits another to take it, with the mutual understanding it is to be paid for, and the vendee leaves money to pay for it where the vender may get it, and the vender afterwards gets the money, and accepts it in payment of the property, such a transaction would be a sale, though the parties may not have said a word about it.

(b) That they must ascertain from the evidence whether the witness A. got the whiskey with the intention of paying for it whether he left the money to pay for it, and whether the defendant afterwards got the money and accepted it for the whiskey.²⁴

§ 3203. Keeping or Using a Place for the Illegal Sale of Intoxicants. The state claims that the defendant kept or used the basement or cellar under their restaurant, and kept beer therein for unlawful purposes. On this issue the burden of proof is upon the state, and, in order to convict defendants on account of what was kept or done in said basement or cellar, you must find from the evidence and beyond reasonable doubt that the defendants kept or used the cellar in question, and that intoxicating liquor was kept therein for the purpose of selling unlawfully. If defendants kept or used the cellar in question, and beer was found therein, the law would presume it was kept there unlawfully; but this presumption might be overcome by evidence showing that the defendants did not keep the beer in the cellar unlawfully. If the defendants did not keep or use the cellar in question, and had no control of it, they would not be responsible for what was kept or done in the cellar; but, if they kept or used the cellar, they would have no right to permit any other person to keep beer therein for unlawful purposes.²⁵

§ 3204. Making a Public Resort of a Dwelling House and the Finding of Liquor There is Presumptive Evidence of Keeping for Illegal Sale. If you find from the evidence that the dwelling house

23—Barnes v. State, 19 Conn. 397.

24—Winter v. State, 132 Ala. 32, 31 So. 717 (719).

In *Matkins v. State*, — Tex. Cr. App. — 62 S. W. 911 (912), the court

instructed the jury that if prohibition existed in the territory described in the indictment, they will consider the defendant guilty.

25—State v. Stevens, 119 Ia. 675, 94 N. W. 241 (242).

or its dependencies, occupied by the defendant at the time in question was a place of public resort, or a place which was resorted to by the general public, then the finding of intoxicating liquors there would be presumptive evidence that such liquor was kept or held for sale contrary to law; but this presumption of the law may be overcome by other evidence appearing in the case, and, unless you find that he kept a place of public resort this presumption would not arise from the fact that he kept liquors there.²⁶

§ 3205. Keeping for Sale of Liquors in a Club House Without License. (a) The jury are instructed that if you find from the evidence beyond a reasonable doubt that the defendant had in his possession beer, as alleged in the first count, and whiskey as alleged in the second count on or about the 17th day of June, —, and that he then had no license or druggist's permit for the sale thereof, still if you believe from a consideration of all the evidence that the defendant is the alleged keeper of liquors for sale, as charged in the first and second counts of the information, was merely acting as a steward or clerk of a private club which had purchased and owned such liquors, the liquors being distributed by said steward or clerk only to other members of the club on checks or coupons, which had been purchased by them, and the money so obtained being used for the purpose of paying the steward or clerk for his services, the use of the room to which the members of the club and their guests had access and where the liquors were kept, and other expenses of the club; and if you further believe from the evidence that this club was organized and conducted in good faith, with a limited and select membership, as well as owning its property in common, and founded for social, literary, artistic or other purposes, to which the furnishing of liquor was merely incidental—this would satisfactorily account for and explain the possession of such liquors, if such possession is proved, and you should find the defendant not guilty on the first and second counts of the information.

(b) But if you believe from the evidence that the organization of the club was merely to provide its members with a convenient method of obtaining a drink whenever they desired it, or if the form of the organization was no more than a pretense or device to enable the proprietor to conduct an unlawful traffic, then in that case he could not have satisfactorily accounted for the possession of the liquor if such possession be proved in manner and form as hereinbefore explained to you, and you should find him guilty on the first and second counts of the information.²⁷

²⁶—State v. Fleming, 86 Ia. 294, 53 N. W. 234 (236).

The court said: "We think this instruction was authorized by section 8, c. 66, Acts 21st Gen. Assem. A person may make a place of public resort of his private dwell-

ing house, and when he does so the finding of intoxicating liquors there is presumptive evidence that they were kept for illegal sale."

²⁷—Sothman v. State, 66 Neb. 302, 92 N. W. 303 (305).

§ 3206. **Opening on Prohibited Days—Sales in Side or Rear Rooms Unlawful.** If a saloon is kept open on one of the forbidden days, for any purpose, or for any business, or for any length of time, no matter how short, it will be a violation of the statute. If a man, renting an entire building, and occupying it, and having a saloon in one room, opening into another room next back of it, on prohibited days, as Sunday, admits to that room persons who call to get beer and persons who call ostensibly for other purposes, and he deals out beer to them in that room, I care not what he calls it—what name he gives the room—and I care not where he gets his liquor from, that room, to all intents and purposes, is a part of that saloon.²⁸

§ 3207. **Order of Liquor by an Agent is not a Sale.** The court charges the jury for the defendant, that if you believe from the evidence that the witness F. got the defendant to order him the whiskey from a dealer in S., and delivered it to him under such order, then the defendant is not guilty, and the jury should so find.²⁹

§ 3208. **What Constitutes Residence District.** (a) If a certain part of the city, large or small, is principally and chiefly used for residence purposes, families residing and having their homes therein, such part of the city would not become a business portion of the city merely because a grocery or other business was here and there carried on therein. The decided preponderance of residences and families residing therein determines the character of said portion of the city.³⁰

28—*People v. Bowkus*, 109 Mich. 360, 67 N. W. 319.

"This last portion of the charge was called out by a question from the jury 'whether a room connected to a barroom, and used as a private residence room, should be considered as a part of the saloon under the law? The latter instruction was correct. Saloon keepers cannot evade the law by taking liquors from their saloons on a week day to a room adjoining the saloon, and there serve it upon Sunday with or without pay. *People v. Whipple*, 108 Mich. 587, 66 N. W. 490. Under the rule in *People v. Minter*, 59 Mich. 557, 26 N. W. 701, the instruction as to opening on forbidden days may have been too strict, although the court used the expression 'kept open,' implying, perhaps, a different condition from that of simply opening the door and entering for a necessary purpose. But this part of the instruction could not have prejudiced the respondent, because he admitted serving liquor in the room."

29—*Waddle v. State*, — Miss. —, 24 So. 311.

The court held that "the refusal of this instruction to the defendant is fatally erroneous, as

shown by *Johnson v. State*, 63 Miss. 228."

30—*Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138 (144).

"If that is not a correct statement of the law upon the subject, then it seems to us that there is no fair way of determining what is meant in the statute, and the ordinance authorized thereby in the use of the words, 'residence portion of such city.' Does one family grocery in the residence portion of a city convert that portion into what the statute means by the words, 'the business portion of such city?' And does one family residence in the business portion of a city convert that part thereof into a residence portion of such city? Most certainly not. Because, if both of these questions may be answered in the affirmative, then it will appear that in very rare instances will any city have either a business portion or a residence portion thereof. In other words, all parts of all cities will be residence portions, and the same parts will be business portions thereof. This makes nonsense out of the language of the statute and the ordinance. The framers of the statute and of the ordinance must have

(b) A family residence in a dwelling house as a family residence may furnish board and lodging to boarders who may occupy with the family a part of such residence, and such use for a dwelling house will not change the character of such dwelling from a residence to a business house.³¹

§ 3209. **Illegal Sale—Local Option.** (a) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, —, in this county and within one year next before the finding of the indictment herein, sold directly or indirectly, to the witness, J. A. V., spirituous, vinous, or malt liquors, in a quantity less than five gallons at the time mentioned by the witness, then you ought to find the defendant guilty as charged in the indictment herein and fix his punishment at a fine of not less than \$60 nor more than \$100, or at imprisonment in the county jail not less than 10 nor more than 40 days, or you may both so fine and imprison the defendant within the above limits, at your discretion, according to the proof. And if you shall believe from the evidence that he will fail to pay or replevy said fine, you may, at your discretion, say that he be placed at hard labor on some public road or street in the county at the rate of one day for each one dollar of the fine and cost and likewise for the imprisonment, if any.

(b) Or, if you shall believe from the evidence, beyond a reasonable doubt, that the defendant was engaged in the sale of liquor at the place mentioned in evidence, and entered into any scheme, plan, device, arrangement, or subterfuge, in evasion of the local option law, whereby he sold or transferred to the witness liquor mentioned in the evidence for the pay or as agent for another, who received the pay, within 12 months before the date of the indictment, then you ought to find him guilty and fix his punishment as provided in instruction No. 1 above.³²

had in mind the common understanding of the import of the words or phrases used, 'business portion,' and 'residence portion,' of a city. And that idea was correctly enough expressed in the instruction so that the jury could apprehend it."

31—Shea v. Muncie, 148 Ind. 14, 46 N. E. 138 (144).

In comment the court said that "Webster's definition of the word

'business' is 'constant employment, regular occupation; as the business of life; business before pleasure.' In view of the general scope and intent of the statute and ordinance, we think the court did not err in telling the jury that keeping boarders in one's residence or dwelling house does not convert the same into a business house."

32—Day v. Commonwealth, 29 Ky. L. 807, 814, 816, 96 S. W. 508.

CHAPTER CI.

CRIMINAL—LARCENY.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 3210. Larceny defined—Felonious intent explained.</p> <p>§ 3211. Taking must be with felonious intent.</p> <p>§ 3212. Felonious intent—Fraud—Artifice—False pretenses—Threats.</p> <p>§ 3213. Intent—Horse stealing.</p> <p>§ 3214. Horse stealing—What necessary to convict.</p> <p>§ 3215. Finding lost property not larceny—Duty to search or advertise for owner.</p> <p>§ 3216. Finding lost property, intent to convert—Concealing the fact of finding.</p> <p>§ 3217. Elements of larceny—What is necessary to prove.</p> <p>§ 3218. Value must be proved.</p> <p>§ 3219. Rule for determining the value of property.</p> <p>§ 3220. What constitutes taking and carrying away.</p> <p>§ 3221. Forcible taking, resistance necessary.</p> <p>§ 3222. Taking property so suddenly from the person as not to allow time for resistance.</p> <p>§ 3223. Obtaining property by threats to do great bodily harm.</p> <p>§ 3224. Money must be proved to be genuine.</p> <p>§ 3225. Ownership in an unknown owner.</p> <p>§ 3226. Special property sufficient.</p> <p>§ 3227. Person having possession of property must be produced.</p> <p>§ 3228. Name of the person injured must be proved.</p> <p>§ 3229. Taking under a mistaken claim of right.</p> <p>§ 3230. Larceny of estrays.</p> <p>§ 3231. Taking up estrays by consent in good faith—Subsequent intent to wrongfully convert.</p> <p>§ 3232. Larceny of different cattle, belonging to different owners, at the same time, is one offense.</p> <p>§ 3233. Placing one's brand upon live stock, appropriating same.</p> | <p>§ 3234. Turning the stolen mare loose and returning it to owner would not divest taking of its felonious character.</p> <p>§ 3235. Stealing of certain animals is grand larceny and jury cannot find defendant guilty of petit larceny.</p> <p>§ 3236. Whether petit or grand larceny.</p> <p>§ 3237. When the crime of larceny is completed.</p> <p>§ 3238. Time is not of the essence of the crime of larceny.</p> <p>§ 3239. Opening a trunk left in defendant's custody.</p> <p>§ 3240. Appropriation of property under a bill of sale and possession thereunder.</p> <p>§ 3241. Obtaining the title as well as the possession by fraud is not larceny.</p> <p>§ 3242. Larceny—Fraud defined.</p> <p>§ 3243. Inculpatory circumstances to show guilt—When.</p> <p>§ 3244. Recent possession unexplained.</p> <p>§ 3245. Recent possession of stolen goods—Satisfactory account of possession.</p> <p>§ 3246. Possession of stock allowed to run at large—Burden of explaining possession, exception.</p> <p>§ 3247. Possession of stolen property not with the defendant—Property found in barn.</p> <p>§ 3248. Possession of stolen property—Defendant's house used jointly with others.</p> <p>§ 3249. On the charge of larceny, proof of defendant having bought the stolen property with such knowledge, he must be acquitted on charge of larceny.</p> <p>§ 3250. Possession by one who has no claim—Subsequent conversation.</p> <p>§ 3251. Action of replevin to recover stolen property does not relieve from the charge of larceny.</p> |
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§ 3252. Larceny—Reasonable doubt
—Burden of proof.

RECEIVING STOLEN PROPERTY.

§ 3253. Receiving stolen property,
criminal intent must exist

at the very instant of receiving.

§ 3254. Purchase of stolen property,
bona fide or sham.

§ 3255. Stolen goods left at a man's
house without his knowledge.

§ 3210. Larceny Defined—Felonious Intent Explained. (a) Larceny is the wrongful and unlawful taking and carrying or leading away of a thing, without claim of right, made in good faith and without the owner's consent, with the intention of permanently converting it to a use other than that of the owner.¹

(b) Larceny is the felonious taking of the property of another without the knowledge or consent of that other, and with the intent of the party taking, at the time of the taking, to permanently deprive the owner thereof, and with the further intent at said times to wholly and permanently appropriate it to the use of the party taking.²

(c) Felonious intent means without the color of right in taking, and if the defendant honestly believed at the time of the taking that he had a right to take the cotton, then it is your duty to acquit him.³

§ 3211. Taking must be with Felonious Intent. (a) The court instructs the jury, that every unlawful taking of the goods and chattels of another, without his knowledge or consent, does not amount to a larceny; to make it such, the taking must be such, and accompanied by such circumstances, as show a felonious intent, that is, an intent to steal the property.⁴

(b) The court instructs the jury that every unlawful taking and carrying away of the personal goods of another will not amount to larceny; to constitute larceny, a felonious intent must be shown to have accompanied the original taking; that is, the goods must have been taken with an intent to steal the same.⁵

(c) You are instructed that it is not every taking and carrying away of the property of another that will constitute a larceny, but a felonious intent must be shown to have accompanied the taking, and

1—Philamalee v. State, 58 Neb. 320, 78 N. W. 625 (626).

"In this instruction the court told the jury that, to constitute larceny, the taking must not only have been wrongful and unlawful, but 'without a claim of right, made in good faith, and without the owner's consent.' This definition is clearly within the rule announced in the following cases. Thompson v. People, 4 Neb. 524; Mead v. State, 25 Neb. 444, 41 N. W. 277; Waidley v. State, 34 Neb. 250, 51 N. W. 830; Barnes v. State, 40 Neb. 545, 59 N. W. 125; Carrall v. State, 53 Neb. 431, 73 N. W. 939."

2—State v. Minor, 107 Ia. 656, 77 N. W. 330 (331).

"The virtue of this instruction," said the Supreme Court, "is in explaining to the jury just what constitutes the felonious intent in taking, without employing that word in doing so. See Georgia v. Keppord, 45 Ia. 51."

3—State v. Sims, 107 La. 188, 31 So. 645.

4—Mason v. State, 32 Ark. 238; Hart v. State, 57 Ind. 102; Com. v. Hurd, 123 Mass. 438.

5—State v. Wood, 46 Ia. 116; Humphrey v. State, 63 Ind. 223.

in determining such intent they had a right to take into consideration all the testimony and circumstances bearing upon that matter.⁶

§ 3212. **Felonious Intent — Fraud — Artifice — False Pretenses — Threats.** While the felonious intent may be found from a secret taking, it may be found from an open taking, provided, for instance, that it may be by deception, artifice or fraud. If the title to the property as well as the possession of the property be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under false pretenses, but it is not larceny. If the possession of property of another to which the taker has no claim be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent, and the crime of larceny committed. * * * Threats which will be regarded as effective in the eye of the law to cause a degree of fear depriving the owner of property of his consent to its taking will be threats of personal violence—either danger to life or great bodily harm. * * * The compulsion of the payment of a valid claim, or one believed to be valid, by threat to bring civil suit and attach, thus causing fear, and inducing as a result of the fear the payment of the money, is not larceny. The compulsion of the payment of money not owed, and which the taker knows is not owed, by threats to bring civil suit and attach, causing fear, under the influence of which the money is paid, is not larceny. The threat made which induced the fear which caused the money to be paid must be a threat which it was apprehended would speedily be put in execution, and, under the influence of a fear of its speedy execution, the money was paid over. The money must have been paid under the influence of fear of great bodily harm to be speedily caused by the taker.⁷

§ 3213. **Intent—Horse-Stealing.** In order to constitute larceny, the taking must be with the intent, at the time of such taking, to convert permanently to his own use thereof; and if the defendant in this case took the mare in question for the purpose of riding her home, and without the intention of retaining the said mare, and

6—State v. Meldrum, 41 Ore. 380, 70 Pac. 526.

In State v. Sally, 41 Ore. 366, 70 Pac. 396, the jury was instructed that the intent to convert the animal to his own use, knowing that it was not his, is the gist of this offense.

The court said that if defendant took the animal "which he is charged with stealing, 'honestly believing, and had reason to believe, and did believe it to be the property of S. then the defendant

would not be guilty as charged, and should be acquitted,' and that it was incumbent upon the state to establish to the satisfaction of the jury, beyond a reasonable doubt, that the defendant took the same with felonious intent, and unless such facts are established to your satisfaction, beyond a reasonable doubt, you will find the defendant not guilty."

7—State v. Kallaher, 70 Conn. 398, 39 Atl. 606 (608), 66 Am. St. 116.

converting her permanently to his own use, then he is not guilty of larceny, and you will acquit him.⁸

§ 3214. Horse Stealing—What Necessary to Convict. (a) In order to convict in this case, it devolves upon the state to show and prove by the evidence beyond a reasonable doubt that the defendant, at the time and place charged in the indictment, did take, steal, and carry away the mare charged in the indictment, with the intent to convert said mare permanently to his own use, and to deprive the owner permanently of the use thereof, and that at the time of such taking the mare was the property of L. W. S., and of some value; and, unless the state has so shown, you will find him not guilty.⁹

(b) Gentlemen of the jury, if you find beyond a reasonable doubt from the testimony in this case that the defendant, —, at the time alleged in the indictment, or about that time within three years next before the finding of the indictment, conspired with others or combined with others and got up any kind of a writing, an order or affidavit, and presented the party who had possession of this horse, claiming that was his horse, and put in this proof that it was his horse and by means of the papers shown by the defendant that T. went to the field and brought the horse up to him and he put a rope around the horse's neck, claiming the horse was his own, and if you find he did this, I instruct that you find him guilty of the larceny of the horse.¹⁰

§ 3215. Finding Lost Property Not Larceny—Duty to Search or Advertise for Owner. (a) The jury is instructed that the finder of lost property is not bound to make any search for the owner. He is under no legal obligation to advertise it in a newspaper or to search the papers to see if the loss has been advertised. And, although the jury may believe, from the evidence, that the said A. B. lost the property mentioned in the indictment, and that the defendant found the same, and afterwards converted it to his own use, still, if you further believe from the evidence that at the time he so found it there was nothing in the nature of the property, or in the circumstances under which it was found, to indicate to the defendant who the owner was, or where he could be ascertained, and that the defendant, at the time he found the property did not intend to steal the same, then you should find him not guilty although you may believe that he afterwards purposely concealed the fact that he had found the property and converted it to his own use.¹¹

(b) The law is that if a man finds goods that are actually lost or are reasonably supposed by him to have been lost, and he appropriates them to his own use with intent to take entire dominion over them

⁸—State v. Weber, 156 Mo. 249, 56 S. W. 729.

⁹—State v. Weber, 156 Mo. 249, 56 S. W. 729 (730).

¹⁰—George v. United States, — Ind. Ter.—, 89 S. W. 1122.

¹¹—Brooks v. State, 35 Ohio St. 46.

as his own, this is not larceny, provided he believes, and has good reason to believe, that the owner cannot be found.¹²

§ 3216. **Finding Lost Property, Intent to Convert—Concealing the Fact of Finding.** (a) The court instructs the jury that it is not necessary to the conviction of the defendant that he should have known, or have had reason to believe he knew, the particular person who owned the property at the time of the alleged finding; or that he should have had the means of identifying the owner immediately, at that time. If the jury believe from the evidence beyond a reasonable doubt that the prosecuting witness A. B. was the owner of the property described in the indictment, and that the defendant found the same, and that at the time of the finding he had reasonable ground to believe, from the nature of the property, or from the circumstance under which he found it, that if he did not conceal the fact that he had found it, but dealt honestly with it, the owner would appear or be ascertained, then, if he purposely concealed the fact that he had found the property, he would be guilty of larceny; provided, the jury further believe from the evidence that at the time the defendant first took the property into his possession he intended to convert it to his own use.¹³

(b) You are instructed, first, that to render the finder of lost property guilty of larceny in appropriating it to his use, it is necessary that he find it under circumstances which give him knowledge or means of inquiry as to the true owner. Second, that there must exist, on the part of the finder, both the belief that the owner can be found and the intent to deprive him of his property at the time of the finding.¹⁴

§ 3217. **Elements of Larceny—What is Necessary to Prove.** You are further instructed that before you can find the defendants, or either of them, guilty, the Territory must prove to your satisfaction, beyond a reasonable doubt, the following propositions: First, that the property charged in the indictment, or some part of the same, was taken; second, that it was taken either by fraud or stealth, or by both fraud and stealth; third, that it was the property of C. H. R. and L. W. R. or one of them; fourth, that it was taken with the felonious intent to deprive the owners thereof; fifth, that the defendants were the persons who took the property.¹⁵

12—Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731, 2 Am. Cr. Rep. 337.

13—Brooks v. State, 35 Ohio St. 46.

14—State v. Hoshaw, 89 Minn. 307, 94 N. W. 873.

15—Flohr v. Territory, 14 Okla. 477, 78 Pac. 585 (574).

The court held in comment that this charge of the court, "that before the jury could find the defendants, or either of them, guilty, they must find that the property stolen was taken either by fraud or

stealth, or by fraud and stealth, was, we think, correct. If it was so taken, the crime as defined by the statute was committed, and might be proved under the indictment charging that property was taken by fraud and stealth. The indictment could not charge the crime in the exact language of the statute, to wit, that it was taken by fraud or stealth, as such language would not charge that it was taken in either manner. We have heretofore sufficiently noted this distinction."

§ 3218. **Value Must be Proved.** That among the material averments contained in the indictment necessary to be proved in order to warrant a conviction, is the one that the property alleged to have been stolen had some value, and if the prosecution have failed to prove, affirmatively, some value to said property, then it is the duty of the jury to acquit the accused. A simple statement of counsel as to the value of the property will not suffice; it must be proved in some of the ways known to the law, or the verdict should be not guilty.¹⁶

§ 3219. **Rule for Determining the Value of Property.** (a) The court further instructs the jury, as a matter of law, if they find the defendant guilty of the larceny, as charged in the indictment, it will then be their duty to find, from the evidence in the case, the value of the property stolen, and to state such value, as found in their verdict; and if, after a careful consideration of all the evidence in the case, the jury have a reasonable doubt arising from all the evidence as to the value of such property being greater than twenty dollars (Iowa), it will be their duty under the law to find the value to be twenty dollars, or less, as shown by the evidence.¹⁷

(b) If you find the defendant guilty, you will determine by your verdict, under the evidence and these instructions, the value of the property, or what it was worth in the market.¹⁸

§ 3220. **What Constitutes Taking and Carrying Away.** To constitute larceny there must be a felonious taking and carrying away of the property mentioned in the indictment or some part of it, but it is not necessary that the property should be carried or removed to any particular distance from the place where it is taken, and in this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant took the property mentioned in the indictment or any part of it from the place where it was left by the owner and concealed the same (in the same room or building) with intent to steal the property so taken, this would be a sufficient taking and carrying away of the property to constitute the crime of larceny.¹⁹

16—State v. Krieger, 68 Mo. 98.

17—State v. Wood, 46 Ia. 116;
State v. McCarty, 34 N. W. 606.

18—Ford v. State, 46 Neb. 390, 64 N. W. 1082 (1085).

"By this instruction, the jury were told to fix the value of the ring in case a verdict of guilty was returned, at what it would bring, or was worth in the market. This doubtless was the correct rule. It is true the instruction does not state whether the value was to be determined by a preponderance of the evidence, or beyond a reasonable doubt; but this point was covered by the second instruction, by which the jury were told that the burden was upon the state to es-

tablish beyond a reasonable doubt each material averment in the information. The jury therefore were fully informed by the court that the value of the property must be established beyond a reasonable doubt. Instructions must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. St. Louis v. State, 8 Neb. 406, 1 N. W. 371; Murphy v. State, 15 Neb. 383, 19 N. W. 489."

19—Nutzel v. State, 60 Ga. 264;
State v. Green, 81 N. C. 560.

What Constitutes Asportation of a Horse.

If you find from the testimony, if you believe from the testimony

§ 3221. Forcible Taking, Resistance Necessary. (a) Unless you are convinced from the evidence to a moral certainty and beyond any reasonable doubt, that in K. County, State of Washington, during the month of January, —, and on or about the 10th day of said month, defendants forcibly took from the person of the prosecuting witness, A., at least some of the lawful money of the United States mentioned in the information, and that said money, if such there actually was, was the money of said A. and that defendants then and there forcibly took the same with the intent to convert the same to their own use, against the will of said A. then your verdict must be for defendants, that is, not guilty.

(b) If the jury believe from the evidence that there was no offense in this cause on the part of defendants other than the mere stealing of money or snatching the same from the person of A., without resistance on his part, then your verdict will be for defendants. Unless witness A. resisted the efforts of the defendants to get his money, if such effort there was, and such resistance was overcome by force, there must be no conviction in this case.²⁰

§ 3222. Taking Property so Suddenly From the Person as Not to Allow Time for Resistance. The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. Now, if you believe from the evidence in this case, beyond a reasonable doubt, that defendant, B. M., . . . did fraudulently and privately take from the person and possession of L. R.

that witness T. voluntarily went and got the horse and he was not induced to do this by the representation of the defendant, then his going and getting it would not be the act of the defendant in going and getting it. Under that state of facts it would be necessary for the defendant to take charge of the horse and move it, and if you find from the testimony that he put his rope on the horse and led him one step that would satisfy the part of the law called asportation. If T. was induced to go and get the horse, if this man sent T. after it by showing the papers and claiming he was the owner of it and T. went and got the horse and brought it to him, then that is sufficient asportation of taking and carrying the horse, but, if the evidence does not satisfy beyond a reasonable doubt that T. was so induced to do this by the representation of this defendant and the producing this order or affidavit, then in order to perfect the larceny it would be necessary that after this he, the defendant, took charge of the horse and the

horse was moved. If the testimony of the witnesses was that he, the defendant, led the horse before he was arrested, if you believe beyond a reasonable doubt that this is true, that is a sufficient carrying away of the horse to satisfy the part of the law that we call asportation, regardless of going after the horse and bringing it. Larceny, among other things consists of the unlawful taking without the consent of the owner, and the witness T. in this case, knew the horse did not belong to the defendant, and under the law T. was bailee of the owner of the horse, and if he turned the horse over to the defendant, at the time not believing the defendant was the owner of the horse but for the purpose of letting the posse man have an opportunity to arrest the defendant, then the defendant would not be guilty of the crime of larceny.

Approved in *George v. United States*, — Ind. Ter. —, 89 S. W. 1122.

20—*State v. Johnson*, 19 Wash. 410, 53 Pac. 667 (668).

one dollar, described in the indictment, without the consent of the said L. R., and so suddenly as not to allow time to make resistance before the property was carried away, with the intent, etc.²¹

§ 3223. **Obtaining Property by Threats to do Great Bodily Harm.** If the jury find that K. secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted.²²

§ 3224. **Money Must be Proved to be Genuine.** The jury are instructed, that to warrant a conviction under this indictment, the jury must believe, from the evidence, that one or more of the treasury notes, bank bills or other money, alleged to have been taken by the defendant, was a genuine bill or note; and if the jury find that the people have failed to produce any proof of the genuineness of such treasury note, bank bill or other money, and that there is no such evidence before the jury, then the jury should find the defendant not guilty.²³

§ 3225. **Ownership in an Unknown Owner.** The court charges you that, in order for the state to convict under the count alleging ownership in an unknown owner, they must establish and prove that some specific cattle was taken from the possession of the said unknown owner. It is not sufficient that the animal found in the possession of the defendant was unknown, but the state must identify it as the one taken out of the possession of such unknown owner, and, unless it does so, you must acquit upon said first count.²⁴

§ 3226. **Special Property Sufficient.** As to the ownership of the property, the court instructs the jury, that if the said C. D. had the actual care, custody and right to use the said (horse), and was in the actual possession at the time of the alleged taking, not as the agent or servant of the real owner, this would be, for the purposes of this trial, sufficient evidence of ownership to sustain the allegation in the indictment, that he was the owner.²⁵

§ 3227. **Person Having Possession of Property Must be Produced.** It is a rule of law, that when property is, by the owner, placed in

21—*Mathis v. State*, — Tex. Cr. App. —, 65 S. W. 523, citing 40 Tex. 316, 50 S. W. 368; *State v. Anderson*, 59 S. C. 229, 37 S. E. 820 (821).

"The charge, properly construed," said the court, "simply authorized the conviction upon the last portion of subdivision 2 of article 880, Pen. Code, to wit, the jury must believe that the private theft consisted of taking the dollar so suddenly as not to allow time to make resistance before it was carried away. Of course, if the proposition contended for by defendant was true, according to the facts in this case, it would be the submis-

sion of an issue not suggested by the evidence. *McLin v. State*, 29 Tex. App. 171, 15 S. W. 600.

"But the offense defined by the statute of privately stealing is the taking of property so suddenly from the person as not to allow time to make resistance before the same is carried away."

22—*State v. Kallaher*, 70 Conn. 398, 39 Atl. 606, 66 Am. St. 116.

23—*Collins v. People*, 39 Ill. 233.

24—*Melton v. State*, — Tex. Cr. App. —, 56 S. W. 67.

25—*Crockett v. State*, 5 Tex. App. 526.

the care and custody and under the control of another, and such property is alleged to have been stolen from the possession of such other person, then, if it is in the power of the prosecution to produce the person, so having such possession, as a witness, he must be produced, in order to show that the property was not taken with his consent; and, in such case, the evidence of such person cannot be supplied by other proof, nor can the accused be convicted without it.²⁶

§ 3228. **Name of the Person Injured Must be Proved.** (a) The court instructs the jury that it is essential in all criminal prosecutions, that the name of the party injured should be proved, as charged in the indictment; and, if the proof shows in this case, that the property stolen belonged to C. B. and not to A. B., as charged in the indictment, the jury must acquit the defendant.

(b) It is necessary for the prosecution to prove the ownership of the property, as alleged in the indictment; and, unless the jury believe from the evidence that the said A. B. was the owner of the (horse), mentioned in the indictment, the jury must find the defendant not guilty.²⁷

(c) The court instructs the jury that, before the state can legally secure the conviction of defendant, it must be established by evidence satisfactory to the jury, beyond a reasonable doubt, that the one hog alleged to have been stolen was the property of X. at the time it was taken, if it was, and if the evidence or want of evidence raises in your mind a reasonable doubt whether or not said one hog described in the indictment belonged to X. at the time it was taken, if it was, then you should acquit the defendant.²⁸

§ 3229. **Taking Under a Mistaken Claim of Right.** (a) You are instructed that if this defendant took this horse under a claim of right, and you find a fair pretense for so taking said horse, it is your duty to acquit this defendant, though you may find he was mistaken in his claim to said horse.²⁹

(b) The jury are instructed, that although they may believe from the evidence, beyond a reasonable doubt, that the defendant took and carried away the property in question, as charged in the indictment,

26—State v. Osborne, 28 Ia. 9.

27—McBride v. Com., 13 Bush. (Ky.) 337; Robinson v. State, 5 Tex. App. 519.

28—Hull v. State, — Tex. Cr. App. —, 80 S. W. 380.

In Flohr v. Territory, 14 Okla. 477, 78 Pac. 565 (573), a variance between the allegation of ownership set out in the indictment and the proof was held immaterial:

The court instructs the jury that the indictments in this case charges the property which is alleged to have been stolen as belonging to H. R. and W. R. If you find from the evidence, beyond a reasonable doubt, that the offense is described

with sufficient certainty in other respects to identify the act of larceny, but find that the property taken all belonged to H. R. individually, or that some of the property belonged to W. R. individually, or that some of the property belonged to H. R. individually and some of it to H. R. and W. R. jointly, then the variance between the allegation in the indictment as to the ownership of the property alleged to have been stolen and the ownership as shown by the evidence is not material.

29—State v. Eubank, 33 Wash. 293, 74 Pac. 378 (380).

still, if they further believe, from the evidence, that the defendant took the property under a claim of title honestly entertained, then he is not guilty of larceny; and, in such case, it makes no difference whether he did, in fact, have any legal right to the possession of the property or not.³⁰

(c) The court instructs the jury that if the evidence fails to show that defendant believed the property at the time of taking was not the property of F. L. D., you will find defendant not guilty.³¹

(d) You are instructed that if you believe from the evidence that the defendant really and bona fide believed that the property which he is charged of having stolen was his, or that he had a right to remove same at the time of such taking, then your verdict will be for the defendant; and it makes no difference whether or not such right did in fact exist.³²

(e) The jury are instructed that if they believe from all the evidence before them, beyond a reasonable doubt, that the one hog described in the indictment belonged to ——— at the time defendant took it, if he did, and if they further believe from the evidence that at the time defendant took said animal, if he did, he did so under a claim of right, and that he honestly believed said animal belonged to him, and, so believing, if he did, took said animal into his possession in good faith, and afterwards brought said animal to K. and sold it, then, if such are the facts, defendant would not be guilty of theft, and you should acquit the defendant.³³

(f) The jury are instructed that no man can commit theft of his own property, and if you should find that T. E. R. owned the animals charged to have been stolen, or if you find that he believed they were his at the time he took them, then it was not theft, although you may believe under the evidence, that they were not his in fact; and if you have a reasonable doubt of this you will acquit the defendant.³⁴

§ 3230. **Larceny of Estrays.** (a) If the jury find, from the evidence, beyond a reasonable doubt, that the animal mentioned in the indictment was an estray, and that the defendant took it into his possession, or found it running with his stock and took care of and fed it with his own stock, and that when he first got it into his possession he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of the crime of larceny, although you may find, from the evidence, beyond a reasonable doubt, that he afterwards killed the animal and converted it to his own use, with intent to deprive the owner of it.³⁵

30—State v. Bond, 8 Clarke (Ia.) 540.

31—Darnell v. State, 43 Tex. Cr. App. 86, 631 (632).

32—Meerschatt v. State, — Tex. Cr. App. —, 57 S. W. 955.

In Reese v. State, 44 Tex. Cr. App. 34, 63 S. W. 283 (285), the court instructed the jury that if they had a reasonable doubt as to

whether or not he believed he had a right to take the cattle, they should acquit.

33—Hull v. State, — Tex. Cr. App. —, 80 S. W. 380.

34—Steed v. State, 43 Tex. 567, 67 S. W. 328 (331).

35—Starch v. State, 63 Ind. 283; Griggs v. State, 58 Ala. 425, 29 Am. Rep. 762 n.

(b) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant took the animal mentioned in the indictment into his possession while the same was running in the public highway, and that at the time he so took the animal he knew it was not his own, and that he intended then to steal and convert it to his own use and to deprive the owner of his property, whoever he might be, and that in pursuance of such intention he afterwards killed the animal and converted it to his own use, this would amount to the crime of larceny; provided, you find all the other allegations of the indictment proved, by the evidence, beyond a reasonable doubt.³⁶

§ 3231. **Taking up Estrays by Consent in Good Faith—Subsequent Intent to Wrongfully Convert.** The jury are instructed that if you believe from the evidence that the owners of the mare alleged to have been stolen authorized the defendant to take her up and hold her for them, and the defendant took her up in good faith for that purpose, and held her for the owners, he is not guilty. That if she was taken from the range by agreement or consent of the owners, in good faith, with an intent to return her to them, a subsequently conceived intention by defendant to wrongfully convert her to his own use would not constitute larceny, and he should be acquitted; but, if he took her with a felonious intent to appropriate her to his own use, he would not be guilty, although the owners may have authorized or requested him to take her up for him.³⁷

§ 3232. **Larceny of Different Cattle, Belonging to Different Owners, at the Same Time, is One Offense.** You are charged that, in order to sustain said plea, you must be satisfied from the evidence that the offense for which defendant was formerly convicted was one and the same transaction, and occurred at one and the same time and place, as the offense for which he is now on trial. The stealing of different cattle, belonging to different persons, at the same time and place, so that the prosecution is the same, is but one offense, etc.³⁸

§ 3233. **Placing One's Brand Upon Live Stock, Appropriating Same.** It is claimed on the part of the state that the defendant on or about that date, in this county or state, took this property and appropriated it to his own use by fraud or stealth, with intent to deprive the owner thereof. I will say to you that the placing of one's brand upon property, and taking the property into his possession and putting it into his pasture, is *prima facie* evidence that he intends to appropriate it and has appropriated it. So the question for this jury, and probably the main question, will be, who was the owner of this colt?³⁹

36—Starch v. State, 63 Ind. 283; State v. Martin, 28 Mo. 530; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

37—State v. Meldrum, 41 Ore. 380, 70 Pac. 526 (528).

38—Stevens v. State, 42 Tex. Cr. App. 154, 58 S. W. 96, 59 S. W. 545.

39—State v. Bjelkstrom, — S. D. —, 104 N. W. 481.

"It is insisted on the part of the accused that this instruction in ef-

§ 3234. Turning the Stolen Mare Loose and Returning it to Owner Would Not Divest Taking of its Felonious Character. (a) The court instructs the jury that if you believe and find from the evidence that the defendant, at and in the county of Dent, and state of Missouri, in the month of ———, 19—, did willfully and feloniously steal, take, and carry away one bay mare, the same charged in the indictment, with the intent at the time to convert the said mare permanently to his own use, and to deprive the owner permanently of the use thereof; and if you further believe and find from the evidence that at the time of such taking, if you find it was so taken, the said mare was the property of W., and of any value whatever—you will find him guilty of grand larceny, and assess his punishment at imprisonment in the state penitentiary for a term not less than two nor more than seven years.

(b) If you believe and find from the evidence that the defendant took the mare at the time and place charged in the indictment, with the intent at the time of such taking to convert her permanently to his own use, and to deprive the owner permanently of the use thereof, and that the said mare was the property of W. and of some value, then the fact that the defendant turned the said mare loose would not divest such taking of its felonious character, but in such case he would be guilty of larceny, notwithstanding that he turned the said mare loose, and it was returned to the owner.⁴⁰

§ 3235. Stealing of Certain Animals is Grand Larceny and Jury Cannot Find Defendant Guilty of Petit Larceny. It will be noticed from the definition of grand larceny that every felonious stealing, taking and driving away of cows, steers, bulls and calves is grand larceny, regardless of the value of the property taken; and in this case as there is no evidence of anything other than calves, cows, steers and bulls having been taken, you would not be at liberty to find the defendant guilty of petit larceny, but your verdict must be guilty of grand larceny, if you should believe from the evidence beyond a reasonable doubt, and to a moral certainty, that the defendant, as charged in the information did steal feloniously, a cow, steer, bull or calf, or if you should upon this proposition have a reasonable doubt of the guilt of the defendant, your verdict should be not guilty.⁴¹

§ 3236. Whether Petit or Grand Larceny. Under our statute there are two degrees of larceny, namely, grand larceny and petit larceny,

fect took from the jury the question of intent and the question of mistake on the part of the accused, and thereby invaded the province of the jury. The latter part of instruction, namely, "so the question for the jury, and probably the main question, will be, who was the owner of this colt?" standing alone, may be conceded to be erro-

neous; but, read in connection with other portions of the charge subsequently given to the jury, it is clear that this apparent error could not have in any manner prejudiced the rights of the accused."

40—State v. Weber, 156 Mo. 249, 56 S. W. 729.

41—People v. Prather, 120 Cal. 660, 53 Pac. 259 (261).

and within the charge contained in the indictment in this case is included the lesser degree of petit larceny. If you find from the evidence, beyond a reasonable doubt, that the defendant did take, steal, and carry away the property described in the indictment, with the intent to deprive the owner thereof, and you further find, beyond a reasonable doubt, that the value of the property was more than \$20, then you should find the defendant guilty of grand larceny as charged in the indictment. But, if you should find that the defendant did take, steal, and carry away the property charged in the indictment, with the intent to deprive the owner thereof, and the evidence fails to show beyond a reasonable doubt that the value of the property was more than \$20, then you can only find the defendant guilty of petit larceny.⁴²

§ 3237. **When the Crime of Larceny is Completed.** If the offense of theft was committed as alleged, the offense was complete at the time the hog was taken in its accustomed range, if it was so taken; and if defendant was guilty as principal, as above defined, in the original taking, under the circumstances making it theft, he would not be relieved from punishment by reason of his failure to aid in bringing the hog to the town of Crockett after such taking, if any.⁴³

§ 3238. **Time is Not of the Essence of the Crime of Larceny.** Time is not what we term of the essence of a crime when a theft or other criminal offense is said to have been committed at a certain time. The gist of the charge does not consist in proving that it was done at the exact time laid in the indictment. The gist is whether or not the crime as alleged was committed, and, if the state proves that it was committed at any time—the particular charge contained in the indictment prior to the finding of the true bill—that would be sufficient; but the state must prove the charge as contained in the indictment. It is not necessary, and the state is not required, to prove the exact time laid in the indictment; but, still, it must prove that substantial charge as having been committed at some date, certainly before the finding of the true bill.⁴⁴

§ 3239. **Opening a Trunk Left in Defendants' Custody.** You are further instructed that if you find from the evidence that R. went to the house of the defendants during the month of ———, 19—,

42—Blair v. Territory, 15 Okla. 549, 82 Pac. 653. (654).

"This charge fully covered the omission in the other, and when taken together are not open to objection. Counsel cite in support of their objection several cases which hold that the giving of an erroneous instruction is not cured by giving another which correctly states the law. We concede the correctness of that proposition but this case does not fall within that rule. A court is not required to

state all of the law of the case in one instruction, and where an instruction given simply omits a proposition which it should contain, and that proposition is clearly and specifically set out in another instruction, and together they embrace the law applicable to the case and do not conflict, we can see no cause for complaint."

43—Newberry v. State, — Tex. Cr. App. —, 74 S. W. 774 (776).

44—State v. Reynolds, 48 S. C. 384, 26 S. E. 679.

taking with them a part of the property described in the indictment, and when they left the premises of the defendants that they left such property in their trunks, and in the care and custody of the defendants, and you further find from the evidence that, after R. and his wife had left the place of the defendants, that the defendants, or either of them, opened the trunk so left in their care and custody, and took the property therefrom with the felonious intent to deprive the owners thereof, then the defendants, or one of them, that took such property under the circumstances above stated, is guilty of larceny, and you should so find.⁴⁵

§ 3240. Appropriation of Property Under a Bill of Sale and Possession Thereunder. You are instructed that if you believe that to secure a debt there was made and executed to the defendant a bill of sale of the drug stock and the fixtures, and that the key to the drug store wherein such property was, was turned over to the defendants, or either of them, because of their having such bill of sale as security for their claim, and in order to place them in possession of the property upon which they had the bill of sale, and in order to give them possession under their lien, then in such a case the defendants could not be found guilty of larceny for the misappropriation of property coming into their hands under such circumstances.⁴⁶

§ 3241. Obtaining the Title as Well as the Possession by Fraud is Not Larceny. The court instructs you that if the title to the property, as well as the possession of the property, be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under false pretenses, but it is not larceny.⁴⁷

§ 3242. Larceny—Fraud Defined. Fraud within the meaning of the statute on larceny, is the getting possession of property by means of falsehood, deception or artifice. The meaning of the word "stealth," as applied to larceny, is the taking of property secretly and without the knowledge or consent of the owner.⁴⁸

§ 3243. Inculcating Circumstances to Show Guilt—When. But if you believe from the evidence in this case, and find there was any evidence upon that question, that the defendant, without any information from any one else, pointed out the places where the tools were found, and they were the tools that were used in wrecking the train, that would be an inculcating circumstance that you might consider in this case with reference to his guilt, in connection with other evidence.⁴⁹

§ 3244. Recent Possession Unexplained. (a) The jury are instructed that the possession of stolen property recently after the

⁴⁵—Floh v. Territory, 14 Okla. 398, 39 Atl. 606 (610), 66 Am. St. 116.
477, 78 Pac. 565 (575).

⁴⁶—Floh v. Territory, 14 Okla. 477, 78 Pac. 565 (573).

⁴⁷—78 Pac. 565 (574).

⁴⁸—Shaw v. State, 102 Ga. 660, 29 S. E. 477 (478).

⁴⁹—State v. Kallagher, 70 Conn.

larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a fact exclusively for the jury.⁵⁰

(b) It is a rule of law, that recent possession of stolen property unexplained is a circumstance tending to show that the possessor was the thief.⁵¹

(c) The court instructs the jury, that the possession of stolen property recently after the theft by the person charged, if unexplained, is a circumstance tending to prove his guilt; and if the jury believe, from the evidence, that the defendant was found with the stolen property in his possession, then, in determining the weight to be attached to that circumstance, as tending to prove guilt, the jury shall consider all the circumstances attending such possession—the proximity of the place where found to the place of the larceny; the lapse of time since the property was taken; whether the property was concealed; whether the party admitted or denied the possession; the demeanor and character of the accused; whether other persons had access to the place where the property was found. All these circumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his guilt.⁵²

(d) The court instructs the jury, that the possession of recently stolen property is usually regarded, in law, as a criminating circumstance, strongly tending to show that the possessor stole the property, unless the facts and circumstances surrounding or connected with such possession, or other evidence, explains or shows such possession might have been acquired honestly. Possession of stolen property, immediately after the theft, is sufficient to warrant a conviction, unless attending circumstances, or other evidence, so far overcomes the presumption thus raised as to create a reasonable doubt of the prisoner's guilt, when an acquittal should follow.⁵³

(e) In this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the property described in the indictment was stolen, and that the defendant was found in the possession of the property soon after it was stolen, then such possession is, in law, a strong criminating circumstance, tending to show the guilt of the defendant, unless the evidence, and the facts and circumstances proved, show that he may have come honestly in possession of the same.⁵⁴

50—Palmer v. State, 70 Neb. 136, 97 N. W. 235.

51—Smith v. State, 103 Ala. 40, 16 So. 12 (13).

52—Conkwright v. People, 35 Ill. 204; State v. Hodge, 50 N. H. 510, 9 Am. Rep. 288.

53—Sahlinger v. People, 102 Ill. 241; Fowle v. State, 47 Wis. 545; State v. Pennyman, 63 Ia. 216; Johnson v. Miller, 29 N. W. 743.

54—Smith v. State, 58 Ind. 340; Watkins v. State, 2 Tex. App. 73.

§ 3245. Recent Possession of Stolen Goods—Satisfactory Account of Possession. The court charges you that, while the recent possession of stolen property, if unexplained, is a circumstance tending to show the guilt of the prisoner, yet, if the jury believed from the evidence that the defendant came honestly into the possession of the property, or that it is unconnected with any suspicious circumstance of guilt, this would be a satisfactory account of his possession, and would remove every presumption of guilt growing out of the same.⁵⁵

§ 3246. Possession of Stock Allowed to Run at Large—Burden of Explaining Possession, Exception. If you find from the evidence that X. was the owner of the gelding described in the information, and that said gelding was permitted to run on the range, proof of the further fact that said gelding was shortly thereafter in the possession of the defendant is sufficient to put upon defendant the burden of explaining such possession. The presumption, if any, arising from such fact of possession of range stock, if you find such fact from the evidence, is one of fact only, and is rebuttable, and such presumption is overcome whenever a reasonable explanation is made or arises from the evidence; that is, an explanation which you deem reasonable, considering all the facts and circumstances of the case, is given, and is not shown to be untrue.⁵⁶

⁵⁵—State v. Sally, 41 Ore. 366, 70 Pac. 396 (397).

"The presumption arising from the possession of stolen property is one of fact, and not of law. It is a circumstance in the case from which the jury may infer guilt, but no legal presumption of guilt arises therefrom. State v. Hale, 12 Ore. 352, 7 Pac. 523. The weight and value of such testimony are exclusively for the jury, and it may well be questioned whether the court, in instructing them as to what would overcome the presumption, did not invade their province. State v. Maloney, 27 Ore. 53, 39 Pac. 398. But if so, it was an error favorable to the defendant, of which he cannot complain."

Jones v. People, 12 Ill. 259, is authority for a nearly identical instruction, given in the second edition: It is as follows:

The court instructs the jury, that while possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possessor, still, in this case, if the jury believe, from the evidence, that the defendant bought the property in question at, etc., openly and publicly, and unconnected with any suspicious circumstances of guilt, this is a satisfactory account of his

possession of the property, and removes every presumption of guilt growing out of such possession.

⁵⁶—State v. Eubank, 33 Wash. 293, 74 Pac. 378.

"By the instruction in this case the burden of explaining possession is placed upon the defendant. The instruction, upon its face, apparently conflicts with the rule announced by this court in State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098.

"An instruction in that case contained the following: 'In this case, if the jury believe from the evidence beyond a reasonable doubt that the property described in the information was stolen, and that the defendant was found in possession of the property soon after it was stolen, then said possession is in law a criminating circumstance tending to show the guilt of the defendant, unless the evidence and the facts and circumstances proved show that he may have come honestly in possession of it. The instruction was held to be erroneous on the theory that possession of recently stolen property is only a circumstance to be considered by the jury in connection with all other evidence in a given case. In State v. Bliss, 27 Wash. 463, 68 Pac. 87, the respondent's counsel urged

§ 3247. Possession of Stolen Property Not With the Defendant—Property Found in Barn. (a) The court instructs the jury that the defendant denies the charge made by the state. He insists, in the first place, that the evidence submitted by the state is not sufficient to authorize a conviction in this case. He insists that if it is true that a burglary was committed, and the harness—the property described in the bill of indictment—was stolen, and if that property was subsequently found in the barn loft, that this evidence does not show beyond a reasonable doubt that the house was his, or was in his control. He insists that the property was in the custody and control of another; therefore the state has not put the possession on him, and the evidence does not authorize a conviction.⁵⁷

(b) In this case there is no evidence that the lot on which the bag of money is said to have been found was at any time in the actual or constructive possession of the defendant, and, therefore, if the jury believe that the money so found was the property of X., no presumption of defendant's guilt is raised thereby, as the defendant had no dominion or control over said premises and the alleged finding of said money on said lot is not a circumstance against the defendant in this case.⁵⁸

this court to overrule *State v. Walters*, supra, in the above-mentioned particular, but we declined to do so, and approved the holding in the former case as the established doctrine of this court. The instruction in the case at bar, however, given under the authority of section 7114, 2 Ballinger's Ann. Codes & St., which is as follows: 'In all prosecutions for larceny under the last preceding section, where the animal alleged to have been stolen was permitted by its owner to run on the range, proof of possession of the animal by the person accused of stealing the same shall be prima facie evidence that the accused acquired possession thereof recently, and shall have the effect of throwing on the accused person the burden of explaining such possession.' The previous section referred to in the above quoted one relates to the larceny of animals, and it will be seen that the quoted section expressly provides that, when the animal alleged to have been stolen was permitted by its owner 'to run on the range,' proof of possession by the accused shall be prima facie evidence that it was acquired recently, and shall throw the burden of explaining it upon the accused. The statute therefore declares an exception to the general rule adopted by this court in or-

dinary larceny cases, the exception being restricted to the larceny of animals permitted to run upon the range. The statute was passed in 1895, and *State v. Walters* was decided prior to this statute. That case involved the larceny of a horse, but the opinion does not disclose whether it was a range animal or not. *State v. Bliss*, supra, however, involved another class of property, and we have made the above observations in order to make it clear that while we adhere to the general rule reannounced in that case, we at the same time recognize the exception made by the statute cited. We have already said in *State v. Bliss* that the general rule adopted is supported by eminent authority, and we now see no reason for changing it, unless it shall be done by the Legislature, as in the case of the exception herein discussed. The instruction in the case at bar came within the exception, and is therefore not erroneous."

57—*Moncrief v. State*, 99 Ga. 295, 25 S. E. 735.

58—*State v. Austin*, 129 N. C. 534, 40 S. E. 4.

The court said that the instruction as asked was given, except the latter part that is in parentheses. This should have been given, in view of the evidence.

§ 3248. **Possession of Stolen Property—Defendant's House Used Jointly with Others.** When the possession sought to be proved on the part of the accused consists of the asserted fact that the stolen property was found in the house of the defendant, it must be shown that the possession and occupation of the house by the defendant was exclusive, and was not enjoyed by other parties jointly with him. If you find the house was used by others,—by others with him,—such evidence would not alone authorize a conviction, but such fact may and should be considered by the jury, together with all the evidence in the case, in passing upon the guilt or innocence of the person charged.⁵⁹

§ 3249. **On the Charge of Larceny, Proof of Defendant Having Bought the Stolen Property with Such Knowledge, He Must Be Acquitted on Charge of Larceny.** (a) You are instructed that if you believe from the evidence the steer in question was sold and delivered to the defendant by one A., or if you entertain a reasonable doubt of such proposition, then you cannot convict the defendant for the larceny of said steer.

(b) The jury are instructed that the buying or receiving of stolen goods is a substantive crime, but the person who is charged of having stolen the property cannot be convicted by evidence showing that he received or bought the stolen property. So that in this case, even though you may believe from the evidence and beyond a reasonable doubt that the defendant either bought or received the steer in controversy knowing it to have been stolen, this would not authorize his conviction for the crime of which he stands charged, and your verdict should be "Not guilty."⁶⁰

(c) You are instructed that if you believe the four cattle in question were stolen from the range, and that recently afterward defendant had them in his possession, then, to warrant his conviction as the thief, you must be satisfied from the evidence that A. R. is the person who took the cattle from their range, so that if you believe he bought them from S. G. and L. G., or from either, then he will not be guilty of theft, even if you believe that he knew they were stolen by persons from whom he bought them.⁶¹

59—Moncrief v. State, 99 Ga. 295, 25 S. E. 734 (735).

60—Roberts v. State, 11 Wyo. 66, 70 Pac. 803 (804), 100 Am. St. 925.

61—Ramirez v. State, 43 Tex. Cr. App. 455, 66 S. W. 1101.

"The objection to this charge," said the court, "is that it required defendant to prove by a preponderance of evidence that he bought the cattle, and thus eliminated reasonable doubt from this phase of the case. The charge, taken as a whole, is not subject to this criticism; nor do we believe this particular portion of the charge is de-

ficient in the matter criticised. It is true, 'reasonable doubt' is not mentioned in the excerpt; but the court after submitting the charge to the jury, to the effect that before they could convict they must believe beyond a reasonable doubt he fraudulently took from the possession of the alleged owner the cattle described in the indictment without his consent, etc., but otherwise that they should acquit him, further gave the reasonable doubt in this language, 'If you do not so believe beyond a reasonable doubt, you will acquit the defendant,' and

§ 3250. **Possession by One Who Has No Claim—Subsequent Conversion.** If the possession of property by another, to which the taker has no claim, be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent, and the crime of larceny committed.⁶²

§ 3251. **Action of Replevin to Recover Stolen Property Does Not Relieve from the Charge of Larceny.** You are further instructed that evidence has been introduced in this case showing that an action of replevin was commenced by one or both of the R.'s to recover the possession of the property, or a part of the property, alleged in the indictment to have been stolen, and that in that suit some part of the property was taken by the sheriff under the order of delivery issued therein, and that a redelivery bond was given by the defendants, and that the property taken under the writ of replevin was retained by them. The evidence of this replevin action so introduced was competent for the purpose for which it was offered, as circumstance throwing light upon the main issue; but the fact that this replevin action was commenced, and the fact that the defendants, or one of them, gave a redelivery bond and returned the property, in no wise relieves him or them of the criminal responsibility of the larceny of the property, if you find from the evidence, beyond a reasonable doubt, that the property was in fact stolen by them, or either of them.⁶³

§ 3252. **Larceny—Reasonable Doubt—Burden of Proof.** (a) If you believe from the evidence that said E. P. authorized or gave his permission or consent to defendant to sell or otherwise dispose of said horse, or if you have a reasonable doubt thereof, you will acquit defendant.⁶⁴

(b) It is not enough to show, even if the evidence should show, that the defendants stole grain, but it should be shown clearly, beyond a reasonable doubt, that the alleged larceny was committed on the — day of —, 19—, as charged in the information, or your verdict should be not guilty.⁶⁵

subsequently again gave the presumption of innocence and reasonable doubt."

62—State v. Kallaher, 70 Conn. 398, 39 Atl. 606 (609), 66 Am. St. 116.

63—Flohre v. Territory, 14 Okla. 477, 78 Pac. 565.

64—Smith v. State, 45 Tex. Cr. App. 251, 76 S. W. 434.

The court said:

"It is contended this changes the reasonable doubt and places the burden upon the accused. We do not so understand it. If the owner

gave appellant his authority or permission to sell or in any manner dispose of the horse, this would meet the contention of the state that the conversion was fraudulent. Now, if there was a reasonable doubt of this, then appellant was entitled to an acquittal; and as we understand this charge, it gave this phase of the law in accordance with our statutory provisions."

65—Baldwin v. State, 46 Fla. 115, 35 So. 220 (222).

RECEIVING STOLEN PROPERTY.

§ 3253. **Receiving Stolen Property, Criminal Intent Must Exist at the Very Instant of Receiving.** To constitute the crime of receiving stolen goods as charged, it is essential to show a criminal intent. The receiver must know that the goods were stolen, and this knowledge must exist at the very instant of the receiving; otherwise the crime does not exist.⁶⁶

§ 3254. **Purchase of Stolen Property, Bona Fide or Sham.** The court instructs the jury that they are the judges, from all the facts and circumstances of the case, whether or not a purchase of the alleged stolen property was in fact a bona fide purchase, or whether or not it is a device and sham.⁶⁷

§ 3255. **Stolen Goods Left at a Man's House Without His Knowledge.** The jury are instructed that if goods are left at a man's house without his knowledge or consent, even though they may have been stolen by the person leaving them, this in itself, does not make the person at whose house the goods were left a receiver of stolen goods.⁶⁸

66—Butler v. State, 35 Fla. 246, 17 So. 551 (552).

67—Bowers v. State, — Tex. Cr. App. —, 71 S. W. 284 (285).

68—Butler v. State, 35 Fla. 246, 17 So. 551 (552).

CHAPTER CII.

CRIMINAL—PERJURY.

See Erroneous Instructions, same chapter head, Vol. III.

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| <p>§ 3256. That the accused was sworn must be proved.</p> <p>§ 3257. Swearing falsely—No reasonable grounds of believing statements to be true.</p> <p>§ 3258. More than one witness required.</p> <p>§ 3259. One witness sufficient, when.</p> <p>§ 3260. Testimony alleged must be proved.</p> <p>§ 3261. Every material allegation must be proved.</p> | <p>§ 3262. Materiality must be shown.</p> <p>§ 3263. Materiality sufficient, when.</p> <p>§ 3264. Test of materiality.</p> <p>§ 3265. Authority of the officer must be shown.</p> <p>§ 3266. Perjured testimony—Absence of motive.</p> <p>§ 3267. Elements to be considered in arriving at a verdict—Series.</p> |
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§ 3256. **That the Accused was Sworn Must Be Proved.** That to authorize a conviction in this case it must appear, among other things, that the defendant was sworn, as a witness, before giving his alleged testimony; and this must be proved, beyond a reasonable doubt; and if the jury entertain any reasonable doubt as to whether the defendant was affirmed instead of being sworn, in the usual manner before testifying, the jury should find the defendant not guilty.¹

§ 3257. **Swearing Falsely—No Reasonable Grounds of Believing Statements to Be True.** The jury are instructed, that while false swearing, under an honest belief that the statements are true, is not perjury, still, the jury are to determine, from all the evidence in the case, whether such honest belief existed; and if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant swore falsely, as charged in the indictment, and that he had no reasonable grounds for believing his statements to be true, and did not honestly and in good faith believe them to be true, then he is guilty of perjury.²

§ 3258. **More Than One Witness Required.** If the jury find that the several witnesses who have testified for the prosecution (or the witnesses, A., B. and C.), have each testified to separate and distinct facts or circumstances, then such testimony must be considered by the jury as the testimony of a single witness upon each specific point testified to by them; and if the jury further believe, from the evidence, that only one of said witnesses has testified to facts tending to show the falsity of the testimony, set forth in the indictment, and upon which the perjury is assigned, then the prosecution has failed to prove the falsity of such testimony as required by law, unless the

1—Hitesman v. State, 48 Ind. 473. 2—Johnson v. People, 94 Ill. 505.

jury further find, from the evidence, that the testimony of such witness has been corroborated upon that point by other facts or circumstances proved on the trial.³

§ 3259. **One Witness Sufficient, When.** The court instructs the jury that as to each and all of the material averments in the indictments, except the allegation of the falsity of the testimony therein stated and set forth, they may be proved by the testimony of one witness alone; provided, the jury are satisfied beyond a reasonable doubt, of the truth thereof by the testimony of such witness; and as regards proving the falsity of such testimony, the court instructs the jury, that while that fact cannot be established by the testimony of one witness alone, it is not absolutely necessary that it be established by the testimony of two witnesses; it may be proved by the testimony of one witness and other corroborating facts or circumstances corroborating such witness; provided the jury are satisfied, beyond a reasonable doubt, from the testimony of such witness, and such corroborating facts and circumstances, that such testimony was false in fact.⁴

§ 3260. **Testimony Alleged Must Be Proved.** The jury are further instructed, that while it is incumbent upon the people, in order to warrant a conviction, to prove, as one of the material averments in the indictment, that the defendant did testify to one or more of the statements of testimony contained in the indictment, still, it is not necessary that they should be proved in the precise words alleged; it is sufficient if they are, substantially, proved in language and effect as therein stated.⁵

§ 3261. **Every Material Allegation Must Be Proved.** That before the jury will be warranted in finding the verdict of guilty in this case, they must be satisfied, beyond a reasonable doubt, from the evidence introduced before them, that the defendant was sworn as a witness by R. L., on the trial of an action of (replevin) pending before him, as an acting justice of the peace of this county, wherein A. was plaintiff and B. was defendant; that the value of the property in question, in said suit, did not exceed \$——; that upon such trial the defendant testified upon oath that he bought the horse of one A. B., and paid \$100 in cash for it at the time; that whether he had so bought the horse was a material question on that trial; that such testimony was false, and that the defendant knew it to be false at the time he so testified; and, unless the prosecution have proved each and all of the matters above enumerated beyond a reasonable doubt, by evidence introduced before the jury, the jury must find the defendant not guilty.⁶

3—State v. Heed, 57 Mo. 252;
State v. Raymond, 20 Ia. 582;
Crusen v. State, 10 Ohio St. 258;
Hendricks v. State, 26 Ind. 493.

4—U. S. v. Wood, 14 Peters 430;
State v. Raymon, 20 Ia. 583.

5—People v. Warner, 5 Wen. 271;
Taylor v. State, 48 Ala. 157.

6—Pankey v. State, 1 Scam. 80;
Montgomery v. State, 10 Ohio 220;
State v. Fasset, 16 Conn. 457.

§ 3262. **Materiality Must Be Shown.** The jury are further instructed, that among the material averments in the indictment is the statement, that whether the said defendant had bought the horse therein referred to of A. B. and paid \$100, for it in cash at the time, became a material question on said trial; and to warrant a conviction in this case, the fact of such materiality must be established to the satisfaction of the jury, beyond a reasonable doubt; and if, after a careful consideration of all the evidence, and in view of the principles of law given you in these instructions, you entertain any reasonable doubts as to whether the fact above stated did become material on said trial, you should find the defendant not guilty.⁷

§ 3263. **Materiality Sufficient, When.** The jury are instructed, as a matter of law, that to render testimony material in a case it is not necessary that it should bear directly upon the main issue in the case; it is sufficient if it is material to any question arising upon the trial, and such as, if it were true, might properly influence the justice or the jury before whom the case is being tried in any matter affecting the rights of the parties.⁸

§ 3264. **Test of Materiality.** That the true test of whether the alleged testimony of the defendant was material on said trial is this: Was it of such a character that, if true, it should properly influence the action of the justice or the jury on the trial in any matter affecting the rights of the parties to that suit; and if the jury find, from the evidence, that the alleged testimony could not properly influence the action of the justice, or jury, in any matter affecting the rights of the parties to the suit, then it is wholly immaterial whether it was true or false, and the jury should find the defendant not guilty.⁹

§ 3265. **Authority of the Officer Must Be Shown.** The jury are further instructed, that, while it is necessary for the prosecution, in order to warrant a conviction for perjury, to show that the person administering the oath was authorized, by law, to administer oaths, still, if it be shown, by the evidence beyond a reasonable doubt, that the oath was administered by a person who was then an acting justice of the peace in and for the county where the oath was administered, this is sufficient evidence of his authority to administer the oath.¹⁰

§ 3266. **Perjured Testimony—Absence of Motive.** (a) If you agree with the defendant that this is a pure fabrication, you ought, at least, to be able to find some motive for such a wicked fabrication.

(b) If, by your verdict, you say the complaining witness has com-

7—Bullock v. Koon, 4 Wen. 531; State v. Thrift, 30 Ind. 211; Wood v. People, 59 N. Y. 117; State v. Aikens, 32 Ia. 403.

8—2 McClain Crim. Law, sec. 862; Com. v. Grant, 116 Mass. 17.

9—State v. Keenan, 8 Rich. 456; State v. Shupe, 16 Ia. 36, 85 Am. Dec. 485 n; State v. Lavalley, 9 Mo. 824.

10—Kerr v. People, 42 Ill. 307; State v. Furlong, 26 Me. 69; Weston v. Lumley, 33 Ind. 486.

mitted perjury, you ought to find, if you can, some motive for her perjury.¹¹

§ 3267. **Elements to Be Considered in Arriving at a Verdict—Series.** Gentlemen of the jury: A grand jury of your county charges S. with the crime of perjury, as set forth and stated in the indictment, which has been read before you. In order to convict him the state must by the evidence, establish all the material allegations of the indictment, and if you have any reasonable doubt as to any of those material allegations you must acquit the defendant. First. The evidence must satisfy you that the defendant S. was duly sworn to testify in a cause in this court entitled J. against the R. & D. Railroad Company. Unless he was put under the sanction of an oath, and unless it was administered by the officer named in the indictment, and was in the cause named, you must acquit. But, if he was duly sworn to testify in the case named, then inquire further whether or not he testified substantially as alleged in the indictment. Consider fully and carefully what the evidence now before us shows as to his testimony in the former case, and see whether or not the material allegations of the indictment as to his testimony are proven to have been sworn to by him on the trial. (Did he, in the other case, testify substantially as the grand jury say that he did? It is not essential that every part of his testimony, as narrated in the indictment, should be proven. For instance, the indictment says that defendant swore that J. S. went out of the back door of the car. If this is a mistake in the indictment, the mistake should not prevent conviction, if the material and substantial allegations are proven, as I will advise you hereafter). But the state must show you by satisfactory proof that the defendant did give the evidence substantially as alleged in the indictment; otherwise you cannot convict. (Then carefully consider and compare all the evidence, and say whether the defendant's evidence, complained of in the indictment, was false or true. If you find different witnesses contradicting each other, then, as reasonable, intelligent men, weigh the testimony of the state going to show the falsity of the defendant's statement against the evidence showing its truth, and try and determine which you must believe.) I cannot instruct you which witness, or which set of witnesses to believe. The responsibility rests on you. I may assist you, however, by some general rules which our experience shows us to be valuable in such cases. For instance, take the state's witnesses and their testimony. How was it given before you? What interest or prejudice

11—Hannon v. State, 70 Wis. 448, 36 N. W. 1 (4).

"A known motive for a course of action is always a powerful argument in favor of such action. The absence of any motive for its commission on the part of the person accused of a great crime is

strong evidence of his innocence, and, in cases where the evidence is not positive and direct, is almost always sufficient to procure an acquittal. . . . We do not think the defendant was prejudiced by this instruction, nor that it was error to give it."

are they shown to have in the case? What amount of intelligence, capacity or memory do they show to have? Is their testimony reasonable or unreasonable? Was it given in with the apparent desire to tell the truth, or was their evidence given with an apparent desire to convict the defendant? Was their sworn testimony, as they gave it, inconsistent, or was it contradictory? Compare the whole testimony of state's witnesses, and see if they corroborate each other or contradict each other. If you find that they corroborate each other literally and minutely, consider whether or not this minute corroboration may not show preconcert and arrangement with a purpose to convict. If on the contrary, there is a substantial agreement and corroboration between the state's witnesses, together with some variety and seeming conflict as to nonessential or immaterial matters, you should note that agreement and corroboration as important to enable you to determine the naturalness and truthfulness of their statements, for experience shows us that witnesses seeing the same occurrence, and detailing the same, are apt to honestly differ in some of the details, and differences as to details are frequently found to be consistent with substantial agreement as to the essential and material facts. Now, use these same rules in weighing the testimony offered you by the defendant, and in considering the value of the testimony of the defendant's witnesses. How did they testify,—positively, intelligently, fairly and impartially, or otherwise? Do they corroborate each other in substantial and material points, or do they contradict each other? If they agree in the substantial parts of their testimony, it should go to establish the correctness of their evidence. But if they contradict each other in matters as to which you believe they cannot be mistaken, you should consider that fact, in estimating the reliability and correctness of what they depose to. Taking all the evidence that has been offered you on both sides try and arrive at the truth of the issues here. Was the evidence of S. as charged in the indictment substantially true, or was it substantially false? If satisfied that it was true, you must acquit. Or if, on considering all the evidence, you are not satisfied beyond a reasonable doubt that defendant swore falsely you must acquit. If you are satisfied he swore falsely go a step further. Was that false testimony material in the case of *J. v. R. & D. R. R. Co.*? * * * Go also a step further. The testimony complained of must not only have been false and material to the issue, but it must have been willfully and corruptly false. It was willfully false if the defendant was not present on the cars, and knew nothing of what he was testifying about, yet testified that he was present, and testified to occurrences in the car, or if, being on the car, and knowing what actually occurred, he knowingly and intentionally testified to what was untrue. You should ask yourselves, was the testimony false, and did S. S. know it was false. Again, the law says it must have been corruptly false. If a man in order to help a friend or

harm an enemy, testifies falsely for the purpose of misleading a court or jury you may well believe and find that his purpose was a corrupt one. If, however, the false testimony is given in by mistake, or by inadvertence, and with no purpose of wrongly influencing a court or jury, you cannot convict. (If, however, the state has convinced you that, in the matters set forth in the indictment, this defendant, being duly sworn in the cause as stated in the indictment, testified willfully and corruptly false as to things material in the cause, as alleged in the indictment, then your verdict should be, "We, the jury, find the defendant guilty, as charged in the indictment.") If the state has not so convinced you, you should say, "We, the jury, find the defendant not guilty."¹²

12—Smith v. State, 103 Ala. 57, 15 So. 866 (868).

CHAPTER CIII.

CRIMINAL—ARSON—BRIBERY—CONCEALED WEAPONS— GAME AND GAMBLING—MALICIOUS MISCHIEF— MISCELLANEOUS PROSECUTIONS.

See Erroneous Instructions, same chapter head, Vol. III.

ARSON.

- § 3268. Arson defined.
- § 3269. Arson, elements to be proved beyond a reasonable doubt—Evidence of ownership essential.
- § 3270. Insanity as a defense to arson.

BRIBERY.

- § 3271. Attempt to bribe a juror—Proof required—Other attempts to bribe held incompetent.
- § 3272. Collection of bribe money from disreputable women by agent.
- § 3273. Bribing public officer to do what they are already obligated to do—Intent essential—Series.

CONCEALED WEAPONS.

- § 3274. Carrying concealed weapons—Right to arrest without warrant.
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GAME AND GAMBLING.

- § 3276. Game or gambling defined.
- § 3277. Keeping a gambling house, what must be proved.
- § 3278. Lottery—Aiding and assisting.

MALICIOUS MISCHIEF.

- § 3279. Malice, when implied.
- § 3280. Malice must be proved.
- § 3281. Malicious injury to an animal—Malice against the owner must be shown.
- § 3282. Ownership, how proved.
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PHYSICIANS AND SURGEONS.

- § 3284. Disinterring dead bodies for surgical experiment—Intent, proof required.
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MISCELLANEOUS PROSECUTIONS.

- § 3288. Peddling without a license—One sale sufficient if intention to continue exists.
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- § 3290. Obstruction wilfully placed in navigable stream.
- § 3291. Military expedition—Transporting men and arms.
- § 3292. Military expedition—Knowledge of accused that it is such.
- § 3293. Concealing inferiority of food—Adulteration.
- § 3294. Breach of peace—Vile epithets on public street.
- § 3295. Abusive language in presence of female.
- § 3296. Construction of a vehicle—Oil tank held a part of the wagon.
- § 3297. Instruction as to measurement of lobster.
- § 3298. Quiet and peaceable possession—Unlawfully break, pull down or injure another's fence.
- § 3299. Cutting trees.

ARSON.

§ 3268. **Arson Defined.** The court instructs the jury that arson consists in the wilful and malicious burning of the dwelling house of another.¹

¹—1 McClain on Cr. Law, § 517.

§ 3269. **Arson, Elements to Be Proved Beyond a Reasonable Doubt.**

(a) If you believe from the evidence beyond a reasonable doubt that defendant X., in the county of B., state of Texas, on or about the 1st day of July, 19—, did willfully set fire to and burn the house of E., mentioned in the indictment; and if you further so believe from the evidence that said house was situated in said state and county, and was then and there in the possession of and occupied by the said E., then you will find the defendant guilty of arson, and assess his punishment, etc.²

Arson, Evidence of Ownership Essential. (b) The court charges the jury that, if the state failed to prove by evidence of title ownership of the property fired as charged in the indictment, the jury cannot find the defendant guilty.³

§ 3270. **Insanity as a Defense to Arson.** You are instructed that the law presumes that every person is sane, and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact to be established by the state to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged burning described in the information raises in your mind a reasonable doubt of his sanity at the time of the alleged burning, then your verdict should be acquittal.⁴

BRIBERY.

§ 3271. **Attempt to Bribe a Juror—Proof Required—Other Attempts to Bribe Held Incompetent.** (a) The court charges the jury that the promise or offer made to S. by the defendant must have been corruptly made, and made with the intent to bias the mind or influence the decision of S. as a juror in the case of ——— v. ———, charged with grand larceny.

(b) The court charges the jury that, if they are reasonably doubtful from the evidence in this cause as to the defendant attempting to bribe S. as a juror in the particular case described in this indictment, they must acquit the defendant, and that any belief that the jury might have as to an attempt on the part of defendant to bribe S. as a witness cannot be considered in this case against the defendant.⁵

§ 3272. **Collection of Bribe Money from Disreputable Women by Agent.** The court instructs the jury that it is the law generally that

2—Kelley v. State, 44 Tex. Cr. App. 187, 70 S. W. 20 (21).

3—Hannigan v. State, 131 Ala. 29, 31 So. 89.

"This charge," said the court, "is a copy of the one which the court

held in Boles v. State, 46 Ala. 207, was good and should have been given."

4—Knights v. State, 58 Neb. 225, 78 N. W. 508 (509), 76 Am. St. 78.

5—White v. State, 103 Ala. 72, 16 So. 63 (65).

any act of an assumed agent, and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts. And if you find in this case that C. was authorized or directed by the defendant to collect in his behalf money from one or more of these women, other than A. M., such fact is proper to be considered in determining whether or not defendant authorized C. to collect money from her. Indeed, if you find that C. had general authority to collect protection money from abandoned women, or from a certain class of them, which included A. M., then you would be justified in finding that in receiving money from A. M., if in fact he received it, he received the same for the defendant, and in that event will find that he himself received the money.⁶

§ 3273. Bribing Public Officers to do What They Are Already Obligated to Do—Intent Essential—Series. (a) Now it makes no difference whether S. issued any orders or not after the payment of it. The crime was completed, if it was a crime at all, at the time the money was offered by the respondent. Now, the respondent admits that he did pay money at that time to S., as I said before, and claims that he paid it at X. It makes no difference whether he paid it at X. or sent it through a letter, as far as the substance of the offense is concerned, and it is for you to consider whether or not the people's claim as to how it was paid is correct, and whether that date is correct.

(b) As a general proposition to direct you in this, I will say that the respondent cannot be convicted unless you find beyond a reasonable doubt that, at the time claimed by the people, the money was given to S., by or through the agency of the respondent, with the corrupt intention and for the purpose of corrupting him and influencing his official action in issuing fraudulent certificates mentioned in the information. As I said to you before, that must have been the purpose, and whether or not S. ever issued them would make no difference, if he received the money. If he had then said, "I won't issue any certificates," the crime would be just as complete as it would be if he had issued them, if it was paid to him with the corrupt intention of influencing him in his official action.

(c) It may have occurred to you that this respondent was committing a wrong from the beginning in paying money to S. That is true. He had no right in the world to pay the first twenty dollars to him for counting sparrows, because the law itself obliged S. to count all sparrows that were brought to him that were caught in the village of X., under the statute.

(d) It was entirely wrong from the beginning for him to pay any money. It is demoralizing to the officer, and to the respondent himself, and all the people, that the people shall be placed in position of having its officers receive money from individuals with whom they are doing business for the purpose of paying them for doing things

that the statute obliges them to do without pay; but, however wrong that may be, it is introduced here simply for the purpose of showing the relation existing between the respondent, S., and G., and has a bearing upon the intention with which the act of December was done.

(e) Now, don't forget that it will be a great wrong to the respondent, and a great wrong to the people, if you should say that this man should be convicted by reason of having paid money in May or June to this officer. However wrong that may have been, this case is not planted upon that occurrence, but you should consider it as bearing upon the occurrence in December.

(f) It is for you to say whether or not the respondent paid the money in December for a corrupt purpose; and if for a corrupt purpose, then he is guilty. If it was not for a corrupt purpose, then he is not guilty, if it was paid to him with no intention of influencing his official action as an officer.

(g) The respondent claims that, while he paid the money to S. to get him to issue orders, that the intention was to detect crime that it was claimed that S. was committing with other persons. The claim of the people is that he did it for the sole purpose of protecting himself and getting S. in his power.

(h) Now, if you find that he did it for a corrupt purpose of protecting himself, or for the corrupt purpose of getting the orders for any other purpose except to detect crime of other people, and without reference to himself, then he should be convicted under his own testimony, because he admits that he paid the money; but, if you find that it was not paid with the corrupt intention of doing wrong then he must be acquitted.

(i) As bearing upon that, whether he paid that rightfully or with the intention of doing right, and without intention of doing a wrong, you must take into consideration all the testimony in this case. It is for you to determine whether or not the statement he makes of what happened between him and R. is true; that is for you to determine.

(j) You are to consider the way these sparrows were brought to S., the memoranda that were left with S., if you find that there were memoranda left, and the respondent himself admits some of them. It is stated here, and admitted by the defendant, that he used to leave memoranda with certain figures of the amounts that he placed in there, and asked orders to be drawn for more than the amount of birds delivered; that he intended afterward to furnish the birds to make up the amount of the orders. Now that was absolutely wrong and demoralizing. No man ought to have thought it was right at any time.

(k) The law is plain, and it seems to me that no one could make a mistake concerning the fact that the sparrows must be counted, must be there, and must be destroyed before the orders are drawn. But that is not what they complain of in this case. I call your attention to that, so that you won't get mixed when you go to your

jury room. You may consider that as bearing upon whether or not the transaction of December was corrupt or not.^{6a}

CONCEALED WEAPONS.

§ 3274. Carrying Concealed Weapons—Right to Arrest Without Warrant. Where any person carried on or about his person in the city of — a pistol, without lawful authority, in the presence and within the knowledge of a police officer of the city of S. while on duty, such officer would have a right to arrest such person without warrant, and to disarm him.⁷

§ 3275. Carrying Concealed Weapons—Apprehension of Personal Injury. (a) The court instructs the jury that if you believe from the evidence in this case that the defendant W. had reasonable grounds to apprehend danger of great bodily harm from A. at or before the time at which he is charged with carrying the pistol, concealed, then he had a right to carry it for his own protection, and the jury will find him not guilty.

(b) The court instructs the jury that if you believe from the evidence that before the date at which defendant is charged with carrying a concealed pistol, A. and he were unfriendly, and that A. had threatened to kill him if he crossed his path, and if you further believe that these threats were communicated to the defendant and he apprehended danger from A. and on that account carried the pistol, you will find him not guilty.⁸

GAME AND GAMBLING.

§ 3276. Game or Gambling Defined. A game is a trial of skill or of chance, or of skill and chance, between two or more contending

6a.—Above series of instructions held good in *People v. Gorsline*, 132 Mich. 549, 94 N. W. 16 (17-18).

7.—*Edwards v. State*, — Tex. Cr. App. —, 69 S. W. 144 (145).

8.—*Strother v. State*, 74 Miss. 247, 21 So. 147 (148), 34 L. R. A. 472.

"The statute (Code § 1027) authorizes one indicted for carrying concealed a deadly weapon to prove by way of defense, that he 'was threatened, and had good and sufficient reason to apprehend a serious attack from an enemy and that he did so apprehend,' etc., and both modifications were necessary to conform the instructions to the letter and spirit of the statute. An apprehension of 'a serious attack' is the language of the statute. The charge as asked made an apprehension of 'danger of bodily harm' the equivalent of the statut-

ory requirement, and this was palpably wrong. The court by its modification in inserting the word 'great' before the words 'bodily harm' in the charge cured its vice. An apprehension of 'a serious attack from an enemy' and an apprehension of 'great bodily harm' are synonymous phrases. It was never the design of the statute to authorize men to carry concealed deadly weapons on a mere apprehension of some bodily harm. It is serious bodily harm—great bodily harm—that the threatened man may guard himself against by carrying concealed a deadly weapon. The statute by its very terms makes the threatened man not only have good and sufficient reason to apprehend a serious attack from his enemy, but also requires him to actually apprehend such attack."

parties, according to some rule, by which each may succeed or fail in the trial.⁹

§ 3277. **Keeping a Gambling House, What Must Be Proved.** (a) The jury is instructed that the defendant is indicted, under section 2644, for keeping and maintaining a gaming room for the purpose of gaming and gambling. The jury will note that it is necessary, before conviction can be had, that the state must establish, beyond a reasonable doubt—First, that the defendant was keeping a gaming and gambling room; and second, that it was kept for the purpose of gaming and gambling.¹⁰

(b) Defendant is charged with committing the offense of keeping and exhibiting a gaming table and bank on or about December —, ——. You are instructed in this connection that if you believe from the evidence, beyond a reasonable doubt, that defendant did commit such an offense on Dec. —, you are charged that it is your duty to convict him.¹¹

§ 3278. **Lottery—Aiding and Assisting.** (a) If you believe and find from the evidence and under these instructions beyond a reasonable doubt that at the city of St. Louis and state of Missouri, at any time within three years next before the 29th day of May, 1903, the defendant, T. willfully and unlawfully did aid and assist in making and establishing as a business and avocation in the city of St. Louis and state of Missouri a lottery or scheme of drawing in the nature of a lottery, and that the same was known as the "Mexican Lottery," and whereby any money of any amount and value whatever might be acquired of said lottery by lot or chance, you will find the defendant guilty as charged in the second count of the indictment; and unless you so find the facts you will acquit the defendant. If you find the defendant guilty, you will assess his punishment in the penitentiary for a term of not less than two years nor more than five years, or at imprisonment in the city jail or workhouse for not less than six months nor more than twelve months.¹²

9—Toler v. State, 41 Tex. Cr. App. 659, 56 S. W. 917.

The court said that an inspection of Stearnes v. State, 21 Tex. 692, shows that this definition is an exact copy of the one there laid down; and held the same to be correct, citing Bouv. Law Dict. 704; 8 Am. & Eng. Enc. Law, p. 1033.

10—Brown v. Owen, 75 Miss. 319, 23 So. 35.

11—Haynes v. State, — Tex. Cr. App. —, 56 S. W. 923.

The affidavit and information in the foregoing case charged that appellant committed the offense on or about December 29th, 1898. "In prosecutions under this statute the state can prove the commission of the offense at any time within two years prior to the date of the information. The information was

dated March 17, 1899. White's Ann. Code Cr. Proc. par. 346."

12—State v. Miller, 190 Mo. 449, 89 S. W. 377 (380).

"The instruction is attacked upon the ground that there was not sufficient evidence upon which to base it. The statute upon which this instruction is based was before the court in State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002, and it was there held that in a prosecution for making or establishing a lottery as a business or avocation in this state it was not necessary to show that the drawings were to occur in this state. The evidence in this case is as strong as, if not stronger than, that offered on Pomeroy's Case, and we think amply sufficient to show that the defendant was aiding and assisting in making and

(b) You are instructed, further, that the mere fact that the defendant sold lottery tickets is not of itself sufficient to prove the charge made in the indictment herein, unless you further find from the evidence that within three years next before the filing of the indictment the defendant aided and assisted in making and establishing a lottery or scheme of drawing in the nature of a lottery as a business and avocation in the city of St. Louis and state of Missouri.¹³

MALICIOUS MISCHIEF.

§ 3279. **Malice, When Implied.** (a) If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant inflicted the injury upon the property in question, in manner and form as charged in the indictment, willfully and wantonly, and without any reasonable excuse being given therefor, then the law will imply malice against the owner of the property.¹⁴

(b) If the jury believe, from the evidence, that the defendant shot and injured the animal in question, in manner and form as charged in the indictment, recklessly and wantonly, and without any provocation, then the law will presume malice against the owner, and the jury should find defendant guilty.¹⁵

§ 3280. **Malice Must Be Proved.** This being an indictment for malicious mischief, malice is a necessary element to be proved, or made to appear from the facts or circumstances proved. Without this ingredient the crime is not complete, and the act complained of

establishing the business of a lottery in this state in a most important particular. He devoted his time to the business, employed agents to make a business, distributed winning lists, and paid prizes, and, as said by this court in *State v. Wilkerson*, 170 Mo. 184, 70 S. W. 478: 'We know of no more effective way to assist in making and establishing a business as an avocation than to participate in it and to devote one's time and service in so doing.' Without repeating the evidence which appears in the statement, we think there was ample evidence to justify the verdict of the jury."

13—*State v. Miller*, supra.

"The objection to the instruction is that it assumes that the defendant sold lottery tickets without submitting that fact to the jury. We think it is without merit. The defendant submitted an instruction himself to the effect that, if he only bought tickets and sold them on his own account, he could not be con-

victed; and he testified himself that he did sell tickets, obviously with the view to reduce his offense from a felony to a mere misdemeanor. It appears that his counsel on different occasions during the progress of the trial stated that the offense of which the defendant was guilty was selling tickets. An instruction is not erroneous which assumes as true the fact which is admitted on the trial. *State v. Holloway*, 156 Mo. 222, 56 S. W. 734; *State v. Edwards*, 71 Mo. 312. As to the criticism of the instructions that they do not use the word 'feloniously.' We have answered that contention in *State v. Cronin*, 189 Mo. 663, 88 S. W. 604. See also *State v. Scott*, 109 Mo. 232, 19 S. W. 89; *State v. Garth*, 164 Mo. 553, 65 S. W. 275; *State v. Tobie*, 141 Mo. 547, 42 S. W. 1076."

14—2 McClain Crim. Law, secs. 829, 833; 2 Whar. Crim. Law, 7 Ed. 2008.

15—*Mosby v. State*, 28 Ga. 190.

would be only a trespass, for which the party injured would be compelled to resort to a civil action for redress.¹⁶

§ 3281. Malicious Injury to an Animal—Malice Against the Owner Must Be Shown. (a) The malice necessary to constitute this offense must exist against the owner of the property, or against some one having a general or special interest therein. Malice against the animal, if proved, will not warrant a conviction.¹⁷

(b) In order to convict the defendant upon this indictment, the prosecution must prove, to the satisfaction of the jury, that the defendant knew or supposed the animal in question belonged to the said A. B., and so knowing or supposing, willfully and deliberately injured the same, through malice towards the said A. B.; and unless this has been done it is your duty to acquit the defendant.¹⁸

§ 3282. Ownership, How Proved. When personal property left in the care and custody, and under the control of a person not the absolute owner, but having a legal right to such possession, not as agent or servant of such owner, is injured, the person having such control and possession has such an interest in the property as will authorize the property to be laid in the indictment, for maliciously injuring the same, as the property of the person so having it in charge.¹⁹

§ 3283. Injury Done Willfully for the Purpose of Gain—Personal Malice Need Not be Shown. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant injured the (property in question) that the injury was a serious one and was done willfully and deliberately for the purpose of gain or benefit to himself, then the jury may find the defendant guilty, in manner and form as charged in the indictment, although the evidence does not show that the defendant had any personal malice towards the owner of the property.²⁰

PHYSICIANS AND SURGEONS.

§ 3284. Disinterring Dead Bodies for Surgical Experiment—Intent, Proof Required. (a) If the jury shall find and believe from the evidence, beyond a reasonable doubt, that the defendant, on or about the _____ of _____, —, at and in the County of C. and State of Missouri, did then and there dig up, disinter, and remove the dead body and remains of L. G., deceased, from the grave in which said dead body and remains had been interred, and then and there was, for the purpose of dissection, and surgical and anatomical experiment

16—Gaskill v. State, 56 Ind. 550.

17—State v. Enslow, 10 Ia. 115;
74 Am. Dec. 378; U. S. v. Gideon, 1
Minn. 292. Contra: Mosby v. State,
28 Ga. 190.

18—Newton v. State, 3 Tex. App.
245.

19—2 Whar. Crim. Law, 2 Ed.
1818; People v. Horr, 7 Barb. 9; 2
McClain on Crim. Law, sec. 831.

20—Brown v. State, 26 Ohio St.
176.

and preparation, of said body and remains, then you should find him guilty as charged in the indictment.

(b) The jury are instructed that the intent of the defendant in removing the dead body of L. G. from the grave where it had been interred, if you find that he removed said body, need not be proved by direct and positive testimony, but may be inferred from the facts and circumstances in proof.²¹

§ 3285. Practicing Medicine Without a Certificate—Reasonable Doubt. (a) The information in this cause charges the defendant with unlawfully practicing medicine by prescribing for, issuing medicine to, and treating one A. H. for the cure of a disease and bodily affliction, and that the same was done in the county of S. and the State of Missouri, and unless you so find and believe from the evidence, beyond a reasonable doubt, you should acquit the defendant.

(b) The court declares the law to be that if you find from the evidence that the defendant, at the county of S. and State of Missouri, at any time within one year next before the filing of this information, did publicly profess to be a physician, and that by reason of his publicly professing to be a physician, one A. H. accepted his services in his professional capacity by calling upon defendant, and defendant prescribed for, treated, and issued medicine to said A. H., who was then and there a sick person; and that the defendant, at the time of so prescribing for, treating, and issuing medicine to said A. H., was not a registered physician of the State of Missouri, and has no certificate issued by the board of health of the State of Missouri, authorizing him to practice medicine in the State of Missouri, you should find the defendant guilty as charged, and assess his punishment at a fine not less than \$50 nor more than \$500 or at imprisonment in the county jail not less than 30 days nor more than one year, or at both such fine and imprisonment.²²

§ 3286. Practice of Medicine—Diploma from an Accredited School Required. In connection with the main charge, the jury are instructed that an accredited medical college is one which is chartered by the legislature of the state, or its authority, in which such college is situated; and if you find that before Jan. 1, —, defendant did file for record with the clerk of the district court of Gonzales county a diploma from an accredited medical college, as the term has heretofore been defined, then you will acquit him.²³

§ 3287. Sale of Drugs without License—Domestic Remedies Excepted. Although the jury may believe, from the evidence, that the defendant sold iodine and quinine, yet, if they further believe from the evidence, that they are domestic remedies, then the defendant is not liable for such sales.²⁴

21—State v. Fox, 148 Mo. 517, 50 S. W. 98 (99).

22—State v. Davis, 194 Mo. 485, 92 S. W. 484.

23—Aldenhoven v. State, 42 Tex. Cr. App. 6, 56 S. W. 914 (915).

24—People v. Fisher, 83 Ill. App. 114 (116).

The court held that "the sale of 'domestic remedies' is exempted from the statutory provisions under which — was being prosecuted.

MISCELLANEOUS PROSECUTIONS.

§ 3288. **Peddling Without a License—One Sale Sufficient if Intention to Continue Exists.** The jury are instructed that it was not necessary that the defendant should have owned the goods or have had any interest in them, or that he engaged in the business for a livelihood or profit; that if defendant knew the owner of the goods had no license, and defendant went along with the owner, and aided and abetted in such sales, Goodman, the owner, being engaged in the business of peddling, and agreeing to pay defendant's expenses for such services, then defendant would be guilty as charged, although he assisted and participated with the owner of said goods in but one sale, provided it was defendant's intention to continue to assist in the business; that one sale by the defendant would have constituted the offense charged, provided he had made proposition and intended to continue in the business employed by Goodman to carry the valise for his expenses, and that it was not necessary that he should have engaged further than this in the business for a livelihood or profit.²⁵

§ 3289. **Obstructing Highway—Sufficient Proof of.** In prosecutions for obstructing a public highway, upon the question of the existence of such highway, it is sufficient to prove that the same was, at the time of the alleged obstruction, used and worked as such. The work here referred to is such as is done by authority of the proper supervisor.²⁶

* * * It is urged that, as the Supreme Court held inferentially in the case of *Cook v. People*, 125 Ill. 278, that quinine is a domestic remedy, it was error to submit to the jury as the instruction did the determination of whether that drug is a domestic remedy. The logic of that contention is that quinine as a matter of law is a drug that can be legally sold only by a registered pharmacist, and is not a domestic remedy. All that was said by the Supreme Court in *Cook v. People*, supra, was that the court thought that 'the jury were fully warranted in finding from the evidence that quinine was not one of the usual domestic remedies referred to in said proviso.' We are clearly of the opinion that in prosecutions under this act the determination of whether the drug sold is a domestic remedy is a question of fact for the jury."

25—*Keller v. State*, 123 Ala. 94, 26 So. 323 (324).

"The case," said the court, "clearly falls within the influence of the decisions in *Abel v. State*, 90 Ala. 631, 8 So. 760; *Segars v. State*, 88 Ala. 144, 7 So. 46. That

portion of the oral charge of the court excepted to by the defendant was in accord with the views above expressed, and is free from error."

26—*Johns v. State*, 104 Ind. 557, 4 N. E. 153 (155).

"This instruction," said the court, "was based upon section 1811, Rev. St. 1881, which is as follows: 'In any prosecution for obstructing a highway * * * it shall be sufficient to prove that it is used and worked as such.' This section should not be construed as undertaking to make such proof conclusive of the fact that the way alleged to have been obstructed is a public highway. The legislature cannot thus make any item of evidence conclusive. *Wantlan v. White*, 19 Ind. 470. The reasonable interpretation of this section is that such proof, in the absence of countervailing proof, is sufficient to sustain the charge that the way is a public highway. The case thus made may be overthrown by proof of such facts as will show that the way is not a public highway, or by proof of such facts as will raise a reasonable doubt as to whether or not it is such public highway.

§ 3290. **Obstruction Willfully Placed in Navigable Stream.** The jury are instructed that if they believe all of the evidence in this case, and find from the evidence, beyond a reasonable doubt, that the ——— is a navigable stream, and further find that the defendant obstructed the same by willfully placing posts in same as testified, then the defendant is guilty, and you should so find.²⁷

§ 3291. **Military Expedition—Transporting Men and Arms.** In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say "provided themselves with the means of doing so," because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.²⁸

§ 3292. **Military Expedition—Knowledge of Accused that it is Such.** To convict the defendants, it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty.²⁹

§ 3293. **Concealing Inferiority of Food—Adulteration.** Now before the inferiority of an article can be concealed it must be necessarily first ascertained as to whether or not there is an inferiority in the article. If it is an inferior article and that inferiority is concealed by reason of the addition of foreign substance in this vanilla, and you are satisfied from the proof beyond a reasonable doubt of the fact, then he would be guilty, although he had no knowledge as to the foreign substance being in the bottle.³⁰

The purpose of the statute is to dispense with the tedious and sometimes difficult proof that the way is a public highway, where, in fact, there is or ought to be no real controversy about that fact. In this case, the evidence is not in the record, and hence we cannot know that there was any evidence at all as to the highway, except evidence of the use and work that the charge implies. That evidence the statute makes sufficient in such a

case. Whether or not such an instruction as the above would be a proper one in a case of conflict in the evidence as to the existence of the way as a public highway, is a question we need not now decide."

27—State v. Baum, 128 N. C. 600, 88 S. E. 900.

28—Wiborg v. United States, 163 U. S. 632 (653), 16 S. Ct. 1127 (1197).

29—Wiborg v. United States, 163 U. S. 632 (655), 16 S. Ct. 1127 (1197).

30—People v. Hinshaw, 135 Mich. 378, 97 N. W. 758.

§ 3294. **Breach of the Peace—Vile Epithets on Public Street.** I instruct you, as a matter of law, that a person who, on the public streets of a city, in the presence of several persons, applies to another vile epithets, with the intention of annoying, offending, and disturbing such person, commits a breach of the peace.³¹

§ 3295. **Abusive Language in Presence of Female.** If, after considering all the evidence, the jury have a reasonable doubt arising out of any part of the evidence as to whether the language used by the defendant was in the presence or hearing of a female, then the jury must find the defendant not guilty.³²

§ 3296. **Construction of a Vehicle—Oil Tank Held a Part of the Wagon.** If you believe from the evidence that the wagon of defendant mentioned in the indictment was constructed with four wheels, two front and two rear, or hind wheels, the wheels being joined by axles on which rest bolsters, bars or springs, and if the bolsters, bars or springs are connected from front to rear by side bars or reaches or platform by which, when a team is attached to the tongue of such wagon, the same could be hauled and moved about; and if you believe that, after such construction of said wagon, a boiler or tank of iron was placed upon said wagon to be used for transporting oil, and so fastened to said wagon, its said side bars, bars, or platforms and bolsters, as to hold and keep the same in place when filled with oil—then said boiler or tank was a part of the load on said wagon equally with the oil contained therein.³³

§ 3297. **Instruction as to Measurement of Lobster.** I instruct you that, in contemplation of that statute, the lobster should be laid upon its back, and extended upon the measure to the end of the tail, the back all being made of joints so that it can naturally and readily lie down, or be laid down, upon the board; that any other way, as by lifting the end of the flipper, which I believe it is said has the tendency or effect of lengthening the lobster, is not in contemplation of the law.³⁴

§ 3298. **Quiet and Peaceable Possession—Unlawfully Break, Pull Down or Injure Another's Fence—Series.** (a) You are charged, as the law of this case, as follows: By "quiet and peaceable possession" is meant such possession as is acquired peaceably and without force, and as is continuous and uninterrupted from the date of such acquisition to the date of the alleged injury; or such possession as is acquired by dispossessing another, but afterwards ratified or acquired (acquiesced)

31—State v. Appleton, 70 Kan. 217, 78 Pac. 445.

32—Rollings v. State, 136 Ala. 126, 34 So. 349.

33—Hamilton v. State, 22 Ind. App. 479, 52 N. E. 419 (422).

"This instruction is a correct exposition of the law, as applied to the facts in this case. It is so well settled, so clear and to the point

that further discussion is unnecessary."

34—Campbell v. Burns, 94 Me. 127, 46 Atl. 812 (815).

Action of debt brought under chapter 285, statute of 1897, to recover the penalty of five dollars for each and every lobster less than ten and one-half inches in length alleged to have been found in the possession of the defendant.

in by the person dispossessed, and is continuous and uninterrupted from the date of such ratification or acquiescence to the date of the alleged injury. You are further charged that the title to the land upon which the fence alleged to be injured is situated, or the title to the land inclosed by said fence, or the right of possession based upon such title, is not an issue in this case, and is not to be considered by you. Now, if you believe from the evidence beyond a reasonable doubt that defendant M. P., on or about the ——— day of ———, —, in the county of W. and State of T., did then and there unlawfully break, pull down or injure a fence belonging to Mrs. D., and that said fence was then and there under the control of W. W., and that said W. W. was then and there holding same under a lease contract, and that said breaking, pulling down or injury, if any, was done without the consent of the said Mrs. D. or of the said W. W., or of either of them; and that at the time of said injury, if any, the said W. W. was in actual possession of said fence and the land inclosed by it, and that such possession at said time was quiet and peaceable, as these terms have hereinbefore been explained to you—then you will find defendant guilty, and assess his punishment, etc.

(b) The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict, "Not guilty."

(c) If you believe from the evidence that on the 28th of October, 1903, the defendant was in the actual, quiet and peaceable possession of the land on which the fence is situated that is involved in this suit, then you will acquit the defendant.

(d) If you believe from the evidence that at the date of the commission of the alleged offense on the 28th of October, 1903, W. W., as the tenant of Mrs. D., was not in the actual, quiet and peaceable possession of the land on which the fence involved in this suit is situated, then you will acquit the defendant, for, unless you so find that said W., as tenant of Mrs. D., was so in the actual, quiet and peaceable possession of said land, you cannot find defendant guilty.^{ss}

§ 3299. **Cutting Trees.** The jury are instructed that if you believe from the evidence and all the circumstances in evidence, that

35—Pate v. State, — Tex. Cr. App. —, 81 S. W. 737 (738).

"We think that the above charges amply and properly covered the facts in this case; the sole question being as to the peaceable and quiet possession of the land, the title not being involved in this prosecution. In other words, it is immaterial who actually owned the land. The offense denounced by the statute under consideration is against the party who molests or injures the property of

another; and property, within the contemplation of this statute, is the possession. That is, the party who has the actual exclusive and peaceful possession of the property can maintain a prosecution against one who injures any property of which he has such possession. Carter v. State, 18 Tex. App. 573; Jenkins v. State, 7 Tex. App. 146; Behrens v. State, 14 Tex. App. 121; Arthbutnot v. State, — Tex. Cr. App. —, 34 S. W. 269."

the defendant X., prior to the cutting of the trees, was a member of the board of trustees of the Y. cemetery association, and as such trustee advised with other members of said board of trustees with reference to the cutting of the trees, and that such other trustees advised that the trees should be cut, and that the defendant, acting in good faith and upon such advice, and believing it would be of benefit to said cemetery, and without any evil design or intent, did cut the trees, then you should find the defendant not guilty.³⁶

36—*Mettler v. People*, 135 Ill. 410 (415), 25 N. E. 748.

The court said: "The general rule requiring the acts of a corporation to be evidenced by a resolution of its board, has no application to the question involved in the ruling of the court, and the admission of the evidence, and under the instruction. The defendant was indicted for a criminal offense, —for knowingly and willfully without color of title cutting trees belonging to a corporation without the consent of the corporate authorities. Suppose these trustees all agreed that it was for the best interest and welfare of the association that these trees should be cut and removed from the cemetery grounds and they directed the defendant to cut and remove the same, we think it is plain that if the defendant did cut under such direction and authority, it could not in justice be said that his action was willful or that he was guilty of a crime in carrying out the wishes of the board of trustees. These trustees, including the defendant, were in possession of the land belonging to the corporation. They had charge of the grounds and the management and improvement thereof, and if they, con-

stituting a majority of the board, think proper to cut a tree, dig a ditch to drain the ground, remove a fence or make any other slight improvement, we think it might be done without subjecting the persons engaged in the work to a criminal prosecution, notwithstanding the board was not assembled and a resolution adopted directing the work to be done. Moreover, the section of the statute under which the defendant was indicted requires the act to be done knowingly and willfully without color of title made in good faith, and without the consent of the proper authorities or persons having legal charge thereof. In what manner was consent to be given to remove from the act the criminal intent which lies at the threshold of every crime? This statute does not declare that such consent shall be given by resolution duly passed and recorded, and, in the absence of a provision of that character, we are inclined to hold in a criminal proceeding consent may be proven in the manner offered by the defendant. The offered evidence should, in our opinion, have been admitted, and the instruction asked should have been given."

